Neutral Citation Number: [2024] EWHC 1374 (Admin)

Case Nos: AC-2O22-LON-002714 AND AC-2023-LON-000730

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2024

Before :

Mr Justice Cavanagh

- -

Between :

THE KING **On the application of** **(1) REFUGEE AND MIGRANT FORUM OF ESSEX AND LONDON ("RAMFEL")** **(2) CECILIA ADJEI**	**Claimants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Stephanie Harrison KC and Shu Shin Luh (instructed by **Bhatt Murphy Solicitors**) for the **Claimants**
Zane Malik KC (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 19 and 20 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cavanagh:

Introduction

1. These are two conjoined applications for judicial review, in which the same grounds of challenge are relied upon by each of the Claimants.

2. These proceedings raise a question about the legal obligations of the Defendant ("the SSHD") towards a class of persons which consists of those who do not have the right of abode in the United Kingdom, but who have previously been granted limited leave to remain for a fixed period, pursuant to section 3(1) of the Immigration Act 1971 ("the IA 1971"), and who have applied for an extension of their limited leave to remain before the expiry of that period, but whose application has not been determined before the limited leave period expired. Section 3C of the IA 1971 provides that, pending determination of the application (and subject to certain conditions), leave to remain is extended on the same terms as before ("section 3C leave"). This means that, if previously enjoyed under section 3(1) leave, various rights and benefits, such as the right to work, to rent accommodation, to obtain state benefits, to obtain free medical treatment, and/or to obtain a student loan, continue. The central issue in this case is whether the Defendant is acting unlawfully in failing to provide all of those whose leave to remain has been automatically extended under section 3C with a document which they can use to prove to a third party, such as an employer or landlord, that they are lawfully present in the United Kingdom and that they have a continuing entitlement to the various attendant rights which accompanied the prior grant of their limited leave to remain. The Claimants say that individuals are at risk of hardship if they do not have such a document, and that a significant number have suffered real hardship as a result.

3. Those who have been granted limited leave to remain under section 3(1) of the IA 1971, apart from those who are given a Standard Visit Visa which is for a maximum of six months, are provided with a physical document called a Biometric Residence Permit ("BRP"), which, at the time the claim was issued, enabled them to prove that they are in the country lawfully and to prove their entitlement to work, rent property etc (if they have it). Those whose leave has been extended automatically under section 3C do not receive a BRP. Certain categories of those whose leave to remain has been extended under section 3C are provided with a digital eVisa which enables them, almost instantaneously, to prove to a third party, for example an employer or landlord, that they remain entitled to particular rights or services. However, a substantial number of those whose leave to remain has been extended under section 3C are not provided with an eVisa or any other hard copy or digital document which can be used to prove their entitlement to the various rights. These include the second Claimant ("Ms Adjei"), and clients of the First Claimant ("RAMFEL").

4. This matters, in particular, because there are a number of statutory provisions in the immigration field which form part of what was originally known as the "hostile environment" regime, and which is now referred to by the Government as the "compliant environment" regime. This is a term used to describe the combination of laws and processes that regulate access to work, benefits, and services in the United Kingdom. The Home Office has published an "Overarching Equality Impact Assessment of the Compliant Environment" ("the Compliant Environment EIA"), dated November 2022. This states that:

> "3… the UK has in place a framework of laws, policies and administrative arrangements to ensure access to work, benefits and services is only available to those who are lawfully present in the UK and have the right [of] access to them.
>
> …..
>
> 5. The Home Office has developed safeguards to protect everyone who follows the UK's rules and minimise the risk that anyone with a legal right to be here is wrongly penalised by the compliant environment measures.
>
> ….
>
> **What is the aim of the compliant environment?**
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> 8. The compliant environment as a framework has multiple aims. Including supporting the broader Government framework to enable the legitimate movement of people and goods to support economic prosperity. The compliant environment measures aim to:
>
> - Deter and prevent immigration offending, acting as a deterrent for those considering coming to, or remaining in, the UK unlawfully;
> - Secure compliance with and help to enforce UK immigration laws;
> - Protect UK taxpayer funded; and
> - Protect vulnerable migrants from the risk of exploitation.
>
> **Who does the compliant environment affect?**
>
> 9. The compliant environment framework is designed to:
>
> - Distinguish between those who are present in the UK with lawful status and those who are here irregularly; and,
> - Ensure where an individual holds lawful status that includes the right to access work, benefits or services they are able to do so."

5. A key plank of the compliant environment regime is to penalise employers or landlords if, without lawful excuse, they employ or provide accommodation to persons who are not lawfully in the United Kingdom, and to ensure that persons who are illegally present in the United Kingdom do not have access to a number of other benefits which are only made available to those who are legally present. These penalties are criminal in nature and consist of substantial fines or even a prison sentence. If a jobseeker, or someone seeking accommodation, can provide proof that they are lawfully present in the United Kingdom and have a right to work or to rent property, as the case may be, then this provides employers and landlords with a "statutory excuse" which protects them from the risk of a penalty. If an applicant cannot provide such proof, the employer or landlord

will have to make their own enquiries, which may take some days. They may decide that this is too much trouble and so may simply refuse to employ or to provide accommodation to the applicant. The Claimants say that this causes real hardship in some cases, which could easily be prevented by the provision of an eVisa or other digital form of proof of a person's leave to remain and of their entitlements. In addition, the Claimants say that the absence of such a document can, and does, place an impediment in the way of individuals who seek access to state benefits, free medical treatment, and other benefits, such as student loans, to which they are entitled.

6. The Claimants accept that there is no express statutory duty, whether to be found in section 3C of the IA 1971 or in any other statutory provision, which requires the SSHD to provide those whose leave to remain has been extended pursuant to section 3C with a hard copy or digital document which can be used to prove their right to remain and their entitlement to work etc. However, the Claimants contend that the SSHD is in breach of his legal obligations by failing to make available a hard copy or digital document of this nature to all those whose leave has been extended under section 3C. There are four grounds of challenge in these proceedings, and the first two grounds relate to this issue. They are that:

   (1) By not providing this cohort with any form of acceptable documentary proof of their lawful immigration status (whether in physical or digital form), the SSHD is frustrating the statutory objects of section 3C and the compliant environment policy, by exposing the wrong people to wrongful denial of their entitlements to work, to access services and benefits, within a system that is founded on a document-based verification of immigration status. I will refer to this as the **Padfield** argument, as the Claimants rely upon a line of case law authority beginning with the judgment of the House of Lords in **Padfield v Minister of Agriculture, Fisheries and Food** [1968] AC 997; and

   (2) Further or alternatively, the decision of the SSHD to decline to issue such a document to the cohort is irrational.

7. I should add that the Claimants made clear that no challenge is made in these proceedings to the compliant environment policy itself.

8. The SSHD denies that his practice of not issuing documentary proof to all of those whose limited leave to remain has been automatically extended by section 3C frustrates any of the statutory objects of immigration law, or that it is irrational. He says that there is no express or implied obligation to provide such documentary proof and points out that there are other straightforward means (described below) by which an employer or landlord or public authority can establish that a person whose leave to remain has been extended by section 3C is lawfully present in the UK and is entitled to work or to rent a property or to obtain the benefit of particular benefits or services. He accepts that some people may face difficulties as a result of the lack of documentary proof, but the difficulties are short-term and do not mean that the failure to provide documentary proof in all cases frustrates the statutory objects of immigration law. The SSHD further submits that the Claimants' argument goes much further than the legal principle identified in **Padfield** and other cases would permit, and that it would be wrong for the Court effectively to create a positive obligation of this nature when Parliament could have imposed such an obligation but did not do so.

9. In any event, the SSHD says that there are insuperable difficulties in the way of providing physical documentary proof to those within section 3C.

10. Furthermore, whilst it is true that the SSHD has provided eVisas for about 25% of the categories of in-country applications for leave to remain to which section 3C extensions may apply, and these eVisas can be used during periods of section 3C leave, and whilst it is also true that the SSHD intends to roll out the eVisa system so that it applies eventually to all of those whose leave to remain has been extended by section 3C, the SSHD stresses that this is not because the SSHD considers that he is under a legal obligation to do so. Rather, the SSHD is rolling out eVisas which can be used during section 3C leave because it is consistent with the SSHD's general policy of digitising the immigration system. The SSHD aims to complete this by the end of 2024.

11. The other two grounds of challenge relate to alleged procedural failings on the part of the SSHD.

12. Ground 3 is that the SSHD has failed to comply with the Public Sector Equality Duty ("PSED"), set out in section 149(1) of the Equality Act 2010 ("EA 2010"). Section 149(1) requires a public authority to have due regard to three equality objectives, which are set out below. The Claimants submit that the SSHD has acted unlawfully by failing to have due regard to any of the statutory equality objectives under the PSED in respect of people who have lawful immigration status under section 3C of the IA 1971, but who are undocumented. The SSHD accepts that the PSED applies, but contends that it has been complied with, by means of two Equality Impact Assessments ("EIAs"). These are the Compliant Environment EIA, dated November 2022, referred to above, and a Home Office EIA which considered the likely equalities impact of the proposal to mandate digital only right to work and rent checks for holders of biometric cards from 6 April 2022, and the limitation of the use of physical biometric cards. This EIA ("the Digital Only EIA") is dated 12 October 2021.

13. Ground 4 is an allegation that the SSHD is in breach of section 55 of the Borders Citizenship and Immigration Act 2009 ("BCIA 2009"). This provides that the SSHD has a duty to make arrangements for ensuring that immigration functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The SSHD accepts that its section 55 duty is engaged, but denies that it has been breached. The SSHD submits that he has complied with his section 55 duty, by issuing statutory guidance, pursuant to section 55(1) of the BCIA 2019, in a document entitled "Every Child Matters", which applies to consideration of applications for leave to remain involving children.

14. I will first set out the relevant statutory framework and the relevant facts, and I will then deal with the four grounds of challenge.

15. The Claimants have been represented before me by Ms Stephanie Harrison KC and Ms Shu Shin Luh. The SSHD has been represented by Mr Zane Malik KC. I am grateful to all counsel for their submissions, both written and oral.

The legislative framework and the relevant facts

16. In this section of the judgment, I will deal with the following matters:

(1) Leave to enter and remain, and attendant conditions;

(2) The legislative history and purpose of section 3C;

(3) The number of people who are in the section 3C category at any one time, and the frequency and average duration of section 3C leave;

(4) RAMFEL;

(5) Ms Adjei;

(6) The compliant environment regime and the impact upon those with section 3C leave who do not have documentary proof of their immigration status;

(7) The SSHD has been warned of the adverse impact of the compliant environment regime upon lawful migrants who are undocumented;

(8) The reasons why the SSHD says that it is not practicable or desirable to provide a physical, hard copy, document to prove that a person has limited leave to remain under section 3C, and attendant rights;

(9) The move towards providing those on section 3C leave with digital documentary proof of their status and attendant rights;

(10) What is the source of the power of the SSHD to provide those on section 3C with documentary proof of their status and attendant rights?

(1) Leave to enter and remain, and attendant conditions

17. The general principles which are at the heart of United Kingdom immigration law are to be found in section 1 of the IA 1971, which provides, in relevant part:

> "**General principles**.
>
> (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.
>
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; …

> (4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom."

18. A person has a right of abode in the United Kingdom if they are a British Citizen as defined in section 2 of the IA 1971.

19. The SSHD's power to grant leave to enter or to remain in the United Kingdom is derived from section 3(1) of the IA 1971. Leave to remain may be indefinite or for a limited period. Sections 3(1)(a) and (b) provide:

> "3(1) Except as otherwise provided by or under this Act, where a person is not a British citizen;
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period."

20. It will be seen that sections 1(2) and 1(4) grant power to the SSHD to impose conditions upon the stay in the UK of those who do not have the right of abode. Section 3(1)(c) goes further and specifies the types of conditions that may be imposed. Section 3(1)(c) provides:

> "(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—
>
> (i) a condition restricting his work or occupation in the United Kingdom;
>
> (ia) a condition restricting his studies in the United Kingdom;
>
> (ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;
>
> (iii) a condition requiring him to register with the police.
>
> (iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

> (v) a condition about residence."

21. Section 3(2) provides for the SSHD to make rules to be followed in the administration of the Act and for regulating the entry into and stay in the United Kingdom of any persons required by the Act to have leave to enter, including the conditions to be attached in different circumstances. These rules are published in the Immigration Rules. Section 3(2) provides:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)."

22. Section 3(3) makes provision for a person's leave to remain or enter (if it is limited leave, rather than indefinite leave) to be varied, whether by restricting, enlarging or removing the limit of its duration, or by adding, varying or revoking conditions. This is the provision which enables limited leave to remain to be renewed. In certain circumstances, after a person has had limited leave to remain for a certain number of years, the limited leave to remain may be converted into indefinite leave to remain. Indefinite leave to remain is unconditional, and provides a pathway to obtaining British Citizenship.

23. Section 3B provides, in relevant part:

> "The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to remain in the United Kingdom.
>
> (2) An order under subsection (1) may, in particular, provide for—

> (a) the form or manner in which leave may be given, refused or varied;
>
> (b) the imposition of conditions;
>
> (c) a person's leave to remain in the United Kingdom not to lapse on his leaving the common travel area."

24. When a person's limited leave to remain is about to expire, they can apply for it to be varied, so that the leave is extended. In practice, it takes some time for the SSHD to process and consider such applications. Section 3C was inserted into the IA 1971 so as to provide protection for those who have applied for variation (i.e., extension) of their leave to remain before expiry of their current period of limited leave to remain, but who have not received a decision before the current period expired. Section 3C preserves the status quo pending the decision being made. Until the decision is made and communicated to them, the person continues to have leave to remain, and on the same conditions as applied during the period of limited leave to remain that had previously been granted under section 3(1). So, for example, if a person's limited leave to remain under section 3(1) permitted them to work and to rent accommodation, those rights continue to apply during the period whilst they are waiting for their application to extend their leave to remain to be decided (or whilst an appeal or administrative review against a refusal is pending). This is subject to the provisos that the section 3C leave can be terminated if (1) the application to extend is withdrawn; (2) the applicant leaves the United Kingdom (section 3C(3)); or (3) the applicant has failed to comply with a condition attached to the leave or has used deception in seeking leave to remain. A significant difference between limited leave to remain under section 3(1), and the statutory extension of leave to remain under section 3C is that, ordinarily, a person who has been granted limited leave to remain under section 3(1) will not forfeit that leave to remain if they leave the United Kingdom. Section 3(4) provides that a person may not make an application for variation of their leave to enter or remain in the United Kingdom whilst that leave is extended by virtue of section 3C. The intention behind section 3(4) is to prevent an applicant from making repeated and successive applications for limited leave to remain, which might lead to an indefinite extension.

25. The relevant provisions of section 3C are as follows:

> "(1) This section applies if—
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(c) an appeal under that section against that decision brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act)

(ca) an appeal could be brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"), while the appellant is in the United Kingdom, against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(cb) an appeal under the 2020 Regulations against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of those Regulations), or

(d) an administrative review of the decision on the application for variation—

(i) could be sought, or

(ii) is pending.

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(3A) Leave extended by virtue of this section may be cancelled if the applicant—

(a) has failed to comply with a condition attached to the leave, or

(b) has used or uses deception in seeking leave to remain (whether successfully or not).

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a)."

26. It will be seen that section 3C leave to remain takes effect by operation of statute: it is therefore automatic, and does not require the intervention, or approval, of the SSHD in an individual case. It is not discretionary.

(2) The legislative history and purpose of section 3C

27. The central purpose of section 3C is to protect the position, and to preserve the entitlements, of those whose limited leave to remain has run out but whose application for an extension to that limited leave has not yet been determined. This is borne out by the legislative history and by the Explanatory Notes to the statutory provision which amended the IA 1971 by inserting section 3C.

28. There was no equivalent to section 3C in the original version of the IA 1971. A potentially unjust lacuna in the appeal provisions in section 14 of the IA 1971 as originally enacted was identified by the House of Lords in **Suthendran v Immigration Appeal Tribunal** [1977] AC 359, in which it was held that a person who had made an application to vary their limited leave to remain before the leave expired, but who did not receive a decision until after the leave expired, had no right of appeal under section 14 of the IA 1971. Their right to an in-country appeal lapsed. This problem was first addressed by the Immigration (Variation of Leave) Order 1976, which provided, by Article 3, that if a person applied for an extension before the expiry of their existing limited leave to remain, that existing leave would be extended until 28 days after the date of the decision on the application or withdrawal of the application. 28 days was the time limit within which an appeal could be made.

29. Section 14 of the IA 1971 and the 1976 Order were replaced by the appeal provisions in the Immigration and Asylum Act 1999 ("the IAA 1999"). The IAA 1999 inserted a new section 3C into the IA 1971, which, unlike the version that is presently in force, only extended leave up to the date of any decision and the period thereafter in which an appeal against it could be issued.

30. The Explanatory Notes to this provision stated that the aims and effect of the amendment are as follows:

> "When a person applies for variation of his leave before that leave expires, but it then expires before a decision is taken, the leave is automatically extended to the point at which the appropriate period for appealing a refusal expires. This will protect the immigration status of that person and prevent him from becoming an overstayer."

31. In my judgment, the reference in this passage to the protection of the immigration status of the person concerned meant not just that section 3C was intended to protect the person's right to remain in the United Kingdom, but also that it was intended to protect the bundle of entitlements that were enjoyed by that person as an adjunct to their limited right to remain, in accordance with the conditions imposed on the limited right to remain, such as the right to work or to rent property, and the right to benefits of services.

32. This version of section 3C was replaced, with effect from 1 April 2003, by section 118 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). This extended section 3C leave so that it continued whilst an appeal was pending. The 2002 amendment also provided that section 3C leave would lapse if the applicant left the United Kingdom. The 2002 Act also introduced a fresh regime of immigration appeals by its Part 5.

33. Further amendments were made to section 3C from time to time. In particular, paragraph 21 of Schedule 9 to the Immigration Act 2014 ("the IA 2014") provided that section 3C leave was extended until the conclusion of an administrative review into a decision on the application for a variation of leave. Section 62 of the Immigration Act 2016 ("the IA 2016") introduced a further amendment to provide that section 3C leave may be cancelled if the applicant has failed to comply with a condition attached to the leave or has used or uses deception in seeking leave to remain (whether successfully or not) (section 3C(3A)).

34. In my judgment, the amendments to section 3C did not alter its principal statutory purpose.

35. That a central part of the statutory purpose of section 3C is to preserve the rights to which the applicant was entitled before the section 3(1) limited leave to remain expired is borne out, not only by the Explanatory Notes to the IAA 1999, but also by the following passage in the judgment of the Court of Appeal in **R (Akinola) v Upper Tribunal** [2021] EWCA Civ 1308; [2022] 1 WLR 1585 (Sir Stephen Richards, with whom Stuart-Smith and Phillips LJJ agreed):

> "40. First, it is common ground that the purpose of section 3C is to protect the immigration status of those with existing leave who have applied for a variation of that leave and are awaiting a decision of the Secretary of State or are exercising appeal rights in respect of a decision. Without an extension of leave in such circumstances, an applicant would be in the UK unlawfully as an overstayer on the expiry of their original leave. The disadvantages to which overstayers are exposed were summarised by Lord Kerr of Tonaghmore in **Pathan v Secretary of State for the Home Department** [2020] 1WLR 4506, at paras 115—117, including the following:
>
> "115. There are two types of effect of becoming an overstayer: immediate and long-term. If one is knowingly an overstayer, one automatically commits an offence under section 24(1)(b) of the 1971 Act and becomes liable to imprisonment for a term of up to six months or a fine. Overstaying also tips a person into the Home Office's hostile environment. Since July 2016 it has been illegal for an overstayer to be in employment. That prohibition remains in place even after an overstayer has applied for a visa extension. It persists until (and if) they are granted leave to remain. Overstayers may find it difficult to rent accommodation and may be prevented from driving.
>
> 116. Long term consequences may be even more serious . . ."
>
> To similar effect is this summary by Lord Wilson, at paras 210-211, of the consequences for Mr. Pathan of becoming an overstayer:
>
> "210. … The consequences were that, while he remained in the UK, he (a) committed a criminal offence punishable with

> imprisonment; (b) became liable to detention pending forcible removal; (c) committed a criminal offence if he continued to work . . . (d) ceased to be entitled to state benefits; (e) became disqualified from occupying rented accommodation; (f) became subject to NHS charging provisions; (g) became subject to the freezing of funds in his bank account; (h) became subject to revocation of his driving licence; and (i) in the various circumstances identified . . . above, became subject to a ban on later re-entry into the UK."
>
> …
>
> 41. In so far as it protects an applicant's immigration status and prevents the applicant becoming an overstayer, section 3C also has a potentially important part to play in the accumulation of the ten years' continuous lawful residence in the UK which is a requirement for the grant of indefinite leave to remain .... Whilst I do not think that that can be said to be a purpose of the section, it is plainly an important aspect of it and provides the context for each of the cases now before us."

36. On behalf of the SSHD, Mr Malik KC submitted that section 3C aims to prohibit indefinite extensions of leave to remain: see **AS (Afghanistan) v Secretary of State for the Home Department** [2009] EWCA Civ 1076; [2010] 2 All ER 21. That is certainly one of the aims of the provision, but it would be wrong to suggest that this was its sole or principal aim. The legislative history, and the language of section 3C itself, make clear, in my view, and as I have said, that the main purpose of section 3C is to protect and to preserve the position for those who have applied to renew their section 3(1) leave to remain, if, as will almost certainly be the case, their application to renew has not been determined when their previous period of section 3(1) leave to remain came to an end. It is not the fault of the applicants that the application to renew will not be determined before the expiry of the previous period of section 3(1) leave, and Parliament has taken the view that fairness requires that, subject to certain conditions, they should continue to enjoy the same rights, services, and benefits as they enjoyed during their section 3(1) leave up until the point at which their application for extension is finally determined. Section 3C also makes clear that an application to renew limited leave to remain does not lapse if no decision is reached before the limited leave expires.

(3) The number of people who are in the section 3C category at any one time, and the frequency and average duration of section 3C leave

37. The number of people on section 3C leave at any one time is not published as part of the SSHD's quarterly immigration statistics. However, in a response provided in March 2021, following a Freedom of Information request by RAMFEL, the SSHD said that in 2019 there had been 370,015 people on section 3C leave. There is no reason to think that this figure was exceptionally high. It is clear, therefore, that at any one time a very substantial number of people have leave to remain under section 3C whilst they are waiting for their application to extend their limited leave to remain to be determined.

38. Limited leave to remain under section 3(1) is normally granted for 30 months at a time. The time that it normally takes for a person who is subject to immigration control to qualify for indefinite leave to remain (also known as settlement) is 5 years. However, in some cases, the period is 10 years. The 10-year period most commonly applies to those who do not meet the usual criteria for settlement that are set out in the Immigration Rules, for example because they are overstayers, but who have rights to family life under Article 8 of the European Convention on Human Rights which would render refusal of leave to remain and removal from the UK unlawful. An example is those who are the parent of a British child and who qualify for limited leave to remain on a 10-year track to settlement under Appendix FM of the Immigration Rules.

39. Before each 30-month grant of limited leave to remain under section 3(1) expires, a person who is on the settlement track will have to apply to renew their leave to remain. Once the section 3(1) leave has expired, and until a final decision is taken on their application, they will be on section 3C leave. The Gov.UK website states that if a person is applying for leave to remain as a partner, parent, or on the basis of their private life, the average waiting time for a decision is 10 months. However, to this must be added the time taken to deal with an application for a fee waiver (which most applicants seek, as the fee for applying to extend leave is £3,600) and this is a further 2-3 months. The overall average period which applicants spend on section 3C leave, according to the Claimants' evidence, is somewhat greater, about 12 months, plus 2-4 months for the time taken to obtain a fee waiver. Mr Beales, Head of Campaigning at RAMFEL, said that the delays are increasing and that some of RAMFEL's clients now spend 18 months on section 3C leave. There is a fast-track system, but this costs £800 and so is not affordable for the great majority of applicants. Mr Malik KC said that a person who has made an application in the usual manner can ask the SSHD for urgent consideration, outlining the facts and providing evidence that justifies that course of action. The SSHD will consider any such request on its merits. However, there was no evidence before me that this was a regular occurrence.

40. If a person is on the 5-year settlement track, it is likely that they will have to apply to extend their leave to remain, and so will have to rely upon section 3C leave, at least twice. If a person is on the 10-year settlement track, they will have to rely upon section 3C leave 3-4 times.

41. Those who are destitute victims of domestic violence are subject to the Destitute Domestic Violence Concession ("DDVC"). Under the DDVC, applicants do not have to wait 5 or 10 years for indefinite leave to remain. Rather, they are granted an initial 3 months' limited leave to remain and may then apply for indefinite leave to remain prior to the expiry of the temporary leave. Such applicants will have to rely upon section 3C leave for the period between the expiry of that temporary leave and the grant of indefinite leave to remain. Radha Ruskin, part-time training officer at the National Training Centre for Women's Aid, who has been working in the immigration and asylum field for 10 years, said in her witness statement that,

> "…in our experience at Women's Aid, women often encounter issues at the end of those 3 months, because at that point they no longer have any formal documentation evidencing their continuing leave or continuing right to access public funds or to work. This often leads to issues such as their benefits being stopped or being suspended from employment, which can cause

> particular harm in these cases given that these women are highly vulnerable and at risk of destitution – a fact that has been recognised by the Home Office and which is the whole rationale for the DDVC."

(4) RAMFEL

42. RAMFEL, is a company limited by guarantee and a registered charity that supports vulnerable migrants living in the London and Essex areas. RAMFEL provides casework support, on a range of legal issues, including regularising immigration leave, rough sleeping support, support with preventing homelessness, and crisis intervention services. It also provides destitution and integration support for refugees and migrants to access asylum support, housing and homelessness assistance, mainstream benefits and registration with GP and health services. It also runs a food bank and English as a Second Language classes for migrants. Its immigration and asylum advice service is accredited and regulated by the Office of the Immigration Services Commissioner (OISC). RAMFEL deals with between 2,000 and 2,500 clients a year, a significant number of whom are persons on 3C leave who are undocumented and who have suffered detriment as a result.

43. No point has been taken about RAMFEL's standing to bring these proceedings.

(5) Ms Adjei

44. The Second Claimant, Ms Adjei, entered the United Kingdom from Ghana on a visit visa on 15 October 2000 and overstayed. She subsequently entered into a relationship with a partner who had indefinite leave to remain and had a child with him. They later separated. She had a second child, a son. Her first child is a British citizen. This enabled Ms Adjei to apply for leave to remain for herself and her second child under Appendix FM of the Immigration Rules. This means that she and her son are on the 10-year track to settlement. On 24 March 2016, Ms Adjei and her son were granted 30 months' limited leave to remain. This expired on 24 October 2018. Before expiry of this leave, Ms Adjei applied for renewal and qualified for an automatic extension of her leave to remain, until a decision was taken, under section 3C. On this occasion, the section 3C leave lasted about seven months. Ms Adjei was granted limited leave to remain a second time in April 2019, with an expiry date of 16 October 2021. She made a further application to extend before the expiry date, and following expiry of her section 3(1) leave, remained lawfully in the United Kingdom under section 3C. On this occasion, Ms Adjei was on section 3C leave for nearly a year before the decision was communicated to her. On 3 October 2022, the Home Office notified Ms Adjei of an extension to her, and her son's, limited leave to remain under section 3 of the IA 1971. They were given a further 30 months' limited leave to remain, which will expire on 3 March 2025.

(6) The compliant environment regime and the impact upon those with section 3C leave who do not have documentary proof of their immigration status

45. As I have said, the compliant environment regime was originally referred to as the hostile environment regime. It consists of a range of statutory provisions and policy measures which, taken together, are designed to make various rights, services and benefits unavailable to those in the UK with no lawful immigration status. These

include employment, free NHS healthcare, housing, bank accounts, the right to drive, and eligibility for student loans. This is with a view to encouraging illegal migrants to leave voluntarily. As the Compliant Environment EIA also makes clear, it has a further purpose of ensuring that where an individual holds lawful status that includes the right to access work, benefits, or services, they are able to do so. There is no central policy document or official definition of the hostile or compliant environment regime. The first reference to the hostile environment regime was made by the then SSHD, Theresa May, in an interview with the Daily Telegraph on 25 May 2012.

46. There are a number of provisions in the immigration legislation which further the purpose of the compliant environment regime. They consist of prohibitions upon those with no immigration status enjoying specified rights, services and benefits, and of penalties for those who provide such rights, services and benefits to those who are not lawfully present in the UK without taking sufficient steps to satisfy themselves that the person was lawfully present. This means that there must be some method by which a third party can establish that a migrant is lawfully present (and so is not unlawfully present) and is entitled to the rights, services or benefits that the third party is being asked to provide.

47. The package of legislation and administrative processes/measures which make up the compliant environment regime include the following:

Penalties for employing a person who is not lawfully present in the UK

48. There are both civil and criminal penalties for those who employ a person who has no right to work.

49. The civil penalties for allowing a person to work when disqualified as a result of their immigration status are provided for by the Immigration and Nationality Act 2006 ("IANA 2006"). Section 15(3) of that Act states that an employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment. The potential prescribed requirements include that the employer has required the production of a document of a specified description (section 15(7)(a)). Pursuant to that provision, the Immigration (Restrictions on Employment) Order 2007 (SI 2007/3290) provides, by regulations 3 and 4, that an employer is excused from paying the penalty if the employee or prospective employee produces to the employer any of the documents or combinations of documents described in list A or B in the Schedule to the order (and, inter alia, the employer or prospective employer takes all reasonable steps to check the validity of the document: reg 6(a)). The documents in list A are various documents which indicate that the individual has indefinite leave to remain in the United Kingdom. The documents in list B are almost all documents issued by the Home Office or the Border and Immigration Agency which indicate that the person is entitled to stay in the UK and is allowed to do the work in question. These include a Biometric Immigration Document issued by the Border and Immigration Agency to the holder, and an Immigration Status Document issued by the Home Office or the Border and Immigration Agency to the holder with an endorsement indicating that the person named in it can stay in the United Kingdom.

50. Thus, an employer can protect itself from a civil penalty by obtaining proof, from a document held by the applicant, that the applicant is lawfully present and has a right to work.

51. The maximum civil penalty is a fine of £60,000: (The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2024, SI 2024/82).

52. It is also a criminal offence to employ a person who is disqualified from employment by reason of their immigration status, if the employer has reasonable cause to believe that the employee is disqualified from employment by reason of the employee's immigration status: IANA 2006, section 21(1A). The maximum sentence for breach by an employer is 5 years' imprisonment: (IANA 2006, section 21(2)(a)). A person who is disqualified from working as a result of their immigration status but who takes employment is also guilty of an offence, for which the penalties are a fine and/or a maximum custodial sentence of up to 51 weeks (IA 1971, section 24B).

53. As Ms Harrison KC pointed out, this statutory regime, and the list of documents, assumes that those who have leave to remain will have been issued with an official document to prove it. Although the "reasonable excuse" for the criminal offence is not statutorily defined, it is a safe assumption that if the steps which provide a statutory excuse from the civil penalty are followed, an employer will have a defence to a criminal charge.

54. In practice, those with limited leave to remain who have been issued with a current BRP or an eVisa can use the Home Office online check procedure to generate a "share code" which can be given to the employer or prospective employer. This can then be used by the employer to conduct an instantaneous check as to whether the individual has a right to work, thus providing them with protection against criminal or civil penalties.

55. If a person does not have a document, whether hard-copy or digital, which they can produce to show to an employer or potential employer that they have a right to work, there is another method by which the employer can verify the position and thereby protect itself from civil or criminal penalties. This is by requesting a check from the Home Office Employer Checking Service ("ECS") to confirm the individual's lawful immigration status and right to work. An employee cannot take this step: only the employer can make the enquiry. If, after the enquiry is made, the Home Office is satisfied that the individual has the right to work, it will issue the employer with a Positive Verification Notice ("PVN"). The issue of a PVN insulates the employer from the risk of civil or criminal penalties.

56. The effect of the provisions that I have just described and of the compliant environment regime generally is that employers are normally not willing to employ, or to continue to employ, those whose right to live and work in the UK is in doubt unless they are able to obtain proof that they are entitled to work. Understandably, most employers are not prepared to take the risk of rendering themselves liable to civil or criminal penalties. Where the individual has digital documentary proof, such as can be obtained via a BRP or an eVisa, there is no difficulty. The document can be used to produce a share code and the employer can, immediately, satisfy itself that the individual has a right to work. Where, as in the case of a substantial number of those with section 3C leave, the individual has no documentary proof, the position is more precarious. As I have said, only an employer can seek a PVN from the Home Office's ECS and some employers may decide that it is more trouble than it is worth, and so will decline to proceed with the employment opportunity. If the employer does proceed, there will a gap in time before the PVN is issued. The aim of the Home Office is to provide a response to an

ECS check within 5 working days and the Home Office believes that this timescale is ordinarily met, although it does not monitor the times taken. The evidence on behalf of the Claimants is that, sometimes, the process can take considerably longer. It is difficult to obtain reliable data because employers do not necessary inform employees or prospective employees when they have commenced an ECS check.

57. The problem is exacerbated because a PVN is only valid for six months and decisions on applications for an extension of limited leave to remain take considerably longer than that. The Claimants' evidence was that the average time between application and decision is around 12 months. This means that an employee might have to ask his or her employer to go through the ECS check twice whilst they are awaiting a decision on their leave application and whilst they have no documentary proof of their own of their right to work.

58. Ms Adjei gave evidence of her own experience of this process.

59. Ms Adjei was granted limited leave to remain, under IA 1971, section 3(1), for a second time in April 2019, with an expiry date of 16 October 2021. She made a further application to extend, and a decision on this was pending when the limited leave expired in October 2021. By that time, she was working as a "bank" healthcare support worker at the Whittington Hospital. When she logged on to see what shifts were available for her to book after 16 October 2021, she discovered that she had been removed from the system. Her employer told her that this was because her right to work had expired and so they could not offer her any shifts. With the help of RAMFEL, Ms Adjei made representations to her employer and on 4 November 2021 she was notified that they had made an ECS request to the Home Office. The PVN was not issued until 17 or 18 November 2021, about two weeks after the employer's request had been made. The combination of the employer's reluctance to continue to employ her and the time taken for the PVN to come through meant that Ms Adjei did not receive any wages for nearly a month. She has a very low income and this caused her real hardship, especially as she had had no warning that this was going to happen. She had a real struggle to keep the bills paid and to keep her children fed. She had to use a food bank at one point, and had to borrow from friends and church members.

60. On 27 May 2022, the 6-month PVN expired and Ms Adjei was again blocked from booking any shifts on her employer's system. At that stage, her application to renew her limited leave to remain had not yet been decided. Ms Adjei had no documentary proof of her section 3C status, and the employer would not accept a letter from RAMFEL as proof. Ms Adjei was again placed in financial crisis. Once again, she had to rely on gifts and the kindness of others.

61. Ms Adjei's employers had applied for another ECS check on 23 May 2022. In response to correspondence from Waltham Forest Migrant Action, the employer said that "we as are most others are experiencing extended delays to this service and the standard 5-day turnaround time is not currently adhered to by the Home Office."

62. The PVN was returned to Ms Adjei's employers, and she was cleared for further work, on 14 June 2022. On this occasion, therefore, she was out of work for nearly three weeks.

63. Subsequently, on 3 October 2022, the Home Office notified Ms Adjei of an extension to her, and her son's, limited leave to remain under section 3 of the IA 1971. They were given 30 months' limited leave and so will not have to rely upon section 3C leave again until 3 March 2025. This meant that she was issued with a BRP which will enable employers, and others, to verify her immigration status and her right to work, up until 3 March 2025.

64. As I have said, Ms Adjei is on the 10-year track to settlement, and she is given limited leave to remain in 30-month increments. This means that it is very likely that there will be several other periods when she will be relying upon section 3C leave to remain before she qualifies for indefinite leave to remain. Unless she is given documentary proof of her section 3C status, she is at risk again of encountering periods of several weeks during which her employer will decline to offer her any work.

65. Ms Adjei's experience is not unique. RAMFEL's witness, Mr Beales, Ms Adjei's solicitors, Bhatt Murphy, and the Joint Council for the Welfare of Immigrants ("JCWI"), each provided evidence of other individuals who lost out on work because their section 3(1) limited leave to remain ran out and they had no documentary proof of their section 3C status. Three examples will suffice. One client had a period of apprenticeship cut short because he had no documentary proof of his right to work whilst in section 3C leave to remain. The same individual had a job offer with a bank withdrawn because of concerns relating to his immigration status. Another client had an offer of work as a teacher of English for speakers of other languages (generally referred to as "ESOL") withdrawn because she could not demonstrate her immigration status. A third individual had her agency shifts as a hospital support worker suspended whilst a PVN was sought. This happened three times and she was out of work for three weeks on each occasion. The Claimants' evidence referred to a total of nine clients who had suffered hardship consisting of periods out of work, or withdrawals of job offers because of difficulties in proving a right to work whilst on section 3C leave to remain.

66. The SSHD did not dispute the veracity of the evidence about the individual cases of hardship in the Claimants' evidence, but said that the problem was not widespread and that, generally, PVNs were provided within 5 working days.

Penalties for private landlords

67. Sections 20-37 of the IA 2014 prohibit landlords in the private rented sector from letting their properties to persons who require but do not have leave to remain in the UK or whose grant of leave prevents them from renting property. The landlord is responsible for checking the immigration status of the prospective tenant and faces a civil fine of up to £3,000 if they rent to a disqualified person. The IA 2016, sections 39 and 40, introduced a new section 33A to the IA 2014, which created a criminal offence for landlords who rent to an adult if they had reasonable cause to believe that they were disqualified from renting by reason of their immigration status, and, by a new section 33D, provided new powers of eviction where the landlord is informed by the Home Office that the tenant is a disqualified person. These provisions came into force on 1 December 2016.

68. As with employers, landlords with a statutory excuse are protected against civil sanctions. The statutory excuse applies in certain specified circumstances, such as

where the landlord can show they complied with "prescribed requirements" to ask for (and take copies of) certain "acceptable" identity documents. (See sections 24 and 26 of the IA 2014, and the Immigration (Residential Accommodation) Prescribed Requirements and Codes of Practice) Order 2014, SI 2014/2874). Those documents include a biometric immigration document which has not expired, issued by the Home Office to the holder, which indicates that the person named is permitted to stay in the United Kingdom for a time limited period. Where a tenant has a 'limited right to rent' because they have limited leave to remain, the landlord has to repeat the check after the longer of one year or the duration of that person's limited leave (see sections 24(6) and 27 of the IA 2014).

69. As I have said, it is a defence to the criminal offence relating to landlords if the landlord had no reasonable cause to believe that they were renting the property to a person with no right to remain.

70. The Home Office has published guidance and a Code of Practice for Landlords on Illegal Immigrants and Private Rented Accommodation, giving guidance on how a landlord should conduct the checks. There are four ways of doing so: (1) a manual right to rent check (using hard copy documents); (2) a right to rent check using Identity Document Validation Technology via the services of an Identity Service Provider (not available to those with limited leave to remain); (3) a Home Office online Right to Rent ("RTR") check. The latter is most commonly conducted using a share code obtained through an eVisa or BRP; or (4) a check by the landlord using the Home Office Landlords Checking Service ("LCS"). This is a similar process to the PVN process for employers.

71. It follows that, as with employers, there is a great incentive for landlords to satisfy themselves that they are only renting properties to those with a lawful right to remain in the United Kingdom. Again, as with employers, where those with a limited right to remain are concerned, by far the easiest way of establishing this is if the potential renter themselves can provide a document (whether in hard copy or in a digital form which will generate an instantaneous share code). If the potential renter cannot do so, the landlord must carry out a LCS check with the Home Office. Only the landlord can do this, and so the renter is dependent on the landlord's willingness to do so. If such a check is carried out, then the response is swift. The landlord should receive an email response confirming the tenant's right to rent within two working days, or indicating that further follow-up checks need to be undertaken. If the Home Office does not respond, the landlord will receive an automatic email granting them permission to rent to the person.

72. For those who have section 3C limited leave to remain but who have no hard copy or digital evidence of their immigration status, the only option is the LCS check. The evidence of Sairah Javed, solicitor and senior caseworker at the JCWI, who provided a statement on behalf of the Claimants, was that this may serve as a deterrent for landlords. If they are looking to rent their properties swiftly and without hassle, they might prefer to do so to a tenant who can provide immediate proof of their right to rent. Ms Javed gave an example of one client who could not provide proof of his immigration status to a landlord as his continued lawful residence was under section 3C leave, and he had no documentary proof. The landlord was initially reluctant to rent to him, and it was only after the intervention of the JCWI that he was prepared to do so.

Ineligibility for welfare benefits

73. Section 115 of the IAA 1999 provides that a person who is subject to immigration control is not entitled to a wide range of welfare benefits unless he or she falls within such category or description, or satisfies such conditions, as may be prescribed. In practice, this means that a person who is subject to immigration control and who has limited leave to remain is ineligible for welfare benefits unless the SSHD has granted them access to welfare benefits as a condition of their leave under s3(1) of the IA 1971.

74. This requirement means that the Department for Work and Pensions, local authority, or other public authority which has responsibility for paying welfare benefits will first need to be satisfied that a migrant has been granted access to welfare benefits as a condition of their leave to remain. The easiest way in which this can be done is by the individual providing documentary proof of their right of access to welfare benefits (via a hard copy or digital document).

75. The evidence on behalf of the Claimants provided four examples of individuals who had an extension of their leave to remain under section 3C, and who had a right of access to welfare benefits, but who suffered difficulties which were, or which may have been, a result of their inability to prove that their conditions of leave provided access to welfare benefits. One of these was a woman whose Job Seeker's Allowance was suspended for two weeks because of the lack of documentary proof of her right to benefits. It was subsequently reinstated and the arrears were paid, but this still caused stress and financial hardship. Moreover, as the entitlement to Jobseeker's Allowance underpinned her entitlement to housing benefit, there was a realistic risk that the suspension of Job Seeker's Allowance might have led to a suspension of her housing benefit, with serious consequences for her and her son, though in the event this did not happen. Another example that was given was of a severely disabled woman whose Personal Independence Payment ("PIP") was summarily suspended in 2023 because she could not prove that she had a right to welfare benefits whilst on section 3C leave. The suspension lasted for 5 months and caused grave financial hardship for the woman, who had to live on handouts from friends and from charities. The other two examples given were of benefit claimants whose PIP was suspended, whilst on section 3C leave, and the reason given was that they could not show that their immigration status entitled them to welfare benefits.

Other services

76. Immigration status checks are also carried out in relation to driving licences (IA 2014, sections 46-47), opening and maintaining bank accounts (IA 2014, sections 40-43), and checks under the Disclosure and Barring Service, which are necessary for certain types of work, including working with children (under Government guidelines).

77. Proof of immigration status is also relevant for determining whether a person should be charged for certain NHS services (National Health Service (Charges for Overseas Visitors) Regulations 2015, SI 2015/238, which applies to England; there is legislation in identical terms relating to the Devolved Administrations). Article 3 of the 2015 Regulations places a legal obligation on NHS trusts to determine whether an individual is eligible for treatment free of charge or is chargeable for treatment. Paragraph 2 of Article 3 states that NHS trusts must make enquiries in order to determine whether

individuals are chargeable for treatment prior to charging for services. Care deemed urgent or necessary will never be withheld.

78. NHS Trusts undertake checks in part using information provided by the Home Office, to determine whether an individual is eligible for treatment free of charge or is directly chargeable for healthcare. The Home Office provides information to the NHS through the Immigration Health Surcharge ("IHS") data feed and through the digital Application Programming Interface to provide information pertaining to the immigration status of an individual to support determination of whether the individual is eligible for treatment free of charge. Migrants who have paid the IHS or who are exempt from payment of the IHS but eligible for free treatment (e.g., asylum seekers) can access NHS treatment free of charge. NHS Overseas Visitor Managers utilise this information and/or documentary evidence provided by the individual to determine if the obligation to charge for treatment under the 2015 Regulations applies.

79. Student finance is available to British nationals, people with indefinite leave to remain and those who have resided lawfully in the United Kingdom for three years or more (i.e., those with limited leave to remain for at least three years): Education (Fees and Awards) England Regulations 2007, SI 2007/779, and similar legislation in the Devolved Administrations.

80. In all of these cases, difficulties or delays may be encountered if a person with section 3C leave cannot demonstrate via documentary proof that they are entitled to the services in question. One witness, Chrisann Jarrett, whilst on section 3C leave and without current documentary proof of her immigration status, was told whilst she was preparing for her final exams that her university would not permit her to graduate without such proof. Although the university eventually changed its position, this caused her considerable stress. The Claimants' evidence also referred to persistent problems with the Student Loans Company (SLC), the executive non-departmental public body, sponsored by the Department for Education, which is responsible for administering student loans and checking applicants' eligibility. Where a person with limited leave to remain, including those on section 3C leave, applies to the SLC for a student loan, the SLC should contact the Home Office to confirm that the student has made an in-time application to extend their limited leave to remain, and so is covered by section 3C leave. In practice, however, there have been a number of cases in which the caseworker at SLC has not understood or followed this practice, and in some cases eligible students have been refused student finance for which they are eligible. There is nothing that a student in this situation can do, other than try to persuade SLC to contact the Home Office. As a result of these problems, some students have been forced to defer taking up their university places, until their leave is granted. In other cases, students have suffered financial hardship whilst waiting for their student loans to be approved. So far as access to medical treatment is concerned, the possession of digital proof of immigration status and entitlements may smooth the way to treatment.

81. Ms Ruskin, from Women's Aid, said that she has known of cases in which women have been refused access to refuge accommodation because their undocumented status whilst on section 3C leave means that the refuge is concerned that they have no right of recourse to public funds and are ineligible for housing benefit.

RAMFEL's research

82. RAMFEL conducted research into the impact of the absence of documentary proof for those on section 3C leave. This was published in a report dated 29 September 2022 entitled, "The Hostile Environment Remains in Place". The report was based on a survey on RAMFEL's open files from January 2020 onwards. RAMFEL estimated that, in 2021 alone, one in three of their clients had experienced some serious detriment under 'hostile environment' measures as a result of being undocumented while on section 3C leave. At least 109 clients were affected. Of these, 56 (17% of the total who had made applications for further leave to remain) had suffered what RAMFEL classified as more serious detriment. This included: 7 whose benefits claims had been suspended; 9 whose benefits applications had been refused; 11 who were suspended from their current employment; 10 were blocked from taking new employment or proceeding with a recruitment process; 19 had other problems, ranging from problems with access to housing, to barriers with student finance and knock-on problems with access to university, to problems with DBS vetting, creating problems with employment. Many of these clients were women with sole responsibility for children.

The SSHD's position

83. As I have said, the SSHD does not dispute the truthfulness of the evidence placed before the Court by the Claimants of the difficulties encountered by various individuals as a result of the absence of any documentary proof of their section 3C status. However, the SSHD submitted that, notwithstanding these incidents, there is no evidential basis on which it can be contended that the failure to issue documentary proof to all holders of section 3C status causes a seriously harmful impact upon a particular group of individuals. The SSHD points out that there are other ways of establishing an individual's section 3C status, apart from the provision of documentary evidence which can be supplied to third parties by the person concerned, and submitted that any difficulties are short-term and that such difficulties are encountered in only relatively few cases.

84. The witness for the SSHD in these proceedings, Jonathan Wright, a civil servant in the Simplification and Systems Unit at the Home Office, said, at paragraph 11 of his first witness statement,

> "The Secretary of State does not consider that there is any real risk that those who have applied for further leave to remain and whose leave has been extended by section 3C of the 1971 Act would be treated as being unlawfully present in the United Kingdom."

85. In his oral submissions on behalf of the SSHD, Mr Malik KC accepted that there is a possibility that a person with section 3C leave might be unlawfully discriminated against by an employer or a landlord if they are undocumented. However, he said that the SSHD had taken three steps to mitigate this possibility.

86. The first is to issue guidance to employers and landlords. The Home Office has published a written "Employer's Guide to Right to Work Checks" and a "Landlord's Guide to Right to Rent Checks". Both are detailed documents and both are readily available on the Gov.Uk website. The Home Office has also published a Code of

Practice for employers, entitled "Avoiding unlawful discrimination while preventing illegal working", and a similar Code of Practice for landlords, entitled "Avoiding unlawful discrimination when conducting "right to rent" checks in the private rented residential sector."

87. Second, the Home Office has set up the online checking services for employers and landlords, to which I have already referred. The checking service for employers aims to respond within 5 days and will result in a PVN which is then in force for 6 months. The Home Office's evidence is that the checking service is responding well within the 5-day target period. The checking service for landlords aims to respond within 2 days, and generates a Right to Rent notice for employers. If the landlord's enquiry is not dealt within in two days, an automated response is given, authorising the provision of accommodation to the migrant, which is valid for 12 months.

88. Third, the SSHD has set up an enquiry helpline for employers and landlords, which they can call if they require support and advice when carrying out right to work checks.

89. So far as access to NHS treatment and access to benefits is concerned, NHS providers or Government departments may contact the Home Office to undertake checks where an individual is unable themselves to demonstrate their status. This includes confirmation as to whether, on the date of verification, the individual's leave has been statutorily extended by virtue of section 3C.

90. Mr Malik KC acknowledged that there remains a risk that migrants with lawful status may still be adversely affected by the lack of documentary proof, but submitted that this does not render the system irrational or mean that the statutory purpose has been frustrated.

(7) <u>The SSHD has been warned of the adverse impact of the compliant environment regime upon lawful migrants who are undocumented</u>

91. Ms Harrison KC submitted that the risk of serious detriment experienced by undocumented lawful immigrants is and ought to be well-known to the SSHD. Ms Harrison submitted that this should have been apparent from the Windrush Scandal, in which it became apparent that many lawful immigrants to the United Kingdom from British Colonies or former Colonies in the West Indies who arrived from the late 1940s onwards were wrongly denied employment, housing, benefits, and healthcare, because they were undocumented. She said that the position was made clear to the SSHD by the March 2020 Lessons Learned Review, which was prepared by Wendy Williams, the SSHD's appointed independent reviewer. Evidence was placed before the Court on behalf of the Claimants to demonstrate that the adverse impact on lawful migrants of undocumented status has been brought to the SSHD's attention repeatedly by stakeholders since the inception of the hostile environment policy. An example is the Equality and Human Rights Commission's report, entitled "Public Sector Equality Duty assessment of hostile environment policies.", published in November 2020. It is not necessary for me to review this evidence in this judgment, but I accept that the issue has been brought to the SSHD's attention by stakeholders for a number of years, via the Windrush Lessons Learned Review and in other ways.

(8) The reasons why the SSHD says that it is not practicable or desirable to provide a physical, hard copy, document to prove that a person has limited leave to remain under section 3C, and attendant rights

92. The SSHD says that this is not practicable because the best that a document could do would be to state the holder's immigration status on the date of issue of the document. This would not be reliable evidence of the holder's status on any later date, at the point at which the user sought to make use of the document to prove their section 3C status and their entitlement to rights, services or benefits. This is because, unlike section 3(1) leave to remain, it would not be possible to know in advance the date when the section 3C leave would come to an end. This would depend on the date of the decision or the outcome of an appeal or administrative review, and this could not be known at the date when any such document was issued. In other words, it would not be possible to know whether a hard copy document was out of date, and misleading. A person might be in possession of a valid hard copy document, even though their section 3C leave to remain has come to an end and they are no longer entitled to remain in the United Kingdom.

93. Moreover, it may well not be possible to verify an applicant's section 3C status at the point at which such a document would be issued. The question whether an application has been validly made depends on the requirements of the rules being met (see **Mirza v Secretary of State for the Home Department** [2016] UKSC 63; [2017] 3 All ER 824, and **Afzal v Secretary of State for the Home Department** [2023] UKSC 46; [2023] 1 WLR 4593), and it is not always possible to know this when the application is made or when the previous section 3(1) leave expires.

94. The SSHD does not suggest that these difficulties would apply to a digital document. Mr Malik KC expressly accepted on behalf of the SSHD at the hearing that it would be possible for the SSHD to provide a digital record of those who have section 3C leave (and, indeed, this is what already happens for some of those with section 3C leave and the Government intends eventually to roll this out to everyone with section 3C leave). There was no suggestion that to do so would be prohibitively expensive. However, as Mr Malik KC also submitted, and as I accept, the question for the court is not whether it is possible for the SSHD to provide such a digital document, but whether there is a legal obligation to issue one.

95. The Claimants did not suggest that a hard copy document would be preferable to a digital document. If a person with section 3C leave has a digital document, such as an eVisa, then they can provide a third party with instantaneous proof of their immigration status, by means of the generation of a share code which can be used by the third party to check the position.

96. It follows that the central issue for me, in respect of the first two grounds of challenge, is whether the SSHD is under a legal obligation to make a digital document available to those with section 3C leave to remain. The problems with hard copy documents that have been identified by the SSHD are not an answer to the challenge in relation to digital documents.

(9) The move towards providing those on section 3C leave with digital documentary proof of their status and attendant rights

97. At paragraph 13 of his first witness statement, Jonathan Wright said:

> "The Secretary of State has set out a long-term vision to move away from providing physical documents that evidence immigration status and enable all individuals to be able to demonstrate their immigration status digitally… Providing immigration status information online means in future we will increasingly be able to update a person's digital status in real-time if their leave is extended by section 3C. This is not possible with the current physical evidence of immigration status, such as a Biometric Residence Permit (BRP), which can only ever show the original expiry date of the person's leave and has never been able to provide evidence that a person has leave extended under section 3C."

98. Pursuant to this policy, the SSHD has issued digital eVisas to certain categories of persons who are subject to immigration control. With effect from 26 January 2023, such persons can use their eVisas to prove their section 3C status and their entitlements to rights, services and benefits. In other words, the eVisas remain valid even after the fixed-term section 3(1) leave to remain has expired and they are reliant upon section 3C leave. They can continue to use the eVisa to provide third parties, such as employers and landlords, with a share code to prove their status whilst they are on section 3C leave.

99. It follows that, for these categories of persons, the outcome which the Claimants seek in this litigation has already been provided. Mr Wright stressed that the new digital status services are not being introduced because the SSHD accepts that there is, or has been, a systemic issue affecting those who have section 3C leave, or because there was a legal obligation to extend eVisas to those on section 3C leave. Rather, this is part of the wider changes that the Secretary of State is making as to conducting certain functions digitally by default.

100. In any event, it is clear that a substantial proportion of those who have section 3C leave still do not have access to an eVisa or to digital status services.

101. At the hearing, I asked for some more information about the categories of those persons subject to immigration control who have access to an eVisa and so who will be able to prove their immigration status and entitlements, via a share code, whilst on section 3C leave. The SSHD had provided some information on this topic in Mr Wright's second witness statement, and more was provided in documentation provided by the SSHD after the hearing. I have been informed that approximately 25% of the categories within the Immigration Rules who are subject to leave to remain have a digital means of confirming their immigration status by way of an eVisa – if they have made an application after January 2023. This applies even during the periods when they have section 3C leave to remain.

102. There are currently 89 categories of in-country applications in total. Of those, 23 categories offer the eVisa option and 66 categories do not. I have also been provided

with a list of the categories which have the eVisa option. It is not necessary to list the categories in this judgment. As Ms Harrison KC pointed out, this information is somewhat incomplete in that it does not tell us the numbers of people who are covered or not covered by the eVisa scheme, nor anything more specific about which groups are or are not covered. We know that 25% of categories have access to eVisas whilst on section 3C leave, but we do not know what percentage of those on section 3C leave are entitled to eVisas.

103. It is clear, however, that a substantial number of persons with section 3C status still do not have access to an eVisa, even if they made an application after January 2023. Those who do not have access to an eVisa include those who are pursuing the 10-year route to settlement under Appendix FM of the Immigration Rules (including Ms Adjei) and those who have leave to remain under the Destitute Domestic Violence Concession. The eVisa is not currently available to **Zambrano** carers (a person from a non-EEA state whose residence is required in order to enable a child or dependant adult, who is British, to live in the UK and who entered the UK on or before 31 December 2020), those with leave under the ECHR (protection claims), those with leave based on family life under domestic and EU law (spouse, partner, parent, child), dependent and bereaved relatives, or private life claims based on residence as a child or spouse of citizens of EU member states.

104. As I understand the SSHD's evidence, the intention is that, eventually, all of those categories who qualify for limited leave to remain under section 3(1) of the IA 1971 will be given eVisas and so will be in possession of a digital document which will enable them to provide proof of their right to remain and to work etc, even when they are relying upon section 3C leave. The aim is that this will be implemented by the end of 2024, but there is no firm commitment that this will happen by then.

(10) What is the source of the power of the SSHD to provide those on section 3C leave with documentary proof of their status and attendant rights?

105. It was common ground before me that there is no statutory provision which expressly imposes a duty upon the SSHD to provide a hard copy or digital document to those with section 3C leave to remain which they can use to provide their lawful immigration status.

106. There was considerable discussion at the hearing about whether the SSHD has a power to issue such a document and if so, where the power came from. Both Mr Malik KC and Ms Harrison KC provided me with brief further submissions in writing on this issue after the hearing had concluded.

107. It is not in dispute that the SSHD has such a power. Indeed, he has exercised the power, because, as I have said, the eVisa scheme has been extended to some categories of persons with section 3C leave to remain, which means that they have now been provided with a digital document which they can use to prove their lawful immigration status.

108. By the time of the post-hearing submissions, it was clear that there was also common ground between the parties as regards the legal source of this power.

109. The answer is that the powers that are granted to the SSHD by the IA 1971 to regulate entry into and stay in the United Kingdom for those who are subject to entry control include a general implied power to exercise ancillary and administrative functions in order to give effect to those powers.

110. That the SSHD has such ancillary and incidental powers was made clear by the majority of the Supreme Court in **New London College v Secretary of State for the Home Department** [2013] UKSC 51; [2013] 1 WLR 2358. That case was concerned with guidance that was applied by the SSHD to decide whether to grant a student sponsor licence to an educational establishment to permit it to enrol students from outside the European Economic Area who wished to study in the United Kingdom. This guidance had not been laid before Parliament pursuant to section 3(2) of the IA 1971 and the Claimants contended that this meant that it was unlawful. The Supreme Court rejected this argument, holding that the requirement in section 3(2) of the IA 1971 that rules be laid before Parliament before they became lawful applies only to rules which a migrant had to fulfil as a condition of his obtaining leave to enter or remain in the United Kingdom. The requirement did not apply to rules concerning the approval of educational establishments to enrol students from outside the EEA, because those were not rules governing the conditions for migrants to enter or remain in The United Kingdom. The Supreme Court held that the SSHD has a range of ancillary and incidental administrative powers outside those which are expressly laid down in the IA 1971, which she or he could use in order to administer the system of immigration, and the power to decide whether educational establishments could admit students from outside the EEA was one such power.

111. Lord Sumption, with whom Lords Clark and Reed JJSC, and Lord Hope of Craighead agreed, said, at paragraphs 28 and 29 of his judgment,

> "28 …. the statutory power of the Secretary of State to administer the system of immigration control must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out in the Act, including the vetting of sponsors.
>
> 29 The Immigration Act does not prescribe the method of immigration control to be adopted. It leaves the Secretary of State to do that, subject to her laying before Parliament any rules that she prescribes as to the practice to be followed for regulating entry into and stay in the United Kingdom. Different methods of immigration control may call for more or less elaborate administrative infrastructure. It cannot have been Parliament's intention that the Secretary of State should be limited to those methods of immigration control which required no other administrative measures apart from the regulation of entry into or stay in the United Kingdom. If the Secretary of State is entitled (as she plainly is) to prescribe and lay before Parliament rules for the grant of leave to enter or remain in the United Kingdom which depend upon the migrant having a suitable sponsor, then she must be also be entitled to take administrative measures for identifying sponsors who are and remain suitable, even if these measures do not themselves fall within section 3(2) of the Act.

> This right is not of course unlimited. The Secretary of State cannot adopt measures for identifying suitable sponsors which are inconsistent with the Act or the Immigration Rules. Without specific statutory authority, she cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Convention for the Protection of Human Rights and Fundamental Freedoms); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law…."

112. In my judgment, the range of ancillary and incidental administrative powers not expressly spelt out in the Act, which the SSHD can use to administer the system of immigration control, encompasses a power to provide migrants with documentary proof of their immigration status. This is part of the "administrative infrastructure". It follows that the SSHD has the power to issue an eVisa to those with section 3(1) limited leave to remain and to those with section 3C leave to remain, even though there is no statutory provision which expressly grants this power. This power is not inconsistent with the IA 1971 or the Immigration Rules, and it is in no way coercive: rather, the exercise of such a power works to the advantage of migrants.

113. I should add that there is a specific provision in the immigration legislation which enables the SSHD to make regulations requiring a person subject to immigration control to apply for the issue of a document recording biometric information (i.e., a BRP), and requiring such a document to be used in specified circumstances, where a question arises about a person's status in relation to nationality or immigration. This provision is section 5 of the UK Borders Act 2007. Section 5(2)(a) provides that such regulations may apply generally or only to a specified class of persons subject to immigration control. Regulations have been made under section 5: the Immigration (Biometric Registration) Regulations 2008, SI 2008/3048.

114. It is clear that the 2008 Regulations do not make provision for the issue of a document recording biometric information to those whose leave has been extended under section 3C, but in my judgment it is equally clear that this does not mean that the issue of an eVisa to such persons would be inconsistent with the 2007 Act or the 2008 Regulations, or with the immigration legislation more generally. The 2007 Act deals only with a hard copy document recording biometric information. It does not apply to eVisas. More broadly, I do not think that section 5 of the 2007 Act can be interpreted to mean that the SSHD is barred from issuing documents to migrants to prove their immigration status if provision has not been made for such documents by regulations made under section 5. This is not the express or implied meaning and effect of section 5.

Grounds 1 and 2: the Padfield and irrationality arguments

115. It is convenient to deal with these two grounds together, as there was considerable overlap in the parties' submissions on these grounds.

The arguments on behalf of the Claimants

(1) Padfield

116. Ms Harrison KC submitted that the purpose of section 3C of the IA 1971 is to provide a statutory extension of the original leave to remain, and this applies to the wider rights and consequences of having continued lawful immigration status, just as it does to the extension of the right to remain itself. Those with a section 3C extension of their leave to remain are not in a materially different position from those who have section 3(1) limited leave to remain. Therefore, they are entitled to the same rights and entitlements that they enjoyed under their original leave. Those with section 3C leave are not the intended target of the compliant environment policy, and so they should not be exposed to or experience its harsh and exclusionary consequences.

117. The Claimants acknowledge that the method by which the SSHD gives effect to the statutory protection conferred by Parliament on those with section 3C leave is a matter for him, but submitted that this is subject to the **Padfield** principle, which requires that the SSHD's discretion as regards the relevant arrangements must be exercised in a manner which promotes and does not thwart or run counter to the policy and objects of immigration legislation.

118. Ms Harrison KC submitted that the SSHD's policy choice to render many of those with section 3C leave undocumented in a system of hostile environment measures which relies heavily on documentary proof of immigration status thwarts and runs counter to the policy and objects of immigration legislation and the compliant environment policy (which is embedded in the legislation). The practical effect is that those who are undocumented whilst on section 3C leave are not, in reality, afforded statutory protection from the serious and harmful consequences of being treated as being unlawfully in the United Kingdom. The SSHD has been warned that this is having a very serious adverse impact upon some migrants.

119. Ms Harrison KC further submitted that the **Padfield** principle applies in this case, even though there is no specific statutory provision, in section 3C or elsewhere, which grants the SSHD a discretion to provide documentary evidence to those with section 3C leave to enable them to prove that they are lawfully presented and are entitled to particular rights, benefits and services. It is common ground that the SSHD has a power to do so, as an administrative measure that is an ancillary to his express statutory powers. She submitted that the **Padfield** principle is engaged if the SSHD exercises, or declines to exercise, statutory powers in a way that thwarts the purpose of the immigration legislative regime as a whole.

120. Ms Harrison KC said, in her skeleton argument, that where the SSHD knows or ought to know that not documenting someone with lawful immigration status exposes them to hostile environment measures, even if unintentionally, the failure to take any reasonable and effective remedial steps for this identified group of people clearly frustrates and thwarts the statutory object of section 3C and the hostile environment measures. She relies upon **R (DMA) v SSHD** [2021] 1 WLR 2374 at paragraphs 204-209.

121. The Claimants challenged the contention on behalf of the SSHD that there are good reasons why it would not be practicable to issue a hard copy document to those with

section 3C leave to enable them to prove that they are present lawfully and have the right to work, or rent property etc. They pointed out that any form of leave can be curtailed, cancelled or revoked, but physical documents are still provided to many classes of migrants, including those who have section 3(1) limited leave to remain. They submitted that, in any event, there is no practical reason why a digital document could not be issued, and, indeed, it is now clear that a number of categories of migrants with section 3C leave are given eVisas which enable them to prove their lawful immigration status and their right to access various rights, benefits and services.

(2) Irrationality

122. Further and/or alternatively, Ms Harrison KC submitted that it is irrational for the Defendant not to make provision for those whose leave to remain is extended under section 3C to have documentary confirmation which is capable of proving their continued lawful immigration status and attendant rights. She said that the failure to provide documentary proof to all of those with section 3C leave was irrational, notwithstanding that section 3C does not contain a duty or power for the SSHD to provide a person with documentary evidence of their lawful immigration status. She relied, in particular, upon observations of the Court of Appeal in **R (Johnson) v Secretary of State for Work and Pensions** [2020] EWCA Civ 778; [2020] PTSR 1872 ("**Johnson**").

123. Ms Harrison KC submitted that the SSHD's failure to provide documentary proof to those with section 3C leave was irrational because it has a seriously harmful impact upon those adversely affected by it. The individuals can do nothing to avoid the detriment that is suffered by them because of the heavy dependence on document-based verification of immigration status which is at the heart of the compliant environment policy. They cannot speed up the time it takes for their application to extend their section 3(1) limited leave to remain: this is in the SSHD's hands. They can, in theory, apply for fast-track consideration of their applications but, in practice, this is prohibitively expensive for most migrants. Though it is not possible to put an exact figure on the number of those who suffer adverse effects, the number is substantial, probably amounting to many thousands, and it will also include child dependants of those on section 3C leave. The average waiting time on section 3C leave is at least 12 months, and most migrants will have to apply to extend their leave to remain, and so come within section 3C leave, two or more times.

124. Ms Harrison KC submitted that it is irrational to treat those on section 3C leave differently from those who have leave to remain under section 3(1) of the IA, 1971, and from other classes of migrants who are given documentary proof of their immigration status.

125. Ms Harrison KC said that there is no question of the provision of documentation to all of those on section 3C leave tending to frustrate the statutory object of section 3C or the compliant environment policy. Rather, it would bring legal clarity and certainty, and would assist in giving assurance to third parties such as employers and landlords that they were not acting unlawfully in providing work or accommodation to migrants who are lawfully present in the United Kingdom and who have the right to work or to rent property. It would also reduce what she described as the deterring and discriminatory effect of the measure.

126. The Claimants further submitted that the SSHD has been on notice that the failure to provide documentary proof to all of those who are on section 3C leave has serious adverse consequences, but there is no evidence that this has been taken into account. Ms Harrison KC submitted that where the matter under challenge was not specifically considered by the decision-maker and affects fundamental rights, the intensity of review will be greater (and the discretionary area of judgment open to the decision-maker correspondingly narrower), relying on **R (Salvato) v SSWP** [2021] EWHC 103 (Admin); [2021] PTSR 1067 at 175, and **R (Kent CC) v SSHD** [2023] EWHC 3030 (Admin), both per Chamberlain J.

127. Ms Harrison KC pointed out that the SSHD not only provides documentary proof of immigration status to those who have section 3(1) limited leave to remain, but also does so for those who have applied for leave to remain under the EU Settlement Scheme ("EUSS"), who are provided with a certificate pending determination of their application, and those who are seeking asylum, who are issued with a paper asylum registration card.

The arguments on behalf of the SSHD

(1) Padfield

128. On behalf of the SSHD, Mr Malik KC submitted that the immediate difficulty for the Claimants is that section 3C of the IA 1971 confers no discretionary powers on the SSHD. There is no exercise of discretion by the SSHD in relation to section 3C. Therefore it cannot be said that the Secretary of State is exercising discretionary powers so as to frustrate the statutory policy. In any event, it is not the policy or object of section 3C, or the IA 1971 as a whole, that those who enjoy the benefit of automatic extension are provided with specific proof of extension. No such policy is apparent from the statutory text or is implicit in the legislation. The legislative history of section 3C shows that the purpose of section 3C (and its predecessor provisions) was to close the loophole, made apparent by **Suthendran**, that a migrant might be deprived of a right of appeal if their appeal was not dealt with before the original grant of limited leave to remain expired.

129. Mr Malik KC submitted that if Parliament had intended to impose a duty upon the SSHD to provide all those on section 3C leave with documentary proof of their immigration status, Parliament would have done so. There is an obligation in section 1(4) of the IA 1971 for the SSHD to formulate Immigration Rules for certain situations (work, study, visit and dependency), but there is no parallel obligation on the SSHD to formulate Immigration Rules and grant documentary proof to those who have leave under section 3C. Moreover, the contrasting language in section 3C and in section 4(1) of the IA 1971 (which places an obligation on the SSHD to issue notice in writing when exercising power to grant, refuse or vary leave to enter or remain) shows that Parliament's intention was to impose no duty on the SSHD to provide specific proof of automatic extension. The Court is effectively being asked to legislate, by creating an obligation which is not provided for in the statute.

130. Mr Malik KC submitted that any incidental effect of section 3C cannot amount to an overriding statutory policy requiring the SSHD to issue specific proof of automatic extension. He relied upon an observation of Lord Carnwath in **Patel v Secretary of**

State for the Home Department [2013] UKSC 72; [2014] 1 All ER 1157, at paragraph 29 (see below).

131. It was submitted that the perceived advantages of providing documentary proof of immigration status to those with section 3C leave are not capable of establishing that the SSHD had acted inconsistently with section 3C in not issuing documentary proof of leave extended by that provision.

(2) Irrationality

132. Mr Malik KC said that the present case is completely different from that which was being considered by the Court of Appeal in **Johnson**. That was a case in which the primary legislation conferred a duty or a particular discretion on the Secretary of State. In contrast, in the present case, there is no policy or decision that can be said to be irrational.

133. He submitted that, insofar as the Claimants have identified a detriment resulting from the failure to provide documentary proof to those on section 3C leave, it is not so serious that it is capable of placing a duty on the SSHD in a way that is not required by the primary legislation. A person who has leave extended by section 3C faces no real disadvantage in relation to matters concerning employment, accommodation and access to essential services.

134. Furthermore, Mr Malik KC submitted that there is no public law duty on the SSHD to investigate the advantages and disadvantages perceived by the Claimants. There is no complaint of a breach of Convention rights.

135. A person who has been granted leave to remain by the Secretary of State is in a materially different position from a person who has merely applied for such leave to remain before expiry of their existing leave and is waiting for the outcome of the application. A person whose application is granted will have limited leave to remain with a specific end date, or indefinite leave to remain. This will not be the case in relation to those whose leave has been extended by operation of law for an undefined period under section 3C of the 1971 Act. Therefore, submitted Mr Malik KC, there was no arbitrariness, and no illogicality in treating those who are on section 3C leave differently from those with section 3(1) leave to remain.

136. As for the comparison with those seeking leave under the EUSS Scheme, and those who are seeking asylum, Mr Malik KC said that the position was different because in both cases there was an express obligation to provide documentation. So far as the EUSS is concerned, this is required by Article 18.1(b) of the EU Withdrawal Agreement, which is part of domestic law by operation of section 7A(1) and (2) of the European Union (Withdrawal) Act 2018. As for asylum seekers, paragraph 359 of the Immigration Rules, made under section 3(2) of the 1971 Act, provides that, within three working days of recording an asylum application, the SSHD will make available a document to the asylum-seeker certifying his status as an asylum applicant or testifying that he is allowed to remain in the United Kingdom whist his asylum application is pending.

The authorities on the Padfield principle

Padfield

137. **Padfield** was concerned with legal provisions, found in the Agricultural Marketing Act 1958, relating to the milk marketing scheme. This scheme provided that producers had to sell their milk to the Milk Marketing Board, which fixed the prices to be paid for milk in each of eleven regions in England and Wales. Section 19(3) of the 1958 Act provided that the Minister had a discretion to appoint a committee of investigation to investigate complaints into the operation of such schemes. The South-Eastern Regional producers complained that they were not paid enough for their milk, especially when compared with the prices paid to the Far-Western Regional producers, and asked the Minister to appoint a committee of investigation. The Minister declined to do so, and the South-Eastern Regional producers brought proceedings for judicial review, on the basis that the Minister's refusal frustrated the purpose of the legislation.

138. In **Padfield**, the House of Lords held (Lord Morris of Borth-y-Guest dissenting) that the Minister was obliged by law to appoint a committee of investigation in these circumstances.

139. Lord Reid said, [1968] AC 997, at 1030B-D:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

140. At page 1053, Lord Pearce said that the law does not permit a Minister silently to thwart the intention of an Act by failing to carry out its purposes.

141. Both Lord Reid and Lord Pearce referred to **Julius v Bishop of Oxford** 5 App Cas 214, in which Lord Penzance said, about a discretion conferred by statutory language:

> " The words ' it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it."

142. In other words, there may be circumstances in which something that, according to the statutory language, is a discretion, becomes a duty, that is, a discretion coupled with a duty.

143. It will be seen that the issue in **Padfield** was different from the issue in the present case, in that the issue in **Padfield** was whether the Minister was obliged to exercise a discretion which was expressly provided for in a statutory provision in a particular way to avoid frustrating the purpose of that provision. In contrast, there is no statutory provision which expressly requires the SSHD to decide whether to provide those in section 3C leave with documentary proof of their immigration status.

R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd [1988] AC 858

144. This was a successful challenge to a refusal by a local authority to exercise its discretion (under section 9(1)(e) of the General Rate Act 1967) to refund rates to a ratepayer in circumstances in which rates had been mistakenly paid to the local authority in respect of some warehouse units in circumstances in which the rates had not, in fact, been payable.

145. Lord Bridge of Harwich, giving the judgment of the Court, said, at pages 872-873:

> My Lords, I start my consideration of the issue from a basic principle which I have found nowhere more clearly expressed and explained than by Professor Sir William Wade Q.C. in Administrative Law, 5th ed. (1982), pp. 355-356 in the chapter entitled "Abuse of Discretion" and under the general heading "The Principle of Reasonableness." After quoting from authorities going back to **Rooke's Case** (1598) 5 Co. Rep. 99b, the author introduces a new subheading "No unfettered discretion in public law" and writes, at pp. 355-356, 357:
>
> "The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.
>
> "The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of power.

In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.... Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what is the scope of judicial review. But that there are legal limits to every power is axiomatic."

As the author points out under the next subheading "Judicial rejection of unfettered discretion," the application of the basic principle is vividly illustrated by the decision of this House in **Padfield v. Minister of Agriculture, Fisheries and Food** [1968] A.C. 997 . Under the Agricultural Marketing Act 1958 the Minister had a discretion, which on the face of the statutory language was unlimited, to refer certain complaints to a committee of investigation. The headnote accurately summarises the effect of the decision as follows, at p. 998:

"Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act; this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere."

In the instant case it is conceded by the rating authority, as Mann J. noted in his judgment [1985] R.V.R. 87 , 89, that the discretion must be exercised "within the confines formulated in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** [1948] 1 K.B. 223." The judgment of Lord Greene M.R. in that case contains the classic exposition of the principle of reasonableness in relation to the exercise of administrative discretions. So far from drawing a contrast between irrelevance and irrationality, in the sense later defined by Lord Diplock in the passage quoted by Mann J., Lord Greene M.R. showed their common derivation. He said, at p. 229:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For

> instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in **Short v. Poole Corporation** [1926] Ch. 66 , 90, 91 gave the example of the redhaired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."
>
> Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose."

R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349

146. In the **Spath Holme** case, the House of Lords applied the principle identified in the **Padfield** case, albeit in reaching a conclusion that the Secretary of State's order was not unlawful. His order, under challenge by a landlord, capped otherwise justifiable increases in the rent which had been registered as payable under regulated tenancies. The order was made pursuant to a power conferred in wide terms by section 31 of the Landlord and Tenant Act 1985. The landlord argued that Parliament's object in granting the power was that it should be used only in order to counter inflation, but the House of Lords held that it had wider objects which extended to the purpose behind the capping order. Lord Bingham of Cornhill said at p 381:

> "No statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question … The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in section 31."

147. Lord Nicholls of Birkenhead said at p 396:

> "The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) … No statutory power is of unlimited scope … Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose … The

> purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event … the exercise is one of statutory interpretation."

R (GC) v Commissioner of Police for the Metropolis (Liberty and another intervening) [2011] UKSC 21; [2011] 1 WLR 1230

148. This case was concerned with the then-current practice of the Metropolitan Police of retaining fingerprints and DNA samples from persons who had been arrested but not charged with offences. Most of the discussion in the Supreme Court was concerned with the impact of the European Convention on Human Rights (which Ms Harrison KC accepts has no application to the present case). However, in the course of his judgment, Lord Judge CJ referred to the **Padfield** principle and said, at paragraphs 83 and 84:

> 83. If indefinite retention of data was indeed section 64(1A)'s unmistakable purpose, I would have readily agreed that the discretion that "samples may be retained after they have fulfilled the purposes for which they were taken" would have to be exercised so as to give effect to that intention. That, as Lord Rodger JSC has said, would be the inevitable consequence of the application of the principle for which **Padfield v Minister of Agriculture, Fisheries and Food** [1968] AC 997 is the seminal authority: that a discretion conferred with the intention that it should be used to promote the policy and objects of the Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives. Everything therefore depends on what one decides is the true intention or purpose of the legislation.
>
> 84. This is not as easy a question to answer as the simple formulation, "what was the purpose of the legislation", suggests. As Lord Brown JSC has pointed out in para 145 of his judgment, the search for the purpose of a particular item of legislation may have to follow a number of avenues and may require consideration of several aspects of the enactment-what is the grain of the legislation, what its underlying thrust etc."

M v Scottish Ministers [2012] UKSC 58; [2012] 1 WLR 3386

149. This case was a challenge to the failure of the Scottish Ministers to make regulations under a statute. Lord Reed, giving the judgment of the Court, said at paragraphs 46 and 47:

> "46. The fundamental flaw in the Ministers' argument is to assume that a failure to exercise a discretionary power can only be unlawful—or, to put the matter differently, to assume that an obligation to exercise a discretionary power can only arise—

> where the exercise of the power is necessary to make effective a legal right. That is too narrow an approach, as was made clear in **Padfield's case** [1968] AC 997, where the same argument was advanced (see pp 1020–1021) and rejected. As Lord Reid explained in that case, at p 1033, **Julius v Bishop of Oxford** 5 App Cas 214 is itself authority for going behind the words which confer a statutory power to the general scope and objects of the Act in order to find what was intended. In the words of Lord Cairns LC in **Julius's** case, at pp 222–223,
>
> "there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty …"
>
> 47. The importance of **Padfield's** case [1968] AC 997 was its reassertion that, even where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention. That intention may be to create legal rights which can only be made effective if the power is exercised, as in **Singh (Pargan) v Secretary of State for the Home Department** [1992] 1 WLR 1052. It may however be to bring about some other result which is similarly dependent upon the exercise of the power. Authorities illustrating that principle in the context of a statutory power to make regulations, where such regulations were necessary for the proper functioning of a statutory scheme, include **Greater London Council v Secretary of State for the Environment** [1984] JPL 424 and **Sharma v Registrar to the Integrity Commission** [2007] 1 WLR 2849, para 26, per Lord Hope of Craighead. In the present case, the exercise of the power to make regulations by 1 May 2006 was necessary in order to bring Chapter 3 of Part 17 of the 2003 Act into effective operation by that date, as the Scottish Parliament intended. The Ministers were therefore under an obligation to exercise the power by that date."

Patel v SSHD

150. On behalf of the SSHD, Mr Malik KC submitted that the narrow scope of the **Padfield** principle was emphasised by the Supreme Court in **Patel**, in 2014, and that this demonstrates its inapplicability to the present case. The facts and legal framework relevant to this appeal are complex. However, in essence, the central issue that was raised in **Patel** was whether, when an application by an applicant to extend their section 3(1) leave was refused, the Secretary of State was obliged, at the same time, to exercise her power under section 37(1) of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") to issue a decision, directing that the applicant was to be removed if and when the appeal was refused and the applicant's extended leave under section 3C came to an end. The advantage of this, from the applicant's point of view, would be that it widened the range of matters an appellant was able to raise by way of appeal

during the period when his leave was extended under section 3C (and so could raise in an in-country appeal).

151. The Supreme Court rejected this argument. The Secretary of State had a discretion whether to issue removal directions at the same time as issuing a decision to refuse an extension of section 3(1) leave. The Secretary of State was not compelled by the **Padfield** principle to issue removal directions at the same time, because the statutory purpose of the power to issue removal directions (under section 10 of the IAA 1999 and section 47 of the 2006 Act) was to form part of the armoury available to the Secretary of State for the enforcement of immigration control. Any extra protection provided to an applicant was incidental (judgment, paragraph 27).

152. At paragraphs 28 and 29, Lord Carnwath, giving a judgment with which all members of the court agreed, said:

> "28 The contrary argument depends to my mind on a misapplication of the so-called **Padfield** principle: **Padfield v Minister of Agriculture, Fisheries and Food** [1968] AC 997. Under that principle, it is clear that discretionary powers conferred by statute must not be used in such a way as to thwart or run counter to the policy and objects of the Act: per Lord Reid, at p 1030C—D. It can no doubt be said that one of the purposes of the 2002 Act was to reduce the scope for repeat appeals, and that, as Laws LJ observed, the legislation leans in favour of what are called one-stop appeals: **JM v Secretary of State for the Home Department** [2007] Imm AR 293, para 23. It may be also, as Mr Malik submits, that the exercise of the Secretary of State's powers has the incidental effect in some cases of adding to the range of matters an appellant is able to raise by way of appeal during the period that his leave is extended under section 3C.
>
> 29 However, neither such general observations nor such incidental effects can be translated into an overriding policy requiring the Secretary of State to act in a particular way, nor into a right for the appellant to insist that he does so. …"

R (Rights of Women) v Lord Chancellor and Secretary of State for Justice [2016] EWCA Civ 91; [2016] 1 WLR 2543

153. This case concerned a judicial review of secondary legislation concerning access to legal aid for victims of domestic violence. The challenge was to the requirement that in order for a victim of domestic violence to be eligible for legal aid, the evidence of such violence must be less than 24 months old, and also to the absence of any provision to cater for victims of domestic violence who had suffered from financial abuse. The Court of Appeal identified the purpose of the reforms as being to save money by withdrawing civil legal aid services from certain categories of case but to continue to make civil legal aid services available to at least the great majority of persons in the most deserving categories. The Lord Chancellor was entitled to impose requirements in regulations, but only provided that such requirements were rationally connected with the statutory purpose. The Court of Appeal held that the 24-month evidence

requirement, and the lack of provision for victims of domestic violence who had suffered from financial abuse, frustrated the statutory purpose, and so that the regulations were unlawful.

154. In the **Rights of Women** case, the Court of Appeal made clear that it was exercising the **Padfield** jurisdiction. Longmore LJ said, at paragraph 42 of his judgment (with which Kitchin and Macur LJJ agreed):

> 42. Mr Sheldon protests that this shows that the challenge being made to regulation 33 is in truth a rationality challenge, a challenge which the Rights of Women have always disavowed. But that is to confuse the **Wednesbury** jurisdiction (**Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223) with the **Padfield** jurisdiction of the court, when they are separate concepts. Any discretion conferred on a Minister "should be used to promote the policy and objects of the statute": **R (Electoral Commission) v Westminster Magistrates' Court** [2011] 1 AC 496 , para 15, per Lord Phillips of Worth Matravers PSC. As Lord Kerr of Tonaghmore JSC said in **R (GC) v Comr of Police of the Metropolis** [2011] 1 WLR 1230 , para 83:
>
> "a discretion conferred with the intention it should be used to promote the policy and objects of the Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives."
>
> Any inquiry as to frustration of purpose must consider whether there is a rational connection between the challenge requirement and the legislation's purpose."

DMA

155. Ms Harrison KC relied by analogy on the **DMA** case. This case was concerned with the Secretary of State's duty under section 4(2) of the IAA 1999 to provide accommodation for destitute failed asylum seekers. The SSHD had failed to provide the claimants with accommodation for periods of between 45 days and nine months. Whilst the legislation stated only that the SSHD "may" provide accommodation for failed asylum seekers, the SSHD accepted that she was under an obligation to exercise her powers under section 4(2) to promote the policy objectives of that section – and also her powers under section 4(5) to make regulations specifying criteria to be used in determining, inter alia, whether or not to provide accommodation. In **DMA**, Knowles J held that the SSHD had been in breach of her duty because she had not provided the applicants with accommodation within a reasonable time. He also held that in order to meet her duties under section 4(2), the SSHD had to put in place a system for properly monitoring the provision of accommodation under that subsection.

156. Knowles J dealt with the **Padfield** principle at paragraphs 201-205 of his judgment:

> "201. There was some discussion of what has come to be known as the **Padfield** principle (**Padfield v Minister of Agriculture, Fisheries and Food** [1968] AC 997) in relation to ground 1. The principle concerns the exercise of power to promote the policy and objects of the legislation conferring the power, determined by construing the legislation as a whole (see generally **R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government** [2020] 1WLR 1774).
>
> 202. In his valuable analysis of a challenge in respect of alleged failures in provision under section 4(1)(c) of the 1999 Act, Edis J said in **R (Sathanantham) v Secretary of State for the Home Department** [2016] 4 WLR 128, para 67:
>
> The power to provide accommodation in section 4(1)(c) is a power to provide it to those who have been released on bail. The SSHD has established a system for its exercise . . . She has not decided not to exercise it. If she adopted a policy of declining [every application] to accommodate those who were released on bail this may perhaps violate the rule in **Padfield's** case, but that is not what has happened here. What has happened here is that the system which the SSHD has established is trying, but failing, to offer suitable bail accommodation to the small number of high risk bail applicants within a reasonable period of time. The policy which she has established is not irrational or unreasonable, it is simply not working very well. There are several reasons for this which include the complex nature of the task in di–cult cases and maladministration. The complex nature of the task includes the difficulty in sourcing accommodation for asylum seekers generally in what is sometimes a hostile climate. That difficulty is magnified when the detainee is dangerous to a degree which requires the accommodation to be of a particular kind and in a particular location . . .
>
> The nature of the problem in this case is not the same as that in **Padfield** and [**M v Scottish Ministers** [2012] 1WLR 3386]. It is unintended delay which is the problem, not a deliberate decision to delay as in the latter case . . .
>
> 203 Mr Tam [Counsel for the SSHD] argued:
>
> This is not a case in which it is said that the Regulations are ultra vires; nor has the [Secretary of State] decided not to exercise her powers under section 4(2) and/or 4(5); nor has she adopted a policy of refusing all applications by failed asylum seekers; nor has she imposed insurmountable obstacles to qualifying for section 4 support (e g by imposing qualifying criteria which would, in practice, be impossible for failed asylum

seekers to meet) such that the policy objectives of section 4(2) would be frustrated (thus engaging the **Padfield** principle).

204 This only goes so far. The Secretary of State would be deciding not to exercise her powers under section 4(2) such that the policy objectives of section 4(2) would be frustrated (thus engaging the **Padfield** principle) if she continued a system which continued the failures evidenced in the present proceedings. There is not so much difference between insisting on a scheme which takes too long and imposing an obstacle in the scheme. To decline to improve a system that is failing to meet the requirements of a duty, when that system can be improved, is equivalent to a decision not to perform a duty; it would be an example of the deliberate decision to delay to which Edis J refers.

205 The policy objective of section 4(2) is the avoidance of a breach of article 3, argued Mr Tam. In my judgment, it is this that makes the matter so serious. Mr Goodman added that it is not the only policy objective; avoiding destitution is a policy objective too. I am not sure that is right in the case of section 4(2), given **Limbuela** [2006] 1 AC 396, save as a route to avoiding breach of article 3. But Mr Goodman does not need the added point. In accepting a section 4(2) duty to an individual, the Secretary of State accepts that there is an imminent risk of breach of article 3."

157. At paragraph 235, Knowles J said:

"235 Where the Secretary of State's systems work in a way that cause her to be in breach of her legal duty it is proper for the court to say that, because the law is not being complied with. Where there is an aspect of the process that will necessarily cause or contribute to the real risk, both of unlawful decisions and of breach of duty, the court should be prepared to declare it."

158. In **Sathanantham**, one of the cases cited by Knowles J, Edis J said:

65**. Padfield v Minister of Agriculture, Fisheries and Food** [1968] AC 997 requires the court to construe the limits of the breadth of a power by reference to the statutory purpose of the Act which conferred it. The decision was explained in **M v Scottish Ministers** [2012] 1 WLR 3386 , paras 46–47. It is to be noted that both these cases concerned the exercise of a power in a way which would run counter to a clearly identifiable statutory scheme. The statutory scheme is to be considered as a whole to determine whether the power is, in reality, a duty or whether it is "coupled with" a duty, see the passage from **Julius v Bishop of Oxford** (1880) 5 App Cas 214 quoted by Lord Reed JSC in the **Scottish Ministers** case, at para 46.

Relevant authorities on irrationality

Johnson

159. Johnson was concerned with the provisions of the Universal Credit Regulations 2013, made by the Secretary of State under powers granted by Schedule 1 to the Welfare Reform Act 2012. Under the regulations, the amount of credit to which a claimant was entitled was assessed by reference to the actual amounts of earned income in each monthly assessment period. The regulations did not make allowance for the fact that the date of a monthly salary payment for a claimant might fluctuate if the normal payday fell on a weekend or bank holiday. In certain circumstances this meant that two monthly salary payments would fall within a single assessment period. This meant the claimant's salary would appear to have greatly increased for the month in question, and his or her universal credit payment would be reduced accordingly. The opposite would happen in the next monthly assessment period: the claimant would appear to receive no salary at all for that period and so would become entitled to a much higher than usual universal credit payment. This phenomenon was described as the "non-banking day salary shift". It had a seriously adverse effect on claimants, who had budgeted on the basis that they would receive a stable universal credit payment each month. In some cases, claimants were at risk of eviction for non-payment of rent. Four claimants brought judicial review proceedings, contending that the regulations should be interpreted in such as way as to make allowance for the non-banking day salary shift, and/or that the regulations were irrational in so far as they mandated this result. The Divisional Court allowed the claims on the first ground (interpretation).

160. The Court of Appeal dismissed the Secretary of State's appeal. However, the Court of Appeal rejected the contention that had found favour with the Divisional Court, namely that the regulations could be interpreted in such a way as to avoid the adverse consequences of the non-banking day salary shift.

161. At paragraph 48 of her judgment, Rose LJ set out the test for irrationality as it has been described by Leggatt LJ and Carr J in **R (Law Society) v Lord Chancellor** [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649:

> "98. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects.
>
> The first is concerned with whether the decision under review is capable of being justified or whether in the classic **Wednesbury** formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see **Associated Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e g **Boddington v British Transport Police** [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be

> challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

162. Although the Divisional Court in the **Law Society** case pointed out that the famous formulation in **Wednesbury** is tautologous, I will, for convenience, refer in this judgment to irrationality/unreasonableness as "**Wednesbury** unreasonableness."

163. At paragraph 50, Rose LJ described as a "useful framework" for how to approach irrationality in the **Johnson** case, the following passage from the **Law Society** case:

> "113. We accept that in principle it was open to the Lord Chancellor to adopt a policy response which did not directly correspond to the problem which it was designed to meet. A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs. Such an approach is in any event consistent with the nature of the Scheme, which uses criteria such as PPE as proxies for the complexity of cases. It is inherent in the use of such proxies that they will result in under-compensation in some cases. But this does not cause unfairness if it is off-set by over- compensation in other cases. What matters is that overall a reasonable balance is struck."

164. Rose LJ continued, at paragraph 50:

> "We need to consider what are the disadvantages of deciding not to "fine-tune" the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP—or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?"

165. The Court of Appeal could not identify any rational policy basis for the non-banking day salary shift. At paragraph 57, Rose LJ said:

> "The SSWP does not point to any way in which the operation of regulation 54 in their cases can be said to further the policies underlying the introduction of universal credit for these respondents."

166. The Court of Appeal rejected the contention that the non-banking day salary shift could be justified by the need for a bright line to ensure that the universal credit system operated in a coherent way, or because it enabled the system to work in an automated way without the need for manual intervention by a DWP officer.

167. At paragraphs 105 and 106, Rose LJ considered whether the challenge was more appropriately characterised as a **Wednesbury** unreasonableness challenge or a **Padfield** challenge. She said:

> 105 The arguments accepted by the court in **Rights of Women** have some echoes in the present case where the complaint is in part that the large cohort of claimants affected by the non-banking day salary shift are unable to benefit from the work allowance to which they are supposed to be entitled. However, my view is that this case is more properly characterised as a **Wednesbury** unreasonableness challenge than as a breach of the **Padfield** principle. The latter principle is more appropriate where a specific exercise of a statutory power such as a rule-making power is challenged because it fails to promote the purpose for which the power was conferred. There is no specific exercise of the regulation-making powers which is alleged to breach the Padfield principle here. The challenge is to the combined effect of the Regulations as currently enacted and their failure to include an exception to the general principle in regulation 54.
>
> 106 Although I do not consider this to be a case within the **Padfield** jurisdiction of the court to which Longmore LJ referred, the fact that the absence of an exception to regulation 54 operates in so many cases and in a way which is antithetical to one of the underlying principles of the overall scheme, is an important factor when considering the rationality of the SSWP's choices."

168. In his concurring judgment, Underhill LJ said, at paragraph 113:

> "113 I start by saying that I recognise, as does Rose LJ, the extraordinary complexity of designing a system such as universal credit, and that it necessarily involves a range of practical and political assessments of a kind which the court is not equipped to judge. I also accept that in order to be workable any such system may have to incorporate bright-line rules and criteria which do not discriminate fully between the circumstances of different individuals. (In that connection the Secretary of State's evidence, and Mr Brown in his submissions, placed great weight on the objective of having as fully automated a system as possible, but the point would be valid even in the case of administrative systems that are not computerised.) For those reasons I fully accept that a court should avoid the temptation to find that some particular feature of such a system

is "irrational" merely because it produces hard, even very hard, results in some individual cases."

169. At paragraph 115, Underhill LJ said:

115 I am inclined to agree with Rose LJ that the relevant form of unlawfulness is best characterised as irrationality, though I also agree that it has echoes of the **Padfield** principle. But ultimately these various characterisations are simply aspects of the fundamental question of whether Parliament can have intended the rule-making power to be exercised in a way which produces so arbitrary and harmful an impact on the respondents and the very many other claimants who are in the same position. I do not believe that it can.

Pantellerisco

170. The guidance on the law in **Johnson** has more recently been adopted by the Court of Appeal in **Pantellerisco v Secretary of State for Work and Pensions** [2021] EWCA Civ 1454; [2021] PTSR 1522.

171. At paragraphs 56-59 of **Pantellerisco**, Underhill LJ said the following in relation to the test for **Wednesbury** unreasonableness:

56. It is now well-recognised that the degree of intensity with which the Court will review the reasonableness of a public law or act or decision (including a provision of secondary legislation) varies according to the nature of the decision in question. There are many authoritative statements to this effect, but I need only quote from para. 51 of the judgment of Lord Mance in **Kennedy v The Charity Commission** [2014] UKSC 20, [2015] AC 435 , where he says:

"The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called **Wednesbury** principle. The nature of judicial review in every case depends upon the context."

57. It is also well-recognised that in the context of governmental decisions in the field of social and economic policy, which covers social security benefits, "the administrative law test of unreasonableness is generally applied … with considerable care and caution" and the approach of the courts should "in general … [accord] a high level of respect to the judgment of public authorities" in that field. I take those words from para. 146 of the judgment of Lord Reed (with which the other members of the Court agreed) in **R (SC) v Secretary of State for Work and Pensions** [2021] UKSC 26, [2021] 3 WLR 428 : see para. 146. In that case the Supreme Court was concerned, as here, with a challenge to the legislation relating to welfare benefits (sections 13 and 14 of the Welfare Reform and Work Act 2016). The

claimants' case was that the impugned provisions contravened article 14 of the Convention , but in the part of the judgment from which I quote Lord Reed is making the point that the Strasbourg jurisprudence is in line with the approach taken by the common law, and it is the latter which he is describing. He explains the reasons for adopting a less intensive standard of review in this area, including the need for the courts "to respect the separation of powers between the judiciary and the elected branches of government" (see para. 144).

58. Although the decision in SC is very recent (indeed it post-dates the argument before us), Lord Reed emphasises that the approach which he sets out is well-established in domestic law. I should note in particular a statement which he quotes from the speech of Lord Bridge in **R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council** [1991] 1 AC 521 to the effect that

"[where a] … statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy *and which can only take effect with the approval of the House of Commons* [my emphasis], it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity".

As is evident from the italicised words, the ministerial orders which were in issue in that case were required to be approved by resolution of the House of Commons; and Lord Bridge evidently attached weight to that fact when identifying the appropriate standard of review. Lord Sumption made the same point at para. 44 of his judgment in **Bank Mellat v Her Majesty's Treasury (no. 2)** [2013] UKSC 39, [2014] AC 700 , where he said:

"When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy."

Those observations were endorsed by Lord Reed in **R (SG) v Secretary of State for Work and Pensions** [2015] UKSC 16, [2015] 1 WLR 1449, at para. 94 .

59. Finally, I would repeat what I said at para. 113 of my judgment in **Johnson**, as follows:

"I recognise, as does Rose LJ, the extraordinary complexity of designing a system such as universal credit, and that it necessarily involves a range of practical and political

> assessments of a kind which the Court is not equipped to judge. I also accept that in order to be workable any such system may have to incorporate bright-line rules and criteria which do not discriminate fully between the circumstances of different individuals. … I fully accept that a Court should avoid the temptation to find that some particular feature of such a system is 'irrational' merely because it produces hard, even very hard, results in some individual cases."
>
> I would add that the very complexity and difficulty of the exercise is bound to mean that following the implementation of the scheme it may become clear with the benefit of experience that some choices could have been made better. But it does not follow that the legislation was in the respect in question irrational as made, or that it would be irrational not to correct the imperfections once identified: the court cannot judge the lawfulness of such schemes by the standard of perfection. Whether any errors or imperfections are of such a nature or degree as to impugn the lawfulness of the relevant regulations must depend on the circumstances of the particular case, having regard to the appropriate intensity of review."

172. The guidance in **Johnson** was, again, adopted in **R (Salvato) v Secretary of State for Work and Pensions** [2021] EWCA Civ 1482. An appeal in **Salvato** is pending before the Supreme Court.

Discussion

Properly understood, is this a Padfield challenge or a Wednesbury unreasonableness challenge?

173. This must be the starting point for the court's analysis. On behalf of the Claimants, Ms Harrison KC relied both upon a **Padfield** challenge and a **Wednesbury** unreasonableness challenge in support of her contention that the SSHD was obliged by law to provide those on section 3C leave with documentary proof of their immigration status and their attendant rights. It is fair to say that she leant towards reliance upon a **Padfield** challenge. In my judgment, however, properly understood, this is not a **Padfield** case. If the Claimants' case is a good one, it will be on the basis that the SSHD's actions (or inactions) are **Wednesbury** unreasonable.

174. It is clear that the **Padfield** jurisdiction, on the one hand, and the **Wednesbury** unreasonableness jurisdiction, on the other, are two different concepts. This was made clear by Longmore LJ in **Rights of Women**, at paragraph 42.

175. The nature of the Claimants' challenge is fundamentally different from the nature of the challenges that have been advanced in cases in which the claimants relied upon the **Padfield** principle. In all such cases that have been cited to me, or that I have been able to find, the challenge has been to a decision in relation to the exercise of a power or discretion that was expressly conferred upon the public body by the statute in question. For example, there was a statutory discretion whether to appoint a committee of investigation (**Padfield**); a statutory discretion whether to refund rates to a ratepayer

(**Chetnik Developments**); a statutory power to cap rent increases (**Spath Holme**); a statutory discretion to retain fingerprints or DNA samples (**GC v Metropolitan Police Commissioner**); a statutory power to make regulations (**M v Scottish Ministers**); a statutory power to issue removal directions (**Patel**); a statutory power to impose requirements for the grant of legal aid (**Rights of Women**); and a statutory discretion to provide accommodation for asylum seekers (**DMA** and **Sathanantham**).

176. The present case is different. There is no statutory provision which confers a discretion upon, or grants a power to, the SSHD to provide documentary proof to those on section 3C leave to demonstrate their immigration status and attendant rights. There is no such discretion or power in section 3C itself. Rather, the power to do so comes from a general implied power, not set out in any specific statutory provision but derived from the generality of the IA 1971, for the SSHD to exercise ancillary and administrative functions in order to give effect to the powers and functions given to him by the IA 1971. This was made clear by the Supreme Court in the **New London College** case.

177. Also, unlike in many of the **Padfield** cases, such as **Padfield** itself, there is no statutorily defined scheme, of which the particular power or discretion forms part, which can shed light on whether the exercise of the power or discretion in a particular way would frustrate the purpose of the statutory scheme.

178. It follows that it is not possible to carry out the type of exercise that has been carried out in the **Padfield** cases, of scrutinising the statutory provision which is the source of the power or discretion in order to identify its statutory purpose and then to determine whether the way in which the public authority is exercising its discretion, or is exercising or declining to exercise its power, frustrates that statutory purpose. This is why it feels somewhat awkward and artificial, in my view, to attempt to apply the analytical tools that are used in the **Padfield** cases to the present case. It is not like them. In my judgment, the SSHD's general power or discretion to exercise ancillary and administrative functions in order to give effect to the powers and functions that have been given to him by the IA 1971 is an example of a statutory discretion that is so wide that it can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith (cf. **Spath Holme**, per Lord Bridge, at 873).

179. Therefore, in my view, this case is properly to be regarded as a **Wednesbury** unreasonableness challenge for essentially the same reason that the challenge in **Johnson** was regarded by Rose LJ as being a **Wednesbury** unreasonableness challenge. Rose LJ considered that a **Padfield** challenge is appropriate where a specific exercise of a statutory power such as a rule-making power is challenged because it fails to promote the purpose for which the power was conferred (**Johnson**, paragraph 105). In the present case, as with **Johnson**, there is no specific exercise of a statutory power or discretion which is alleged to breach the **Padfield** principle.

180. In many cases, it may make little difference whether the challenge is treated as a challenge under the **Wednesbury** unreasonableness jurisdiction or the **Padfield** jurisdiction. Although Longmore LJ in **Rights of Women** made clear that the two concepts are different, they have similarities and echoes of each other. This was noted by Underhill LJ at paragraph 115 of **Johnson**. Both **Wednesbury** and **Padfield** are aspects of the fundamental question of whether Parliament can have intended powers or discretions to be exercised in a way that produces a certain outcome. In other words, the court is seeking to identify the will of Parliament, and to decide whether the acts or

decisions of the public authority are within the scope of the powers and discretions conferred by statute upon the public authority. It would also be possible to define the **Padfield** principle in a way that essentially overlapped with **Wednesbury:** if a public authority exercises a power (or fails to exercise a power) in a way which frustrates the statutory purpose, it might be said to have failed to take into account a relevant consideration – the statutory purpose – or to have reached a decision which no reasonable public authority could have reached. In **Rights of Women**, the Court of Appeal said that any inquiry into frustration of purpose (i.e. the **Padfield** jurisdiction) "must consider whether there is a rational connection between the challenged requirement and the statutory purpose" (paragraph 42). This is very close to the **Wednesbury** test.

181. It is also clear that, even when applying the **Wednesbury** unreasonableness test, the court must consider and take into account the statutory purpose and consider whether the acts or decisions of the public authority frustrate that statutory purpose. In **Johnson**, at paragraph 106, Rose LJ took into account that the challenged regulation operated in a way that was antithetical to one of the underlying principles of the overall scheme.

182. Although, as I have said, there are many cases in which it may well make no difference whether the court treats the challenge as being one relying on the **Padfield** principle or upon **Wednesbury** unreasonable, there are several respects in which, in the present case, it assists with the analysis to appreciate that this is a **Wednesbury** unreasonableness challenge, not a **Padfield** challenge.

183. First, in the **Padfield** cases, the key question is often whether, in the statutory context, something that is expressed as a power is in reality a power coupled with a duty. In other words, is there a legal duty to exercise a discretionary power in a particular way? This question is not at all illuminating in the present case, because there is no discretionary power, set out in a statutory provision, which permits the SSHD to decide whether or not to provide documentary evidence to those on section 3C leave.

184. Second, in my judgment, the conclusion that this not a **Padfield** challenge is the answer to Mr Malik KC's point that section 3C of the IA 1971 does not give any sort of discretion to the SSHD, and so the failure to provide some migrants with documentary evidence cannot be said to frustrate the statutory purpose of section 3C. As this is not a **Padfield**-type case, this is not a case, unlike **Padfield** and the other cases which I have referred to, in which the focus must primarily be upon the statutory provision which grants the power or discretion. There is no such statutory provision in this case. Section 3C does not confer the power which, it is said, the SSHD has unlawfully declined to exercise. I agree with Ms Harrison KC that, in considering whether the SSHD's failure to provide documentary evidence is **Wednesbury** unreasonable, the court must look at the statutory purpose not only of section 3C itself, but also at the broader statutory purpose of the main Immigration Acts, and the compliant environment regime. To use the words of Rose LJ in **Johnson**, the court must look at the "underlying principles of the overall scheme", when deciding if the SSHD has acted rationally.

185. In any event, even if this had been better characterised as a **Padfield** challenge, it would still have been necessary for the court to look at the bigger picture. It would have been wrong to look at the statutory purpose of section 3C in isolation – though it is plainly

relevant – and it would have been necessary to look at the statutory purpose of the framework of immigration legislation more generally. To borrow the language of Lord Judge CJ at paragraph 84 of **GC v Metropolitan Police Commissioner**, even in a **Padfield** case it would be necessary to consider the grain of the legislation and its underlying thrust. It would have been necessary to consider the statutory scheme as a whole (**Padfield**, at 1030B-D and **Sathanantham**, paragraph 65).

The Wednesbury unreasonableness challenge

Relevant principles

186. I will begin by reminding myself of some relevant principles.

187. As the courts have made clear, time after time, claimants who mount a **Wednesbury** challenge have a high hurdle to overcome. Either the Claimants must show that the failure to provide documentary evidence to all those on section 3C leave was outside the range of reasonable decisions open to the SSHD, or they must show that there was a demonstrable flaw in the SSHD's reasoning which had important consequences. I should add that there is no suggestion of bad faith in this case.

188. As Lord Mance said in **Kennedy v The Charity Commission**, the nature of judicial review in every case depends upon the context.

189. In my judgment, there are three aspects of this challenge which mean that the SSHD's margin of discretion (to borrow a phrase from another context) is potentially broader than in many other challenges, and so that the hurdle facing the Claimants is all the higher.

190. First, this is a judicial review challenge in the field of immigration, and in my judgment a similar level of respect must be afforded to executive decision-making in this field as was afforded to such decision-making in other fields of social and economic policy, such as social security (see the passage from Underhill LJ's judgment in **Pantellerisco**, set out above).

191. Second, the challenge is not to the exercise of a power or discretion that has been expressly conferred by a specific statutory provision; rather, it is a challenge to the SSHD's exercise (or non-exercise) of one part of the broad and inchoate package of ancillary and undefined powers which the Supreme Court said in the **New London College** case were enjoyed by the SSHD as a consequence of the express powers granted to the SSHD by the IA 1971. That these powers are undefined, and are administrative in nature, means, in my view, that SSHD's margin of discretion is broader than in many other contexts. Also, in the normal course of events, a Government Department will be best-placed to know which administrative steps should or should not be taken to give effect to the statutory and policy requirements.

192. Third, the objective of the Claimants is, in effect, to obtain an order of the court which will have the effect of compelling the SSHD to take a positive step, that is, to provide all those on Section 3C leave with a means of proving their status. Though the relief that the Claimants seek is declaratory in nature, this will be the ultimate consequence, if they are successful. In my view, courts have to be particularly careful about declaring that a public authority has acted in a **Wednesbury** unreasonable manner by failing to

take a positive action, both because the public authority will be particularly well-placed to appreciate the advantages and disadvantages of doing the thing, and because the grant of relief by the court will be particularly onerous for the public authority. However, it is clear that, in an appropriate case, the court can do so. **Johnson** is itself an example of this. In that case, the Court of Appeal granted declaratory relief, the effect of which was to require the Secretary of State to redraft and re-make regulations which would solve the problem of the "non-banking day salary shift". There is no reason in legal principle why a public authority may not act in a **Wednesbury** unreasonable manner by deciding not to do something which it has a power to do. Indeed, if it were otherwise, then the ancillary powers which the SSHD can exercise in relation to the immigration legislation would be immune from judicial scrutiny.

193. Again, I bear in mind that the immigration system is very complex, and, as Underhill LJ said in relation to the universal credit system in **Johnson**, at paragraph 113, it necessarily involves a range of practical and political assessments of a kind which the court is not equipped to judge. This does not mean that the court cannot intervene (and the court intervened in **Johnson**) but it means that the court must show the appropriate level of deference.

194. Still further, I bear in mind Underhill LJ's observation, in the same paragraph, that a court should avoid the temptation to find that some particular feature of a system is "irrational" merely because it produces hard, even very hard, results in some individual cases.

195. Finally, I bear in mind that courts should resist the temptation to fill in a perceived gap or lacuna in legislation. In **R (Countryside Alliance) v Attorney General** [2007] UKHL 52; [2008] 1 AC 719, at paragraph 45, albeit in a different context, Lord Bingham of Cornhill deprecated any attempt by those holding particular views "to achieve through the courts that which they could not achieve in Parliament".

Decision

196. In my judgment, the failure to provide digital evidence to all of those on section 3C leave is **Wednesbury** unreasonable, essentially for the reasons put forward by the Claimants. There are three key considerations, in my view.

197. First, the evidence clearly establishes that a substantial number of those on section 3C leave suffer real hardship through being unable to provide immediate documentary proof of their immigration status and attendant rights. I have summarised the evidence in detail earlier in this judgment. Though it is not possible to work out the precise numbers of those who have been adversely affected, it is clear that it is a substantial number.

198. It is also clear that several hundreds of thousands of people will have a period of section 3C leave each year. All those who have section 3(1) limited leave to remain must expect to have two or more periods of section 3C leave before they attain settled status (if they do so). There is no way in which the vast majority of migrants can avoid having to rely upon section 3C leave. There is nothing they can do to ensure that their application to vary their limited leave to remain will be considered and determined before the expiry of the current period of section 3C leave. The cost of fast-track applications is prohibitively expensive for most of them. Each period of section 3C

leave is likely to last a year or so. All of this means that there will be a large number of people on section 3C leave in any one year. In 2019, the SSHD said that there were over 370,000 people on section 3C leave.

199. Not all of those on section 3C leave will suffer adverse consequences from the unavailability of documentary proof of their lawful immigration status and their rights and entitlements to benefits, by any means. But it is clear from the Claimants' evidence, not challenged by the SSHD, that a significant number will do so. It is true that the SSHD has put in place a number of mitigating measures, and that any delay in being able to work or to obtain accommodation resulting from the unavailability of documentation will only be relatively brief. However, large numbers of those who on section 3C leave will need to provide proof of employment status or the right to accommodation, and it is inevitable that a sizeable minority will suffer real hardship from a delay of a few days or weeks arising from their inability to provide documentary proof of their immigration status. It is also inevitable that dependent children will suffer hardship in consequence. There is also a real danger that employers and landlords will be put off by having to take steps themselves to ascertain the status of the applicants, especially against the background of potential civil and criminal penalties. Again, the SSHD has put in place mitigating measures, such as guidance documentation, but the risk remains.

200. As the Claimants' evidence demonstrates, the absence of a means of proof has serious adverse consequences for some people in other respects, for example for those seeking free healthcare, and those seeking a university place or education funding. Where these problems bite, the consequences are very severe indeed.

201. Even where a person on section 3C leave does not themselves suffer any adverse consequences of these kinds, they are at risk that this may happen in the future, and this no doubt causes stress and worry. Moreover, as most migrants will have to rely upon section 3C leave two or more times before they qualify for settled status, the strain caused by the knowledge that they will not have documentary proof of their right to remain and attendant rights and benefits during section 3C leave periods will be all the greater, and there is a risk that, as with Ms Adjei, they will suffer adverse consequences more than once.

202. Second, in my judgment it is clear that the legislative purpose, both of section 3C in isolation, and of the broader framework of immigration legislation, and in particular of the compliant environment system, includes that those who are lawfully present on s3C leave, and who have a right to work, rent accommodation etc, should be able immediately to demonstrate that they have such rights and entitlements. As set out earlier in this judgment, the Explanatory Notes to the IAA 1999 and the Court of Appeal's judgment in **Akinola** make clear that the central part of the statutory purpose of section 3C is to preserve the rights to which the applicant was entitled before the section 3(1) limited leave to remain expired.

203. Looking at section 3C in isolation, I do not accept Mr Malik KC's submission that the legislative history shows that the purpose of this provision is solely to enable those whose applications for a variation of leave have not yet been determined at the end of their current period of section 3(1) leave (who are, in practice, all of those on section 3(1) leave) to remain in the United Kingdom whilst pursuing their applications and/or appeals to their conclusions. It is absolutely clear, in my judgment, that the

Parliamentary intention was not only that migrants awaiting determination of their applications to vary their limited leave to remain should be entitled to remain in the United Kingdom in the meantime, but that they should also be entitled to remain here on exactly the same terms, as regards benefits or entitlements, as they had enjoyed during their previous period of section 3(1) leave. Given the complaint environment policy, this can only happen if they have some means of proving their continued rights and entitlements. I do not consider that the passages from **Mirza** at paragraphs 20-29, referred to by Mr Malik KC in his submissions, in which Lord Carnwath set out the legislative history of section 3C, and from Sullivan LJ's judgment in **AS (Afghanistan)** at paragraphs 102-103 (referred to at paragraph 34, above) affect this conclusion.

204. Looking at the broader perspective, I accept Ms Harrison KC's submission that the framework of immigration legislation is underpinned by the objectives and purpose of the compliant environment policy. This is not just departmental policy: it is embedded in the legislation. The complaint environment policy is predicated upon the ability to distinguish between those who are lawfully present and documented, and those who are unlawfully present and so who cannot provide documentary proof of their right to be here and to work, rent accommodation etc. The underlying purpose of the legislative framework is that there should be a hostile and unwelcoming environment for those who are unlawfully present and so who are undocumented. The corollary of this is that those who are lawfully here should not face the hostile environment. That can only happen if they are documented. It is, in my judgment, irrational that the legislation, and specifically section 3C, is intended to protect the rights and entitlements of those with section 3C leave, but leaves them with no way themselves of demonstrating that they have such rights and entitlements. It is no use for those with section 3C leave to be able to comfort themselves that they are entitled to continue to work and rent accommodation etc, if they do not have any means immediately of being able to show to employers and landlords that this is the position. As things stand, the failure to provide them with documentary proof means that those on section 3C leave – unless they already have an eVisa – do not in practice have the protections that section 3C guarantees for them. I do not consider the other methods that the SSHD has put in place for enabling checks to be made of an applicant's section 3C status to be sufficient, in circumstances in which, as I will explain, there is a simple and straightforward way of giving them the documentary proof that will enable them to provide instant evidence of their status.

205. It follows that I do not accept Mr Malik KC's submission based on the **Patel** case. The protection for those who are lawfully here which is undermined by the failure to provide those on section 3C leave with documentary proof of their status is not just an incidental effect of the statutory provisions, it is right at the heart of them. In light of the compliant environment regime, which underpins the immigration legislation, those who are lawfully present should be protected from suffering the consequences that are designed to make life difficult for those who are unlawfully present. The availability of a means of proving a person's immigration status and entitlements, without delay, whilst on section 3C leave, is necessary to make effective a legal right (see **M v Scottish Ministers** at paragraph 46, above).

206. A related point is that I do not see any logic in treating those with section 3C leave differently from those with section 3(1) leave. The statutory purpose was to put them in exactly the same position. Those with section 3(1) leave are given documentary

evidence that they can use; those with section 3C leave are not. I do not consider the points of distinction that were put forward by Mr Malik KC to justify the difference in treatment. The fact that someone on section 3C leave will lose their limited leave to remain if they leave the United Kingdom, unlike someone with section 3(1) leave, is not an important point of distinction. An eVisa is capable of keeping up with a person's real-time immigration status and so, if a person's immigration status changes, then that can be reflected in their digital documentation. In any event, as the Claimants pointed out, even a person with section 3(1) status can lose their right to remain. Nor is it a significant point of distinction that a person with section 3(1) leave to remain has a specific end-date for their leave, whereas those on section 3C leave do not. This is a reason why it is not irrational to decline to provide those on section 3C leave with hard copy documentary evidence, but it is not a reason why the decision not to provide them with digital proof can be justified. I should add that I did not find the comparisons put forward by the Claimants with those who are on the EUSS Scheme, or with asylum seekers, particularly helpful: there is a more direct comparison much closer to home, with those on section 3(1) leave.

207. In my judgment, the failure to provide a digital means of immediately demonstrating the immigration status of a person on section 3C leave – when such means is readily available – frustrates the purpose both of section 3C itself and the broader framework of immigration legislation, informed as it is by the complaint environment.

208. This brings me on to the third and perhaps most significant point. If there were countervailing considerations, that is, reasons why proof should not be supplied to those on section 3C leave, then it might very well be that it could not be said that it was **Wednesbury** unreasonable for the SSHD to decline to provide those on section 3C leave with such proof. It would be for the SSHD to balance the conflicting considerations and to decide how to proceed. This would be so, even if there were harsh consequences in some individual cases (as Underhill LJ made clear in **Johnson**, at paragraph 113).

209. The SSHD has provided reasons why he considers that it would be impractical to provide those section 3C leave with a hard copy, paper, document to show their immigration status. This is because it would not necessarily be up-to-date and might mean that a person who has lost their right to remain would continue to possess a document which suggested that they had a right to remain. This would run counter to the compliant environment policy. The Claimants do not accept that this is an insuperable difficulty and point out that hard copy documents are given to those on section 3(1) leave, even though their status might change. Nonetheless, in my judgment, it cannot be said that the SSHD is acting in a **Wednesbury** unreasonable manner by declining to furnish those on section 3C leave with a physical document to evidence their status. There are arguments in favour and against doing so, and it is for the SSHD to balance the competing considerations and to decide how to proceed.

210. However, in contrast to the position relating to hard-copy documentation, there was no evidence placed before me to suggest that there is any disadvantage for the SSHD if he were to provide all of those on section 3C leave with digital proof, in the form of an eVisa, or the like. Nor would it run counter to any aspect of Government policy. In fact, this is already being rolled out to those on section 3C leave. eVisas have already been provided to about 25% of the categories of persons with limited leave to remain, and these can be used during periods of section 3C leave. The SSHD's intention is that,

before long, all categories of persons on section 3C leave will have an eVisa and so will have access to the ready proof of immigration status which the Claimants are seeking. Mr Malik KC emphasised that the roll-out of eVisas for those on section 3C leave is being done without any admission that the SSHD is legally obliged to do so; rather this is part of the general drive towards the use of digital media in the immigration field. Nonetheless, and crucially, there was no evidence before me, and no submissions were made on behalf of the SSHD, to the effect that there are reasons of impracticality or expense as to why the SSHD would not be able to provide those on section 3C leave with digital proof of their status. Sometimes, harsh consequences for individuals are justified on the basis that there is a need for bright-line rules or criteria, which are not flexible enough to address all situations, but nothing like that arises in this case.

211. In light of the evidence before me, therefore, there are, in my judgment, compelling reasons for the provision to those on section 3C leave of digital proof of their status, but the court has not been provided with any reasons, whether of a policy or practicality nature, why the SSHD should not do so. I fully accept that there is no requirement of perfection, but this is a case in which the SSHD can take a straightforward step to avoid hardship for a substantial number of people, with no negative consequences for the Home Office or for the immigration regime.

212. I test my conclusion by applying, with necessary adaptations, the four-stage test employed by Rose LJ in **Johnson,** at paragraph 50:

(1) What are the disadvantages of deciding not to fine-tune the SSHD's administrative practices by imposing a requirement to provide digital proof of immigration status to all those on section 3C leave? As described above, the disadvantages are grave for an unquantifiable but significant number of people, and the mitigating measures put in place by the SSHD do not operate so as prevent those grave problems from arising in those cases;

(2) What are the disadvantages of adopting the solution proposed by the Claimants? On the basis of the evidence, there are none. It has not been suggested that the solution would be impractical or costly. Indeed, it is already gradually being rolled out by the SSHD;

(3) Would the solution be consistent or inconsistent with the nature of the immigration regime? The solution would be consistent with the compliant environment regime, which is at the heart of the immigration regime, as it would mean that those who are lawfully present will not suffer the deterrents put in place for those who are unlawfully present, and it would not run the risk of making it easier for those who are unlawfully present to obtain access to employment, accommodation etc; and

(4) Can it be said that no reasonable SSHD would have struck the balance the way that the SSHD has done in this case? In my view, the answer is "yes". There are very strong reasons in favour of giving digital proof of status to those with section 3C leave, and no good reasons that I have been able to identify for not doing so.

213. I should add a few points. First, this is the position as things currently stand, in light of the state of the evidence before me. It does not necessarily follow that the SSHD has acted in a **Wednesbury** unreasonable manner in this regard in the past. It may be that it is only recently that the technology has become available to provide those on section

3C leave with effectively instantaneously digital proof of their status, rights and entitlements. I have heard no evidence about this. If so, then it may be that, in the past, it was not **Wednesbury** unreasonable for the SSHD to fail to provide those on section 3C leave with documentary proof that they can use to demonstrate their status. There is no inconsistency or illogicality in there being **Wednesbury** unreasonableness now, but not in the past (if that is the case), because the unreasonableness relates to the performance by the SSHD of the powers and functions that are ancillary to his express powers under the IA 1971, and the factors which determine whether those functions are being performed rationally may vary from time to time, as circumstances change.

214. Second, Mr Malik KC submitted that the present case can be distinguished from **Johnson**, and that the facts were particularly stark in that case. I agree that the facts in **Johnson** are different, and that it is, perhaps, a particularly egregious example of **Wednesbury** unreasonableness. Similarly, this case is different from the case which Ms Harrison KC said was its closest analogue amongst the reported cases, namely **DMA**. The facts of each case are different, but the general guidance given by the judges in **Johnson** is very helpful for present purposes. Nonetheless, the present case is **Wednesbury** unreasonable for reasons of its own, as I have outlined.

215. Third, in my judgment this ruling does not fall into the trap of filling in a perceived lacuna in legislation by judicial activism. Almost any instance in which a judge finds that there has been **Wednesbury** unreasonableness, or a breach of the **Padfield** principle, can be characterised as an attempt to fill in the gaps in legislation, because it will be a case in which a court is saying that a Government or a public authority is legally bound to do, or to refrain from doing, something, when there is no express statutory provision which says that the thing must be done or not done. However, the court's power to do this is constrained within tight limits and, in my view, this is an example of a case in which the Government department has failed to do something in breach of well-established public law principles. Again, this is not a case in which the court is seeking to conduct a wide-ranging investigation into how an administrative system works as a whole, which was rightly deprecated by Cranston J in **Hossain v SSHD** [2016] EWHC 1331 (Admin) at paragraphs 144-5, or a macro-economic and social policy designing exercise, which was similarly criticised by Saini J in **R (MK) v Secretary of State for the Home Department** [2019] EWHC 3573 (Admin); 2020] 4 WLR 37, at paragraph 125. This case is concerned with a narrow and specific aspect of the SSHD's functions in relation to immigration. Still further, this is not a case in which the court is disturbing the delicate balance of a carefully-designed system. As with **Johnson**, this is a case of "fine-tuning" the system to cater for an arbitrarily harmful impact (cf **Salvato** in the Court of Appeal at paragraph 126).

216. Fourth, I have found that the SSHD's position in relation to digital evidence for those on section 3C leave is **Wednesbury** unreasonable. It is therefore unnecessary for me to go on to consider whether there was also process irrationality, as defined in the **Law Society** case, in that the SSHD has failed to take into account an important relevant consideration, namely that he has failed to consider whether, by failing to provide all those on section 3C leave with digital proof, he has thwarted the statutory purpose of section 3C or of immigration legislation more generally, underpinned as it is by the compliant environment principle. Nor do I need to consider Ms Harrison KC's submission that the intensity of review in this case should be greater than in many cases because the matter under consideration had not been considered by the SSHD, (even

though he should have been alerted to it by the Windrush review and in other ways) and the matter affects fundamental rights. Even applying the generous standard of review which I have found applies to challenges to decisions relating to administrative functions, the SSHD's actions are **Wednesbury** unreasonable.

217. Fifth, Mr Malik KC submitted that the failure to provide documentary proof of section 3C status is not **Wednesbury** unreasonable, because the perceived advantages of doing so are not significant. As, I hope, will be apparent, I reject this submission. Notwithstanding the other ways in which proof of section 3C status, and attendant entitlements, can be established, and notwithstanding the mitigating measures put in place by the SSHD, I consider that the hardship caused to many people by the failure to provide documentary proof, in digital form, is very significant and is enough to mean that the failure is Wednesbury unreasonable in all of the circumstances.

218. Sixth, I do not accept Mr Malik KC's submission that the differences in language between section 4(1) of the IA 1971, and section 3C show that Parliament did not intend to impose a duty on the SSHD to provide proof of status to those on section 3C leave. The fact that section 4(1) imposes an express statutory duty to issue documentation in other, different, circumstances, does not shed any light upon whether it is **Wednesbury** unreasonable to fail to do so for those on section 3C leave.

Ground 3: the Public Sector Equality Duty

The law

219. There is no significant dispute between the parties as regards the nature and scope of the PSED. The PSED is imposed by the Equality Act 2010 ("EA 2010"), s149, which provides, in relevant part:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

220. Section 149(7) provides that the relevant protected characteristics include disability, race, sex and age. However, Schedule 18 to the EA 2010 provides that section 149(1)(b), the duty to have regard to equality of opportunity, does not apply to the protected characteristics of age, race, religion or belief. "Race" for this purpose, refers to nationality or ethnic or national origins, but not to colour.

221. The relevant legal principles were helpfully summarised by Chamberlain J in **R (MXK and SXB) v SSHD** [2023] EWHC 1272 (Admin) as follows:

> 83 The principles applicable in a claim alleging breach of s. 149 of the 2010 Act have been developed in a series of cases. They were summarised in **R (Bracking) v Secretary of State for Work and Pensions** [2013] EWCA Civ 1345, [2014] EqLR 60, [25] (approved in **Hotak v Southwark LBC** [2015] UKSC 30, [2016] AC 811, [73]) and **R (Bridges) v Chief Constable of South Wales Police** [2020] EWCA Civ 1058, [2020] 1 WLR 5037. In the last of these cases, at [175], the Court of Appeal identified six principles:
>
> "(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
>
> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."
>
> 84 Often, compliance with s. 149 is evidenced by the production of a formal EIA. But there is no statutory requirement to produce such a document. Indeed, there is no obligation to produce any contemporaneous document. However, if there is no such document it may be more difficult to show that the duty has been discharged "in substance" and "with rigour"."

222. It is well-established, and is not in dispute, that the PSED is concerned with procedure, not with outcome. In **R (Baker) v Secretary of State for Communities and Local Government** [2009] PTSR 809 (CA) at paragraph 31, Dyson LJ said:

> "In my judgment, it is important to emphasise that [the PSED] is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals"

223. As for what amounts to "due regard", that depends on all of the circumstances. The Court of Appeal in **Bridges** made clear that the duty must be exercised in substance, with rigour, and with an open mind. The Court of Appeal has recently addressed this

issue in **R (British Medical Association) v HM Treasury** [2024] EWCA Civ 355, 17 April 2024, a case which has been decided since legal argument in this case. The Court said, at paragraph 162 of its judgment:

> "162. The touchstone is the statutory language. A decision maker must simply give 'due regard' to the listed equality needs whenever it exercises a function. What regard to those needs is due in any particular context is a question, in the first instance, for the decision maker. On an application for judicial review, the question whether the duty has been complied with by the decision maker is a question of evaluation for the first instance judge. On an appeal, this court cannot interfere with that evaluation unless a challenge to that assessment shows that it is 'wrong'. That is a high hurdle (see, for example, **Volpi v Volpi** [2022] EWCA Civ 464; [2022] 4 WLR 48)."

<u>The parties' submissions and the SSHD's concessions</u>

224. In the SSHD's skeleton argument for the hearing in this case, it was submitted that there could not be a breach of the PSED, for two cumulative reasons. First, because the SSHD did not exercise a "function" when a person's leave is extended under section 3C, as the extension is automatic, and so the PSED did not arise. Second, because there is no conceivable direct or indirect discrimination on the grounds of race, gender or disability or in relation to any other protected characteristic. Those on section 3(1) limited leave to remain are not valid comparators, and there is no potential comparator which might render the treatment of those on section 3C leave discriminatory.

225. At the hearing, however, Mr Malik KC on behalf of the SSHD conceded that the PSED was engaged. He accepted that the PSED was engaged by the general ancillary and administrative functions that are carried out by the SSHD under the IA 1971. He did not press the submission that the SSHD did not have to exercise the PSED in this context because there was no conceivable possibility that the decision not to provide those on section 3C leave with digital proof of status might be relevant to the matters set out in section 149(1) of the EA 2010.

226. In my judgment, the SSHD was right to make these concessions. The ancillary powers and functions that are exercised by the SSHD under the IA 1971 are "functions" for the purposes of the PSED, even though they are implied rather than spelt out expressly in the legislation. This is not a case in which there is no conceivable risk of the decision in relation to digital proof of section 3C status giving rise to discrimination against those with relevant protected characteristics, or of giving rise to issues with equality of opportunity, of having an impact upon good relations between those with differing relevant characteristics. It is not necessary to analyse this in detail. The Claimants contend that the failure to provide all those on section 3C leave with digital proof is likely to have a disproportionate impact upon women and upon disabled persons. I accept that it is at least a real possibility that this will be the case. I note that some categories of migrants on section 3C leave are provided with eVisas, and that the categories of those who do not include, for example, those who are pursuing the 10-year route to settlement under Appendix FM of the Immigration Rules (including Ms

Adjei) and those who have leave to remain under the Destitute Domestic Violence Concession. Those in these categories are more likely to be women. As I have said, it is not necessary to go further, because the PSED does not arise only where it can be established in advance that a particular function has a discriminatory effect: the whole idea of the PSED is to examine whether it has a discriminatory effect.

227. In light of the concessions by the SSHD, the focus of the argument before me has not been upon whether the PSED has been engaged at all, but, rather, upon whether the PSED has been complied with in all of the circumstances of the case. On behalf of the SSHD, Mr Malik KC submitted that the PSED has been complied with by, as evidenced by the two EIAs, the Compliant Environment EIA, dated November 2022, the Digital Only EIA, dated 12 October 2021. Mr Malik KC submitted that this amounted to compliance with the SSHD's PSED obligations. Ms Shu Shin Luh, who made submissions on behalf of the Claimants in relation to this ground of challenge, submitted that it did not. She said that there was at the very least an obligation on the SSHD to have considered the impact of the compliant environment measures on those who have lawful immigration status by virtue of section 3C, but who are undocumented, and that this did not take place.

The Compliant Environment EIA

228. This EIA was prepared and published in response to a recommendation made by Wendy Williams in the Windrush Lessons Learned Review, which was presented to the Home Secretary on 18 March 2020. The review made thirty specific recommendations. Recommendation 7 stated:

> "The Home Secretary should commission officials to undertake a full review and evaluation of the hostile/compliant environment policy and measures – individually and cumulatively. This should include assessing whether they are effective and proportionate in meeting their stated aim, given the risks inherent in the policy set out in this report, and its impact on British citizens and migrants with status, with reference to equality law and particularly the public sector equality duty. This review must be carried out scrupulously, designed in partnership with external experts and published in a timely way."

229. The Compliant Environment EIA stated:

> "This overarching EIA stands as a living document and will be kept under regular review. Where the Home Office identifies any impact, which has not been recorded below, this document will be updated to reflect the considerations we have undertaken, and any differential impact identified. Likewise, as new data continues to emerge the Home Office will use it to inform our considerations and update this EIA where appropriate."

230. The Compliant Environment EIA is a detailed document. It considers the potential impact of the regime in turn upon each of the relevant protected characteristics. There is consideration of the impact upon those with protected characteristics of the compliant

environment regime. For example, at paragraph 33, in the section dealing with disability, the EIA states;

> "There may be a greater impact on British or Irish citizens who are disabled than on such citizens who are not disabled, because the broader discrimination discussed above may mean they encounter the compliant environment measures more regularly. However, although they may encounter the compliant environment measures more frequently the effect is the same for anyone who regularly changes employment, privately rented accommodation or benefits and services. …."

231. The Compliant Environment EIA also made reference to the plans to widen the digitalisation of the border and immigration system, and said that the SSHD had borne in mind that disabled persons may find greater difficulty than others in accessing and making use of digital facilities.

232. Another example of the approach in this EIA can be found under the heading of "Race", in which the Compliant Environment EIA said:

> "60. The aims of the policy and their fulfilment mean that the compliant environment framework and the measures within are designed to largely focus on individuals who are third-country national migrants (both regularised and irregular) in the UK rather than British or Irish citizens, In some areas, such as employment and private rented housing, everyone is subject to checks, including British and Irish citizens. In other areas, such as banking and driving, restrictions are only imposed on individuals who are known to be present in the UK irregularly.
>
> 61. This does mean that third-country migrants in the UK may interact with and be impacted by the compliant environment framework more so than British or Irish citizens, thereby causing a directly differential impact.
>
> 62. It is considered that this directly differential impact is the result of the broader way in which immigration control in the UK is managed and is not directly as a result of the compliant environment itself.
>
> 63. This is because at a high-level, the UK's immigration system differentiates between those: who do not require permission to enter and stay (that is British and Irish citizens); and, third-country national migrants who do. In respect of third-country nationals, the immigration system also provides for conditions to be attached to any limited or temporary permission to stay that they are given – these conditions can include restrictions relating to work, access to public funds, and so on.
>
> Similarly, the immigration system criminalises migrants who either enter the UK without permission; remain longer than any

limited permission allows; or, breach a condition associated with their permission to be in the UK. This approach and the powers which enable its operation are set out in legislation. They stem from the Immigration Act 1971 but have been built on ubstantially by numerous pieces of succeeding legislation; including pieces of legislation which restrict the rights and activities that migrants whose status has become irregular can utilise.

….

65. The operation of the compliant environment framework, and the resulting directly differential impact, is consistent with the overall approach the UK takes to immigration control. As a result, the Home Office also considers the compliant environment framework to be a proportionate means of achieving legitimate aim, rational, fair and reasonable because it is based on the existing framework and legislation underpinning immigration control in the UK.

66. Turning to look at decisions made under the compliant environment framework, it should be noted that nationality alone would not be the reason why an individual is affected by the measures. Decisions to prevent access to work, benefits and/or services are taken on the basis of someone's immigration status in the UK; primarily whether they have permission to be in the UK or not, and whether any permission provides them the appropriate right they are seeking to access. Thus, although there is a link between nationality and immigration status, the Home Office does not consider decisions made under the compliant environment measures to have directly differential impact in respect of this protected characteristic."

…

82. The data set out above therefore suggests that there may also be an indirectly differential impact in respect of ethnicity. Although the area is complex and limited by available data, our consideration thus far may suggest that non-white ethnic groups, and in particular those identifying as part of the black ethnic group, may more frequently interact with and be affected by the compliant environment measures. On the basis that lower socio-economic indicators may mean certain ethnic groups interact more frequently with the compliant environment measures and the measures contained within.

83. However, the reasons for apparent lower socio-economic status among ethnic groups is complex and the result of a wide range of factors. It is not considered to be as a result of the operation of the compliant environment alone.

> 84. Likewise, the indirect differential impacts identified in the preceding paragraphs are considered to be justified as a proportionate means of achieving the legitimate policy aim. Namely, of the compliant environment framework protecting taxpayer funded services; and protecting vulnerable migrants from exploitation. They are also considered to be the result of the approach to immigration control that the UK operates more broadly, as well as migration trends, both historic and current."

233. In the section dealing with "Sex", the Complaint Environment EIA said that there was no reason to think that there was direct discrimination in relation to sex, but acknowledged that there was a possibility of indirect discrimination. The EIA said:

> "Extrapolating the general UK population, although the margin is small, could initially indicate that women may be subject to the compliant environment measures more frequently than men and this may result in an indirect differential impact."

234. In the concluding section of the Compliant Environment EIA, the following is said:

> "In response to the Windrush scandal the Home Office has committed to undertake a full evaluation and review of the compliant environment. This process is currently underway and will be delivered in continuous stages, but it will take some time to fully conclude. **Therefore, in parallel, the Department has proactively worked to put in place additional policy-based as well as operational safeguards to better protect those who are lawfully present in the UK and who hold permission to access work, services and/or benefits. These safeguards also mitigate the risk of unintended consequences and offer avenues allowing those who believe they have been incorrectly impacted by the measures to contact the Department**."
>
> (emphasis added)

The Digital Only EIA

235. The main thrust of this EIA is concerned with whether the move to digital systems, and the phasing out of physical documents, such as the BRP, might have an adverse effect on those with protected characteristics, in one or more of the ways relevant to section 149(1) of the EA 2010. In other words, the purpose of the Digital Only EIA was to consider whether the policy of moving towards providing those with limited leave to remain with digital proof of their status would itself have equality implications.

Conclusion: Has the SSHD complied with the PSED?

236. I have not found this question entirely straightforward.

237. It is clear, in my view, that the Digital Only EIA does not assist the SSHD in establishing that he has complied with the PSED in relation to the decision not to

provide all of those on section 3C leave with digital proof of their status. Rather, the Digital Only EIA considers what is, in a sense, the flip side of this issue, namely whether there are any equality implications if all migrants with limited leave to remain (including those on section 3C leave) are given a digital document which they can use to prove their status. In other words, the Digital Only EIA is not concerned with the position, as at present, in which some migrants on section 3C leave, are not given such digital proof; rather, it is concerned with the position when, as is planned, all migrants with limited leave to remain, including all of those in section 3C leave, are given such digital proof.

238. The more difficult question is whether the Compliant Environment EIA satisfies the SSHD's PSED in relation to the current arrangement by which not all of those on section 3C leave are furnished with proof of their status. The Complaint Environment EIA is, in my opinion, an impressive, thorough and detailed document, which aims to comply with the SSHD's PSED in relation to the compliant environment policy. Most of it, however, assumes that it will be clear whether or not a migrant is present lawfully and unlawfully, and addresses equality issues from that standpoint. The issue with which this case is concerned is something different, namely that there a substantial number of those on section 3C leave who are present lawfully, but who suffer hardship because they are unable to prove it, or at least to prove it instantaneously. In other words, the focus of this case is upon those who are caught up in adverse consequences of the compliant environment policy, but who are actually present lawfully.

239. It is true that the Compliant Environment EIA does not state clearly, in words of one syllable, so to speak, that the SSHD has had regard to the position of this category of persons with protected characteristics. In my judgment, the SSHD was under an obligation to have regard to this. However, I have come to the conclusion that the Compliant Environment EIA does just enough to demonstrate that the SSHD has indeed had due regard to the matters he was required by section 149(1) to have due regard to in relation to the failure to provide all those on section 3C leave with digital proof. This is because the part of the concluding section of the EIA which is set out at paragraph 235, above, shows that the SSHD has considered the equality implications of the unintended consequences, in the sense of the equality of implications of there being a cohort of migrants who have a legal right to remain and to access benefits etc being treated as if they did not. This part of the EIA refers to consideration of ways of mitigating the risk of such unintended consequences and refers to ways in which the Home Office can provide assistance to those who may suffer adversely as a result of the unintended consequences.

240. It follows, in my view, that the SSHD has had regard to the fact that there may, or will, be some people who have a lawful right to remain but who cannot prove it and so who are treated, at least for a while, as if they are present unlawfully. The next question is whether the SSHD has had "due regard". This is not easy. The Compliant Environment EIA does not refer to section 3C specifically, or to the fact that not everyone on section 3C leave is given documentary proof. Most of the EIA is, as I have said, written from the standpoint that only those who are unlawfully present will suffer the consequences of the compliant environment regime. The relevant part of the EIA goes into very little detail. Moreover, the very fact that, until the hearing itself, the SSHD's position was that the failure to provide documentary proof to all those on section 3C leave did not engage the PSED does not engender confidence that the SSHD

has complied with his PSED obligations. Nevertheless, on balance I have come to the conclusion that the SSHD has indeed complied with his obligations. He has had regard to the position of those who cannot prove their lawful status. I have found in an earlier section of this judgment that he has not done enough to protect their position, but that does not mean that he did not have due regard. The PSED is about process, not outcome. I bear in mind that the Court of Appeal in the **BMA v HM Treasury** case said (at paragraph 162) that, in the first instance, the question of how much regard is due regard is a matter for the decision-maker – in this case the SSHD. The functions that are performed by the SSHD in relation to immigration are enormously complex. In my view, it is not necessary, in order to demonstrate that he has complied with the PSED, that the SSHD must show that he has considered in granular detail the section 149(1) issues in relation to every aspect of the practices he carries out and the functions that he performs. If that was the position, then almost every EIA would be of virtually infinite complexity and length, and this would render it unworkable and of little, if any, use.

241. In my view, it is clear from the Compliant Environment EIA that the SSHD has recognised and had regard to the fact that persons with protected characteristics might become caught up in the adverse consequences of the compliant environment policy even if they are lawfully present, and that some may struggle to provide proof of their lawful status. In my view also, though the consideration of this issue was not very detailed, it was sufficient to amount to due regard, especially having regard to the depth and scope of the issues that are covered in the Compliant Environment EIA.

242. I should add that, once the SSHD moves to provide all of those with section 3C leave with digital proof of their status, the equality implications of the new state of affairs will be addressed by the Digital Only EIA.

Ground 4: the Secretary of State's duties under section 55 of the BCIA 2009

243. Section 55 provides, in relevant part:

> 55. **Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality; ...."

244. The Secretary of State has published guidance in accordance with the duty under section 55(1) of the BCIA 2009 in a document entitled Every Child Matters ("the section 55 guidance"). This guidance is addressed to the Border Agency. Paragraph 5 of the section 55 guidance said that "This guidance is aimed at staff of the UK Border Agency and contractors when carrying out UK Border Agency functions."

245. The section 55 guidance, at paragraph 2.7, requires the decision-makers to act in accordance with five principles, namely:

> "(1) Every child matters even if they are someone subject to immigration control.
>
> (2) In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.
>
> (3) Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
>
> (4) Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.
>
> (5) Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience."

246. These five principles are apt to deal with cases in which the SSHD is considering the position of children in particular cases. However the obligation is broader than that. This was made clear in **Regina (Project for the Registration of Children as British Citizens and others) v Secretary of State for the Home Department** [2021] EWCA Civ 193, at paragraphs 69 and 70, in which David Richards LJ said:

> "69 The meaning and effect of section 55 has been considered by the Supreme Court in a number of cases, including **ZH (Tanzania) v Secretary of State for the Home Department** [2011] 2 AC 166, **Zoumbas v Secretary of State for the Home Department** [2013] 1 WLR 3690 **and R (MM (Lebanon)) v Secretary of State for the Home Department (Children's Comr intervening)** [2017] 1WLR 771.
>
> 70 There was no dispute before us as to the propositions established by those authorities which for present purposes may be summarised as follows:

(i) Section 55 was enacted to give effect in domestic law, as regards immigration and nationality, to the UK's international obligations under article 3of the 1989 United Nations Convention on the Rights of the Child (UNCRC). The UK is a party to the UNCRC and in 2008 withdrew its reservation in respect of nationality and immigration matters. Article 3 provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Although section 55 uses different language, it is conventional and convenient to refer to a duty under section 55 as being to have regard, as a primary consideration, to the best interests of the child.

(ii) The duty is imposed on the Secretary of State. She is bound by it, save to the extent (if any) that primary legislation qualifies it; we were not referred to any qualifying legislation.

(iii) The duty applies not only to the making of decisions in individual cases but also to the function of making subordinate legislation and rules (such as the Immigration Rules) and giving guidance. The fact that subordinate legislation or rules are subject to the affirmative vote of either or both Houses of Parliament does not qualify the Secretary of State's statutory duty under section 55.

(iv) The best interests of the child are a primary consideration, not the primary consideration, still less the paramount consideration or a trump card. This does, however, mean that no other consideration is inherently more significant than the best interests of the child. The question to be addressed, if the best interests point to one conclusion, is whether the force of other considerations outweigh it.

(v) This in turns means that Secretary of State must identify and consider the best interests of the child or, in a case such as the present, of children more generally and must weigh those interests against countervailing considerations."

247. On behalf of the Claimants, Ms Shu Shin Luh, who again dealt with this ground of challenge, submitted that it follows that in making arrangements to give effect to the statutory protection conferred by section 3C, the SSHD is required under s. 55 BCIA 2009 to investigate whether and to what extent making people undocumented during their period of their section 3C leave impacts on dependant children, and to ascertain the extent of that impact, including of exposure of their parents to the exclusion from attendant rights, benefits and services under the hostile environment measures.

248. As with the PSED challenge, the position of the SSHD, prior to the hearing, was that the SSHD was not exercising any function in relation to section 3C leave, and so section 55 of the BCIA was simply not engaged. As I have said, the SSHD resiled from this

position at the hearing, and accepted that in deciding not to provide documentary proof to all those on section 3C leave he was exercising his ancillary administrative functions under the IA 1971. Mr Malik KC therefore accepted that section 55 applies, but said that the SSHD had discharged his obligation under section 55 by issuing the section 55 guidance. He also pointed out that if there is a failure to have regard to the guidance in a particular case, the affected person can challenge the SSHD's conduct in that case by bringing proceedings for judicial review.

Conclusion on section 55 of the BCIA 2009

249. In my judgment, it is clear that section 55 of the BCIA 2009 applies to the general functions that are carried out by the SSHD in the immigration field, as well as to specific functions in individual cases. This is made clear by the language of section 55(2)(a), "any function of the Secretary of State in relation to immigration, asylum or nationality; …", and by paragraph 70(iii) of the Court of Appeal's judgment in the **Project for the Registration of Children as British Citizens** case. Furthermore, in my view the SSHD was right to concede that this meant that section 55 applies to the general ancillary functions that the SSHD performs in relation to the IA 1971 and which are derived by implication from the specific express powers that are granted to the SSHD by that Act.

250. The duty of the SSHD is to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, in exercising these functions. There is no evidence that the SSHD has done so. It appears that, until very recently, the SSHD did not consider that section 55 applied to his consideration of the question whether to provide documentary proof of status to those with section 3C leave. I agree with the Claimants that the failure to provide documentary proof of status of status might have an adverse impact upon children, both in their capacity as applicants for leave to remain themselves, and in their capacity as the offspring of adult applicants who are unable to prove their status. No consideration was given to this matter, and this places the SSHD in breach of section 55. I do not consider the publication of the section 55 guidance meant that the SSHD complied with his (or, previously, her) obligation in this regard. The guidance is directed at Border Agency officers and at contractors. It deals with decision-making in individual cases. It does not purport to consider itself with the SSHD's wider general functions.

251. For these reasons, I find that the fourth ground of challenge is made out.

Conclusion and the form of relief

252. For the reasons set out above, I find in the Claimants' favour in relation to Ground 2, **Wednesbury** unreasonableness, and Ground 4, breach of section 55 of the BCIA 2009.

253. The Claimants seek declaratory relief. Declaratory relief is discretionary. Section 31(2) of the Senior Courts Act 1981 provides that the court may grant declaratory relief when it is just and convenient to do so. I do not see any reason why I should decline to grant declaratory relief in relation to Grounds 2 and 4. It is just and convenient to grant such relief. It is true that, regardless of the outcome of these proceedings, the SSHD intends to do what the Claimants seek by litigation to compel him to do, namely to provide all of those on section 3C leave with digital proof of their status, and that he hopes and intends to do so by the end of 2024. However, this does not mean that

declaratory relief would be otiose. The SSHD's intentions might change, or the anticipated time-scale might slip. The SSHD did not suggest that there were any reasons why the court should decline to exercise its discretion to grant declaratory relief, if the application for judicial review succeeds.

254. I invite counsel to agree the terms of such a declaration in the light of this judgment. If that is not possible, they may file brief written submissions with the court.

255. The Claimants also seek mandatory orders. In relation to Ground 2, they seek an order requiring the SSHD to take reasonable steps to remedy the detriment identified in this claim as it affects people with s. 3C leave, including the Claimant. In relation to Ground 4, they seek an order requiring the SSHD to comply with his duty under section 55 of the BCIA 2009.

256. Counsel are invited to file written submissions as to whether, in light of this judgment, the Court should make these mandatory orders. Alternatively, they may invite the Court to list a short further hearing to consider this issue.