Neutral Citation Number: [2024] EWHC 2968 (Admin)

Case No: AC-2023-LON-002206

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2024

**Before** :

**MR JUSTICE SHELDON**

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**Between :**

**JEANELL HIPPOLYTE** **Claimant**

**- and -**

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

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**Mr Chris Buttler KC** and **Ms Grace Brown** (instructed by **Leigh Day**) for the **Claimant**
**Mr William Hansen** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 8-9 October 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 20 November 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 SHELDON

## Mr Justice Sheldon:

1. The Claimant, Jeanell Hippolyte, challenges the decision of the Secretary of State for the Home Department refusing to grant her indefinite leave to remain under the *Windrush Scheme*: a concessionary scheme designed to address and rectify the historic injustice experienced by the *Windrush* generation with respect to their status in the United Kingdom. The Claimant contends that she has been a victim of historic injustice associated with the treatment of her father, Cletus Hippolyte, who was a member of the *Windrush* generation. The Claimant did not satisfy one of the specific requirements of the *Windrush Scheme* – that she should have been continuously resident in the United Kingdom following her entry as a child. The Claimant contends, however, that the Secretary of State acted unlawfully in that (i) she failed to consider exercising her discretion under section 3(1)(b) of the Immigration Act 1971 ("the 1971 Act") to waive the continuous residence requirement; and (ii) the application to her of the continuous residence requirement contravened Article 14, read with Article 8, of the European Convention on Human Rights ("the Convention").

Factual Background

2. The Claimant was born in St Lucia on 19 November 1982. In August 2000, at the age of 17, she travelled to the United Kingdom with her mother Sonia Martha Hippolyte. The Claimant's sister, Sherryanne was already living in the United Kingdom having first arrived in August 1998. The Claimant's mother returned to St Lucia, where she had responsibility for the family's restaurant business. The Claimant remained in the United Kingdom until September 2002. During that time, the Claimant studied at the Trans-Atlantic College for a Certificate in Business Administration. The Claimant applied for Leave to Remain as a student on 15 February 2001. In support of her application, her parents wrote a letter dated 13 February 2001 from an address in Edmonton, London, in which they stated that they were "responsible for Miss Jeanelle Hippolyte during her stay here in the United Kingdom undergoing her studies." This application was granted on 23 August 2002, with Leave to Remain expiring on 30 September 2002. She was informed that "under the Immigration Rules, your stay in the United Kingdom as a student will give you no claim to remain in the United Kingdom when your studies are completed".

3. The Claimant says that she wanted to stay in the United Kingdom with her family, but she understood from the Home Office's letter that she had no right to stay, and that if she stayed she would be in breach of immigration rules and she did not want to break the rules. As a result, she left the United Kingdom and returned to St Lucia.

4. On 23 February 2006, the Claimant applied for entry clearance to join her parents in the United Kingdom: by this time, her mother had moved to the United Kingdom from St Lucia. This was refused, and an appeal against that decision was withdrawn by the Claimant. On 11 August 2008, the Claimant applied for a working holiday visa. This was refused. On 26 March 2013, the Claimant entered the United Kingdom as a visitor, with leave valid until 27 September 2013.

5. On 28 August 2020, the Claimant made an application under the *Windrush Scheme* for Indefinite Leave to Remain. The application was rejected on 23 February 2021. She was deemed to be ineligible for the scheme as she had not been continuously resident in the United Kingdom since her initial arrival. The Claimant sought an independent

review, which upheld the refusal. A pre-action letter was sent on 8 August 2022, which was responded to on 5 September 2022.

6. A further application for Indefinite Leave to Remain under the *Windrush Scheme* was made by the Claimant on 2 December 2022. This was refused on 19 January 2023. A review was requested, and this was refused on 20 April 2023. A pre-action letter was sent on 16 May 2023, and this was responded to by the Secretary of State on 25 May 2023.

7. The Claimant is currently living in the United Kingdom. She has two children, both of whom were born in the United Kingdom, one of whom has a diagnosis of ADHD. The Claimant has seven siblings (including half-siblings) living in the United Kingdom; all of whom have British citizenship. I shall deal with the factual circumstances of some of the Claimant's siblings later in this judgment.

The *Windrush Scheme*

8. The scandal of the way in which the *Windrush* generation were treated by the United Kingdom is well documented and has been addressed on a number of occasions by the Courts. In *R (Mahabir) v Secretary of State for the Home Department* [2021] 1 WLR 5301, Tim Smith (sitting as a deputy High Court Judge) stated that:

> "40. The name 'Windrush generation' and related terms derive from the ship HMT Empire Windrush which arrived in the United Kingdom from the Caribbean in June 1948 carrying around 1,000 passengers. This passage is said to symbolise Caribbean migration to the United Kingdom starting in the late 1940s.
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> 41. The issue that came to light many years later was that, although the Immigration Act 1971 conferred on Windrush migrants coming to the United Kingdom before January 1973 a right of abode in the United Kingdom, many were not issued with the documentation to prove it and the Home Office did not keep a consistent set of records to that effect. The same is true for children of Windrush migrants who entered the United Kingdom with their parents, whether on their own passports or those of their parents."

9. In the *Windrush Lessons Learned Review*, March 2020, Wendy Williams explained that: "The 1971 Immigration Act confirmed that the Windrush generation had, and have, the right of abode in the UK. But they were not given any documents to demonstrate their status. Nor were records kept" (p.7). "The 1971 Immigration Act entitled people who had arrived from Commonwealth countries before January 1973 to the 'right of abode' or 'deemed leave' to remain in the UK. But the government gave them no documents to demonstrate this status. Nor did it keep records. This, in essence, set the trap for the Windrush generation" (p.9).

10. The *Windrush Scheme* was designed to put right the wrongs experienced by people from the *Windrush* generation who were not provided with the necessary documentation or struggled to obtain it. Four categories of person were identified by

the Secretary of State who can register or naturalise as British citizens, qualify for settlement or obtain confirmation of status already held:

(1) A person in the United Kingdom: who as a Commonwealth citizen was either settled in the United Kingdom before 1 January 1973 and has been continuously resident in the United Kingdom since their arrival or has the Right of Abode;

(2) A person in the United Kingdom: who as a Commonwealth citizen was settled in the United Kingdom before 1 January 1973, whose settled status lapsed because they left the United Kingdom for a period of more than 2 years, and who is now lawfully in the United Kingdom and who has strong ties to the United Kingdom;

(3) A person outside the United Kingdom: who is a Commonwealth citizen who was settled in the United Kingdom before 1 January 1973 but who does not have a document confirming their Right of Abode or settled status, or whose settled status has lapsed because they left the United Kingdom for a period of more than 2 years;

(4) A person in the United Kingdom: who is a child of a Commonwealth citizen parent, where the child was born in the United Kingdom or arrived in the United Kingdom before the age of 18, and has been continuously resident in the United Kingdom since their birth or arrival, and the parent was settled before 1 January 1973 or has the Right of Abode (or met these criteria but is now a British Citizen).

11. The present case concerns category 4. Further details relating to that category are set out in the *Windrush Scheme* policy document, including the following:

> "• Applicants whose parent was settled in the UK before 1 January 1973 or those whose parent had a Right of Abode who had strong ties to the UK will be taken to have sufficient knowledge of English and of life in the UK and so the requirement to pass the Life in the UK test will not apply to them. They will also not have to attend a citizenship ceremony, unless they want to.
>
> • The applicant will have to meet the residence requirements for Citizenship and the good character requirement. If the applicant qualifies for British Citizenship, they will be given a certificate of naturalisation.
>
> • If the applicant does not apply for British Citizenship, or does not qualify for naturalisation, the Windrush Help Team will consider whether they have the Right of Abode and, if so, they will be given a document confirming the Right of Abode.
>
> • If not, the Windrush Help Team will consider whether they are settled in the UK and, if so, they will be given a biometric document confirming their settled status (NTL – No Time Limit).

> • If not, if they are lawfully in the UK and are not liable to deportation on grounds of criminality or other non-conducive behaviour, they will be given indefinite leave to remain."

12. The *Windrush Scheme* policy document explains how applications will be considered:

> "An application under the Windrush Scheme will be considered under existing law and policy, but if policy set out in this document differs from existing policy this document will be applied.
>
> . . .
>
> The Windrush Help Team will not consider any application which fall outside the scope of the Windrush Scheme as set out in this document".

13. The Home Office has produced a document entitled *Windrush Scheme Casework Guidance*. This is guidance for decision-makers working under the *Windrush Scheme*. It specifically states that the policy does not provide for:

> "• consideration of any application not made on the Windrush Scheme (UK) or Windrush Scheme (Overseas) application form
>
> • consideration of another application type that is made on a Windrush form
>
> However, the Taskforce may direct a person to the guidance on how to make other applications for leave to enter or remain under the existing Immigration Rules . . .""

14. The policy set out in the *Windrush Scheme* document does not form part of the Immigration Rules. Rather, it is a concessionary policy of the Secretary of State in exercise of her discretion under section 3(1)(b) of the 1971 Act. In *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192 at [44], Lord Dyson explained that the Secretary of State is given a "wide discretion" under section 3 of the 1971 Act (along with sections 3A and 3B) to control the grant and refusal of leave to enter and remain. Lord Dyson stated that:

> "The language of these provisions, especially section 3(1)(b)(c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules".

The Parties' submissions on the grounds of challenge

15. In her judicial review application, the Claimant made three grounds of challenge: (1) the decision to refuse her application was *Wednesbury* unreasonable; (2) no consideration was given to whether any discretion should be exercised in her case; and

(3) the Claimant was discriminated against contrary to Article 14 of the Convention, read with Article 8. At the hearing before me, the Claimant abandoned the first of these grounds. I shall therefore renumber ground 2 and refer to it as Ground 1, and ground 3 as Ground 2.

16. The abandonment of the original ground 1 means that the case that I have to consider under Ground 1 is not whether the Secretary of State exercised her discretion wrongly, but whether consideration was given as to whether to exercise it at all.

Ground 1: No consideration was given as to whether any discretion should be exercised in the Claimant's case

17. Mr Buttler KC and Grace Brown represented the Claimant at the hearing before me. Under this ground of challenge, they submitted that the Secretary of State was obliged to consider exercising her discretion under section 3(1)(b) of the 1971 Act to waive the continuous residence rule and grant the Claimant indefinite leave to remain on account of the following factors:

    (i) someone in the Claimant's position would be granted indefinite leave to remain under the *Windrush Scheme* if they had overstayed in the United Kingdom, and it is unjust that the Claimant should be punished for complying with the immigration rules in 2002 when she returned to St Lucia when her leave to remain expired;

    (ii) the purpose of the continuous residence requirement is to be a proxy for showing a strong and subsisting connection to the United Kingdom. Even though the Claimant could not satisfy the proxy, she could satisfy the connection, as she returned to the United Kingdom as often as possible between 2008 and 2020, she had lived in the United Kingdom since August 2020, a number of siblings live here, and her two children live in the United Kingdom and were born here. Her eldest child goes to school here; and

    (iii) the Claimant lost the chance to remain in the United Kingdom as a result of the Secretary of State's failure to issue her father, Cletus Hippolyte, with documents demonstrating that he had indefinite leave to remain in the United Kingdom: the *Windrush* injustice. On a proper reading of the correspondence and communications from the Secretary of State, it is clear that she did not consider exercising this discretion.

18. With respect to (iii) -- the loss of a chance argument -- it was submitted that the Secretary of State accepted that Cletus Hippolyte satisfied category 1 of the Windrush scheme. However, Cletus Hippolyte was not given documentary proof of status until 2003, when his St Lucian passport was stamped with "ILE" (leave to enter) on arriving back to the United Kingdom. Cletus Hippolyte did not have a document of this kind in 2000 when the Claimant first arrived in the United Kingdom when she was under the age of 18. The Claimant contends that she could have applied for Indefinite Leave for Remain under the immigration rules that were in force in 2000, but she did not know that she could make that application as she did not know that her father had Indefinite Leave to Remain. Support for this position is evidenced by the fact that her brothers Denzel and Danny Hippolyte, who arrived in the United Kingdom in 2007, did apply

for Indefinite Leave to Remain as they knew about their father's status at that time. Although the brothers' application was initially refused, it was subsequently reviewed and revised: the Secretary of State accepts that they should have been granted Indefinite Leave to Remain when they initially applied.

19. Mr Hansen appeared on behalf of the Secretary of State. He did not take issue with the legal principles advanced by Mr Buttler KC and Ms Brown. The Secretary of State acknowledged that she had a broad discretion under section 3(1)(b) of the 1971 Act. Mr Hansen submitted that a proper reading of the correspondence and communications from the Secretary of State was that it had been considered whether to exercise discretion in the Claimant's case, but the Secretary of State had decided not to exercise her discretion. It could be seen from the way in which the applications made by the Claimant's brothers (Denzel and Danny) had been handled by the Secretary of State that she would consider exercising her discretion in an appropriate case. Mr Hansen explained that they did not have lawful status in the United Kingdom when they made their application under the *Windrush* scheme (a requirement for a category four case); however, the earlier decisions refusing their application for Indefinite Leave to Remain were reviewed and a correction was made to those decisions after an error was identified, such that they were treated as though they did in fact have Indefinite Leave to Remain when applying under the *Windrush* scheme.

20. Even if that was not accepted by the Court, Mr Hansen submitted that the Court should refuse relief pursuant to section 31 (2A) of the Senior Courts Act 1981 ("the 1981 Act"), given that it is "highly likely" that the Claimant would have been refused leave in any event had the Secretary of State considered whether to exercise discretion in the Claimant's case.

21. Mr Hansen submitted that the assumption for the exercise of discretion in the Claimant's favour – that she had lost a chance to apply for Indefinite Leave to Remain whilst still a minor at the end of 2000 – was misconceived. In addition to the fact that the representations made by the Claimant did not refer to "loss of a chance" but were couched in terms of an "entitlement" to the grant of Indefinite Leave to Remain, Mr Hansen submitted that it was clear, when one looked at the documentary evidence relating to the Claimant's father, including information gleaned from his passports, that the Claimant's application would have failed. Mr Hansen contended that the evidence was compelling that Cletus Hippolyte was not present, nor settled, in the United Kingdom at the relevant time. Moreover, there was no evidence that the Claimant considered applying for Indefinite Leave to Remain at the end of 2000, when she was living in the United Kingdom and before she turned 18, or that she had been deterred from doing so as a consequence of the absence of documentation evidencing Cletus Hippolyte's correct immigration status.

22. In reply, Mr Buttler KC sought to refute Mr Hansen's arguments on section 31(2A) of the 1981 Act. There was, he submitted, no finding of fact made by the Secretary of State that the Claimant would have failed to have obtained Indefinite Leave to Remain if she had applied whilst a minor, at the end of 2000. The analysis advanced by Mr Hansen was Counsel's own analysis, and not that of the Secretary of State. Mr Buttler KC submitted that, as a matter of the separation of powers, the Court should not make findings of fact that ought to be made by the Secretary of State herself. Moreover, it was well accepted that the threshold under section 31(2A) was a high one: see *R(Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [273].

Ground 2: Discrimination contrary to Article 14, read with Article 8, of the Convention

23. The Claimant submits that the application to her of the continuous residence rule breached Article 14, read with Article 8, of the Convention. It was common ground with the Secretary of State that the claim fell within the ambit of Article 8, and that the Claimant had the necessary 'status' to fall within Article 14 as a child of a category 1 Windrush person, who arrived in the United Kingdom under the age of 18, who was lawfully present in the United Kingdom, but had left at some point between the initial arrival and the present. The issues in dispute were (i) whether the Claimant was in an analogous situation with a comparator or hypothetical comparator, and (ii) whether the discrimination, or differential treatment, was justified.

24. The Claimant had initially relied on her brothers, whose application for Indefinite Leave to Remain had been successful, as her comparator. This was no longer pursued now that the Secretary of State had disclosed documents that explained the reasoning for the decision in their cases. The Claimant instead relied on a hypothetical comparator whose only difference was that the comparator had not left the United Kingdom following their arrival: the hypothetical comparator was lawfully present in the United Kingdom at the time of their application for Indefinite Leave to Remain, whether they had previously been in breach of immigration control or not during their time in the United Kingdom.

25. With respect to justification, Mr Buttler KC and Ms Brown contend that the basis for the continuous residence test was that it demonstrated a strong and subsisting relationship with the United Kingdom. The Claimant accepted that this was a legitimate aim, and that the continuous residence test was rationally connected to that aim. However, applying the 4-stage test identified by Lord Reed in *Bank Mellat v HM Treasury* (No 2) [2014] AC 700, a less intrusive approach that did not unacceptably compromise the objective of the rule could have been applied: the Secretary of State could have looked at individual cases to see whether the applicant had a strong and subsisting relationship with the United Kingdom as she was doing in respect of Returning Residents under category 3 of the *Windrush Scheme*. Further, in any event, even affording considerable deference to the decision-maker, the balance fell heavily in the Claimant's favour that the rule should not have been applied rigidly. The impact on the Claimant was said to be "catastrophic", but there was limited public interest in maintaining the rigidity of the rule. In this regard, the Claimant relied by analogy on the decision of Bourne J in *Vanriel v Secretary of State for the Home Department* [2022] QB 737 where, in the context of a *Windrush* scheme case, the Court quashed the rule that an individual who applied for citizenship had to have been present in the United Kingdom five years before the application was made.

26. With respect to the issues in dispute between the parties, Mr Hansen contended that the hypothetical comparator would have to be someone who had left the United Kingdom and presently had lawful status. However, there was an obvious difference between the Claimant's situation and that of the hypothetical comparator, as she was in the United Kingdom as a visitor and this did not give her the appropriate status to apply under the *Windrush Scheme*.

27. With respect to justification, Mr Hansen submitted that the Secretary of State relied on the fact that the continuous residence rule is a tried and tested rule which provides the best proxy for whether there are strong and subsisting ties with the United Kingdom.

The rule avoids uncertainty and arbitrariness. It was a bright line rule, which left no room for doubt for those applying. The contents of the *Windrush Scheme* followed extensive consultation, and therefore a conscious choice to ensure that the necessary degree of connection between the applicant and the United Kingdom was in place. The scheme had been revised over time, but no one had suggested that the continuous residence rule should be relaxed. Mr Hansen confirmed to the Court that the Secretary of State was not relying on administrative cost or convenience to justify the rule.

Discussion

Ground 1: No consideration was given as to whether any discretion should be exercised in the Claimant's case

28. The legal principles are clear. A public law decision-maker cannot fetter their discretion. Even where a decision-maker has expressed a policy as to how their discretion will ordinarily be exercised, there must still be room for the possibility of exceptions. The availability of exceptions does not need to be articulated expressly: it is implicit or inherent in the policy itself.

29. These principles were well expressed by the Court of Appeal in *R (West Berkshire District Council) v. Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 and [16]-[17], and [21]:

> "16. …It is important …to notice a distinction in this area of the law which is at the core of the debate in this appeal. It is between these two principles. (1) The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception. See British Oxygen Co Ltd v Board of Trade [1971] AC 610, in which Lord Reid and Viscount Dilhorne cited the classic authority of R v Port of London Authority, Ex p Kynoch Ltd [1919] 1 KB 176, 184, per Bankes LJ.
>
> 17. But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in De Smith's Judicial Review, 7th ed (2013), para 9-013: 'a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy …but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself.' …
>
> 21. The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder

> that the policy must be applied consistently with the rule against fettering discretion—or, in the planning context, consistently with section 38(6) of the 2004 Act or section 70(2) of the 1990 Act. A policy may include exceptions; indeed the WMS did so, allowing a five-unit threshold for certain designated areas in place of the ten-unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of sections 38(6) and 70(2) are not, of course, part of any administrative policy. They are requirements which the law imposes upon the application of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions."

30. The question that arises in the instant case is whether the Secretary of State applied those principles in refusing the Claimant's application for Indefinite Leave to Remain under the *Windrush Scheme*. It does not seem to me that the treatment by the Secretary of State of the applications made by the Claimant's brothers, Denzel and Danny Hippolyte, provides support for whether consideration was given to exercise discretion in the Claimant's case. It merely goes to show that, in appropriate cases, the Secretary of State is clearly prepared to consider looking outside of the rules to grant applications under the *Windrush* scheme. Whether or not the Secretary of State did so in the Claimant's case turns on a close examination of the correspondence and communications between the Secretary of State and the Claimant and her legal representatives, including the representations made by her legal representatives on her behalf as part of the pre-action protocol process.

31. It might have been open to the Secretary of State to contend that the pre-action correspondence could not, and did not, constitute the decision or the decision-making process under challenge, especially as the N461 (judicial review claim form) identified the Secretary of State's decision "of 20 April 2023 to refuse to grant the Claimant indefinite leave to remain under the Windrush Scheme" as the decision that the Claimant seeks to have judicially reviewed. Nevertheless, during the course of the oral hearing, Mr Hansen confirmed that the Secretary of State accepted that the pre-action correspondence also formed part of, or at least reflected, the decision-making with respect to the application, and so was appropriate for the Court to consider.

32. Further, although the earlier representations from, and on behalf of, the Claimant might have been viewed as an application under the terms of the *Windrush Scheme* itself, with no express request that discretion be exercised by the Secretary of State outside of the scheme's specific terms, Mr Hansen accepted that the correspondence looked at in its entirety, including the pre-action correspondence, did include an express request for the exercise of the Secretary of State's discretion and for a waiver of the continuous residence requirement that was an explicit feature of the *Windrush Scheme*.

33. Mr Hansen's submission was that on a fair reading of the correspondence it could be seen that the Secretary of State had considered whether to exercise her discretion to waive the continuous residence requirement in the Claimant's case. The Secretary of State had decided not to do so having decided that there had been no historic injustice

on the facts of this case. This, he submitted, was lawful and in accordance with the legal principles set out in *British Oxygen* and *West Berkshire*.

34. I disagree. In my judgment, a fair reading of the correspondence and communications is that no consideration was given by the Secretary of State as to whether to exercise her discretion to waive the continuous residence rule. It is correct that the Secretary of State (acting through her officials in accordance with the principle in *Carltona v Commissioner of Works* [1943] 2 All ER 560) did read and consider the representations made by the Claimant. Nevertheless, this was done within the strict confines of the *Windrush Scheme* principles themselves, and in particular the continuous residence rule.

35. In the Secretary of State's letter of 25 May 2023, responding to the Claimant's pre-action letter of 16 May 2023, under the heading "Ground Two: The SSHD's failure to exercise discretion given the circumstances of your client's case is lawful", the Secretary of State wrote as follows:

> "Throughout your PAP letter you refer to the SSHD's ability to apply discretion to applications and question why this was not utilised in your client's case.
>
> The Windrush Scheme, which came into force in May 2018, allows for a grant of ILR to be made in cases where the child of a Commonwealth citizen who was settled prior to 1 January 1973:
>
> • Came to the UK before the age of 18.
>
> • Has remained continuously resident in the UK.
>
> • Is in the UK lawfully, but does not already have ILR.
>
> • Does not fall for refusal on criminality or non-conducive grounds.
>
> The introduction of the Windrush Scheme in 2018 represented a conscious choice to ensure that a specific cohort of people (i.e. individuals who have continuously lived in the UK since arriving as children, and who remain in the UK lawfully but who have never settled) could more easily acquire ILR.
>
> As explained in previous correspondence from the SSHD on 05 September 2022 and 20 April 2023 your client does not fall within this cohort.
>
> The decision of 20 April 2023 states: 'As the compassionate circumstances you have raised are considered within the context of a Returning Resident consideration, and for the reasons given above you cannot possibly succeed as such these also do not further your claim. The circumstances you have raised moreover are not within the remit of a Windrush Scheme consideration.'

> The decision letter also lists the representations made by your client that were taken into consideration on pages 1 – 2. Therefore, your client's representations were acknowledged and considered however, discretion was not considered appropriate to apply as mandatory requirements have not been met".

(Emphasis in the original).

36. A fair reading of this response is as follows:

(i) the Secretary of State acknowledges that, in her pre-action letter, the Claimant refers to the Secretary of State's ability to apply discretion and has questioned why that was not utilised in her case. This correctly identifies what the Claimant was complaining about: you have a discretion, why have you not exercised it in my case;

(ii) the answer given is that the Windrush Scheme provides for certain cohorts to be provided with relief, and there was a conscious choice made to ensure that one of those cohorts was for individuals who had continuously lived in the United Kingdom since arriving as children and who remain lawfully in the United Kingdom;

(iii) the Claimant "does not fall within this cohort";

(iv) compassionate circumstances of an applicant are considered as part of the "Returning Residents" cohort, but this did not apply to the Claimant, and the circumstances raised by the Claimant are not matters within the *Windrush Scheme*; and

(v) whilst the representations were acknowledged and considered, it was not appropriate to consider exercising discretion because the "mandatory requirements" of the *Windrush Scheme* had not been met.

37. The key sentence in the letter of 25 May 2023, under the heading Ground Two, is "Therefore, your client's representations were acknowledged and considered however, discretion was not considered appropriate to apply as mandatory requirements have not been met". Mr Hansen sought to persuade the Court that the statement that "discretion was not considered appropriate to apply" meant that consideration was given as to whether discretion should be exercised. I accept that it would be possible to read this passage in the way suggested by Mr Hansen if that was all that was said by the Secretary of State, and if it was consistent with the remainder of the correspondence. That, however, was not all that the Secretary of State said, and that is not consistent with the remainder of the correspondence.

38. The Secretary of State went on to say that "discretion was not considered appropriate to apply *as mandatory requirements have not been met*" (my emphasis). Had the mandatory requirements been satisfied by the Claimant, she would not have needed the Secretary of State to exercise her discretion, or at least to consider doing so. The Claimant would have fallen within the requirements for the specific cohort under the *Windrush Scheme* that she was seeking to have applied to her. The fact that the requirements had not been satisfied were the reason why the Claimant was requesting

the Secretary of State to exercise her discretion to waive them in her case. By saying that the discretion was not considered to apply because the mandatory requirements were not met was the same as the Secretary of State saying that she was not prepared to consider exercising her discretion at all in the circumstances of this case.

39. This conclusion is, in my judgment, reinforced by what was said by the Secretary of State in the Amended Detailed Grounds of Defence at paragraph 4, under the heading 'Summary of SSHD's Position': "The refusal of C's application under the Windrush Scheme was clearly lawful: she cannot establish membership of a cohort to which the Scheme applies. That really is the end of the matter". This suggests that no consideration was given to whether discretion should be exercised.

40. Further, the original decision refusing the Claimant's application, set out in a letter dated 19 January 2023, stated that "Your application has been carefully considered, but I am sorry to tell you that you are not eligible to be considered under the Windrush Scheme". The reasons given for why the Claimant was not eligible were that the Claimant had "not been continuously resident in the UK since you entered the UK under the age of 18. Unfortunately, this means that you are not within one of the groups above, and as such you are not eligible for a consideration under the Windrush Scheme". This was a clear rejection based on the Claimant not falling within any of the cohorts, and there is no hint of the exercise of discretion being considered.

41. Similarly, in the review decision of 20 April 2023, the Secretary of State confirmed that the original decision was correct. The letter stated that the "new evidence", among other things, was looked at carefully. However, it was stated that this did not change the original decision to refuse the Windrush Scheme application "because none of the points you have raised demonstrate that you meet the requirements of the Scheme". This also implies that no consideration was given to exercise discretion in the Claimant's case. As the Claimant did not "meet the requirements of the Scheme", her application failed.

42. In the course of his oral submissions, Mr Hansen argued that it was wrong to read the key sentence in isolation. That sentence was set out in the Secretary of State's response under Ground Two, but it should also be read as applying to what was said under Ground One. When that response is read, along with other material from earlier responses that are incorporated therein, Mr Hansen argued that it could be seen that consideration was given to the exercise of discretion. I agree with Mr Hansen that the response under Ground Two should be read as including the other material. However, that does not overcome the various statements referred to above that demonstrate that no consideration was given by the Secretary of State to exercise her discretion. I will set out the detail of this analysis for completeness, and also because it will help to inform my subsequent analysis of Mr Hansen's alternative submission under section 31(2A) of the 1981 Act.

43. On its face, there is nothing within the text of the 25 May 2023 letter to suggest that what was said under Ground One ("The SSHD's decision of 20 April 2023 unlawfully refused your client's application on the basis that she did not hold indefinite leave to remain at the point she left the UK") applied, or was intended to be read as applying, to what was said under Ground Two. The responses to the different grounds read as if they are discrete and not related to one another. In answer to Ground Two, the Secretary of

State did not say, for instance, that for the reasons set out under Ground One "discretion was not considered appropriate to apply as mandatory requirements have not been met".

44. Nevertheless, it seems to me that it is possible to construe the 25 May 2023 letter as including within the text at Ground Two the reasoning given under Ground One, if one reads the pre-action response in the context of the pre-action letter to which it was actually responding to. The pre-action letter, sent by the Claimant's solicitors on 16 May 2023, contains a number of different sections for submissions under the headings: "Indefinite leave to remain", "Historic and historical injustice in the Claimant's case", "The Defendant's discretionary powers", "Error in failing to consider whether to exercise discretion", and "The Claimant as returning resident".

45. Under the heading "Indefinite leave to remain", the Claimant's legal representatives contended that the Claimant had a right or entitlement to remain in the United Kingdom in 2000 as the child of a person settled in the United Kingdom. Under the heading "Historic and historical injustice in the Claimant's case", reference was made to the failure to issue Cletus Hippolyte with documentation evidencing his status in the United Kingdom, and the "historic" injustice to the Claimant herself in that she was "erroneously compelled, by the immigration authority, to leave" the United Kingdom when she had a right or entitlement to remain.

46. Under the heading "Error in failing to consider whether to exercise discretion", it was submitted that in the circumstances of the case it was unlawful not to exercise discretion and grant the Claimant Indefinite Leave to Remain for a number of reasons: (a) the Claimant only left the United Kingdom due to Home Office enforcement action, which was unlawful in the circumstances; (b) there were historic and historical injustices; (c) the Claimant has strong ties to the United Kingdom, and there are compelling compassionate circumstances in her case, including the diagnosis of ADHD for one of her children; and (d) the Secretary of State must act in the best interests of the Claimant's children. It can be seen, therefore, that part of the Claimant's arguments for why discretion should be exercised in her favour were factors relating to the failure to provide her father, Cletus Hippolyte, with documentation, and that she would have had the 'right' or entitlement to remain in the United Kingdom as a minor in 2000. These two points were answered in substance by the Secretary of State in the pre-action response letter of 25 May 2023 in her answers under the heading of "Ground One". Accordingly, it could be said that in dealing with the question of discretion under the heading of "Ground Two" – which was the Secretary of State's own description of the submissions being made, as the Claimant had not described her different points as numbered grounds in the pre-action letter – the Secretary of State was also referring back to its answers at Ground One.

47. Under Ground One, the Secretary of State stated that there was no "historic injustice" in her father, Cletus Hippolyte's, case. There was no failure to proactively bestow documentation on him in the absence of an immigration application by him. Further, that he was not subject to an incorrect decision or wrongly prevented from accessing documentation confirming his status when he held Indefinite Leave to Remain. As for her own situation, there was no evidence that the Claimant had applied for Indefinite Leave to Remain, and she would not have had an 'entitlement' to be granted Indefinite Leave to Remain on the sole basis of being a child of a person present and settled in the United Kingdom, as there were other requirements in the rules.

48. In addition, there is a reference at the end of the answer to Ground Two which states that "The decision letter also lists the representations made by your client that were taken into consideration on pages 1-2". Those representations included the same points as were made in the pre-action letter of 16 May 2023: the Claimant's strong ties to the United Kingdom, the compelling compassionate circumstances including her son's diagnosis of ADHD, her entitlement to the grant of Indefinite Leave to Remain when the Claimant arrived in the United Kingdom in 2000, and the historic injustice in not providing Cletus Hippolyte with appropriate documentation evidencing his status.

49. On a fair reading of the correspondence, therefore, I accept Mr Hansen's submission that the points referred to in the letter of 25 May 2023 under Ground One are to be read as applying to Ground Two as matters that were "acknowledged and considered". Nevertheless, as I have already indicated, the fact that those matters were acknowledged and considered does not mean that consideration was given as to whether to exercise discretion to disapply the continuous residence rule. Moreover, it still does not explain why the Secretary of State qualified the phrase that the Claimant's "discretion was not considered appropriate to apply" with the words "*as mandatory requirements have not been met*". The points referred to at Ground One, including whether or not Cletus Hippolyte was in fact a victim of historic injustice, are not "mandatory requirements". The mandatory requirements for category four cases are set out at paragraph 11 above, and include the continuous residence rule.

50. In the circumstances, therefore, the Secretary of State acted unlawfully in failing to consider whether to exercise her discretion under section 3(1)(b) of the 1971 Act.

Application of section 31(2A) of the Senior Courts Act 1981

51. Mr Hansen has, however, invited the Court to refuse any relief in this case on the basis that it is highly likely that even if the Secretary of State had considered whether to discretion her disapply the continuous residence rule, she would not have done so. I do so, bearing in mind the observations made in *Plan B Earth* at [273] that "courts should still be cautious about straying, even subconsciously into the forbidden territory of assessing the merits of a public law decision under challenge by way of judicial review . . . Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, . . . "the threshold remains a high one"".

52. There is no witness statement from an official in the Home Office setting out what the decision would have been. Nevertheless, there is much material available to the Court from which inferences can be drawn as to what the decision was highly likely to have been if the Secretary of State had considered whether discretion should be exercised to disapply the continuous residence rule. Two of the points made by the Claimant as to why discretion should have been exercised in her favour were specifically addressed by the Secretary of State. There is no reason why the Secretary of State would not have addressed them in precisely the same way as part of the exercise of discretion.

53. The points made by the Claimant in the pre-action letter of 16 May 2023 as to why discretion should be exercised in her favour were:

    (i) the Claimant only left the United Kingdom due to Home Office enforcement action, which was unlawful in the circumstances, as she had "entitlement to a grant of indefinite leave to remain in 2000";

(ii) there are historic and historical injustices in her claim;

(iii) the Claimant has 'strong ties to the UK and . . . there are compelling compassionate circumstances in her case' which include her son's diagnosis of ADHD;

(iv) under section 55 of the Borders, Citizenship and Immigration Act 2009, the Secretary of State must act in the children's best interests which must be a 'primary consideration'. It is clearly in her children's best interests for the Claimant to be granted Indefinite Leave to Remain.

54. With respect to (i), the basis for this argument was rejected by the Secretary of State in the response dated 25 May 2023. The Secretary of State stated that there was no evidence that the Claimant had made an application; and that the Claimant had no entitlement to be granted Indefinite Leave on the sole basis of being a child of a person present and settled in the United Kingdom as there were a number of other requirements that needed to be satisfied for such entitlement to have been established. There is no reason why the Secretary of State would have reached a different conclusion had she considered this matter as part of her exercise of discretion, and so this would not have been supportive of the exercise of discretion in the Claimant's favour.

55. First, it is clear that the Claimant had not made an application for Indefinite Leave to Remain whilst still a minor. Second, Mr Buttler KC accepted that the Secretary of State was correct to conclude that the Claimant was not entitled to Indefinite Leave to Remain in late 2000, had she made an application on the basis of her arrival then as a minor. He was right to do so.

56. The Secretary of State did not conclude that there was no entitlement to Indefinite Leave to Remain in late 2000 because Cletus Hippolyte was not present and settled in the United Kingdom at that time, which was one of the requirements under the relevant immigration rule: rule 298. There was much argument at the oral hearing as to whether that requirement was satisfied on the facts. Mr Hansen argued, based on an analysis of the various stamps in Cletus Hippolyte's passport, and the lack of an explicit reference in the Claimant's witness statement to her father being present in the United Kingdom in late 2000, that Cletus Hippolyte was not 'present' in the United Kingdom in late 2000.

57. Nevertheless, I cannot say that the Secretary of State was highly likely to have reached that conclusion had she considered the matter in the exercise of her discretion. There is material in the correspondence relating to the application made by the Claimant's brothers, that suggests the opposite conclusion. In that correspondence, Andy Chase a senior official within the Home Office stated that "Although, Mr Hippolyte had business interests in St Lucia, he maintained a property/family home in the UK and split his time between the UK and St Lucia. He was never absent from the UK for more than 2 years and maintained his UK settled status throughout". Mr Hansen submitted that this could not be correct, and that the officials who had analysed Cletus Hippolyte's passports had not accurately analysed the various stamps that they contained. It seems to me, however, that in considering the matter under section 31(2A) of the 1981 Act it would not be appropriate to take Mr Chase's statement otherwise than at face value.

58. The basis for the Secretary of State saying that the Claimant was not entitled to a grant of Indefinite Leave to Remain in late 2000 was that other aspects of rule 298 would need to have been satisfied. This must be a reference to the fact that – given that both of her parents were alive in late 2000 and there was no suggestion that Cletus Hippolyte had "sole responsibility" for her upbringing -- the Claimant would need to have satisfied the Secretary of State that she had:

> "one parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care".

This requirement is a matter of evaluative judgment, and it is clear that this judgment would not necessarily have been exercised in the Claimant's favour if she had made an application in late 2000. Even assuming that Cletus Hippolyte was "present" in the United Kingdom at the time, the Claimant's mother, Sonia, was living in St Lucia and was running the family business there. The Claimant had grown up in St Lucia. Whilst there were family members of the Claimant living in the United Kingdom, it is far from obvious that there were "serious and compelling family or other considerations which make exclusion of the child undesirable".

59. Mr Buttler KC's submission to the Court was different, however. He contended that the Claimant had lost a chance to be granted Indefinite Leave to Remain had she applied when she initially arrived in the United Kingdom, on the basis that the Claimant might have been able to persuade the Secretary of State that there were serious and compelling family or other considerations which made her exclusion undesirable and suitable arrangements had been made for her care. Mr Buttler KC's submission was that this loss of a chance argument was what the Secretary of State would need to have taken into account in the exercise of her discretion. The difficulty with this submission, however, is that the Secretary of State was not asked to take the loss of a chance argument into account when the representations were made to her in the pre-action letter, or in any of the previous correspondence. In carrying out the section 31(2A) analysis, it is necessary to consider what the Secretary of State was highly likely to have done, on the basis of the representations made to her at the time – which in this case was that the Claimant had an 'entitlement' to be granted Indefinite Leave to Remain -- and not on the basis of the representations that might have been made to her.

60. With respect to point (ii) as to why discretion should be exercised in her favour, the Claimant had argued that there was an historic injustice in that Cletus Hippolyte had not been issued with documentation evidencing him status and this impacted on her status in the United Kingdom. There was also a historical injustice in that she was erroneously compelled to leave the UK in 2002. The Secretary of State had rejected these submissions on the facts, and there is no doubt that she would have done the same when considering whether to exercise discretion.

61. In the letter of 25 May 2023, responding to the pre-action letter, it was stated that:

> "this point was fully addressed in the previous PAP response dated 5 September 2022. You are directed to the previous response which explains that it is not accepted that a failure to proactively 'bestow' documentation (in the absence of any

> immigration application) constitutes an historic injustice in Mr Hippolyte's case. Your client has not put forward any claim that her father was subject to an incorrect decision or otherwise wrongly prevented from accessing documentation confirming his status at a time when he held ILR."

62. As for the impact on the Claimant herself, and the alleged injustice to her, this had been addressed by the Secretary of State in the 25 May 2023 letter:

> "Ms Hippolyte would have needed to apply under the Immigration Rules applicable at the time for ILR. There is no evidence that such an application was submitted by your client Ms Hippolyte would not have had any entitlement to be granted ILR on the sole basis of being a child of a person present and settled in the UK as there were a number of requirements specified by the Rules at the time that would have needed to have been satisfied had an application been submitted. Therefore, the suggestion your client was" entitled" to a grant of indefinite leave to enter/remain as the child of a person present and settled in the UK is incorrect."

As Mr Hansen submitted, and I agree, if the Secretary of State had taken this argument into account when considering the exercise of her discretion she would have been bound to conclude that Cletus Hippolyte's lack of documentation was incidental and not causative of any injustice. Accordingly, it would have provided no basis for the exercise of discretion in the Claimant's favour, and that is a conclusion which the Secretary of State was highly likely to have reached.

63. With respect to points (iii) and (iv), these were not specifically addressed in the Secretary of State's letter of 25 May 2023. It is highly likely that, had they been considered in the exercise of discretion, they would have not led to the disapplication or waiver of the continuous residence rule under the *Windrush* scheme, and so the same decision would have been reached by the Secretary of State.

64. The Secretary of State would have been highly likely to decide that, although the Claimant was a child of a member of the *Windrush* generation, her claim was not really equivalent to a *Windrush* scheme claim, as she (and her father, Cletus Hippolyte) had not suffered a historic injustice. The Secretary of State would have been highly likely to decide that there was no reason therefore for the Secretary of State to make an exception to the *Windrush* scheme in the Claimant's case, and that the points made by the Claimant at (iii) and (iv) should be made by her, if she wished, as part of an application made under Appendix FM to the Immigration Rules: a detailed policy promulgated by the Secretary of State for considering applications under the "Family Policy: Family life (as a partner or parent) and exceptional circumstances". The points made by the Claimant at (iii) and (iv) are typical of the representations made by applicants under Appendix FM, and there is nothing to preclude the Claimant from making such an application if she wishes to do so.

65. In these circumstances, therefore, I refuse the Claimant relief under Ground One of this application for judicial review. If the Secretary of State had considered exercising her discretion as to whether to disapply the continuous residence rule, she was highly likely

to have reached the same conclusion: she would not have done so, and the application for Indefinite Leave to Remain as a *Windrush* scheme, or *Windrush* scheme equivalent, applicant was highly likely to have failed.

66. I should add for completeness that Mr Hansen also contended that the Claimant did not have 'lawful' status when she made the application and so this would have necessarily been a bar to the exercise of discretion in her favour. This argument was based on the suggestion that a person who was lawfully present in the United Kingdom on a visitor's visa could not use that lawful presence to apply for status under the *Windrush* scheme. It does not seem to me that this is necessarily so. During the course of the hearing, Mr Hansen drew my attention to *Immigration Rules Appendix V: Visitor.* There is nothing in that document which states that a visitor cannot make an application under the *Windrush* scheme or for Indefinite Leave to Remain as an exception to the express requirements of the *Windrush* scheme. A genuine visitor is described at V 4.2 as someone who "(b) will not live in the UK for extended periods through frequent or successive visits, or make the UK their main home". That means that the Visitor route cannot be used by itself to make the United Kingdom the applicant's main home. That does not mean, however, that they cannot apply for a different status whilst they are present in the United Kingdom as a visitor.

Ground 2: Discrimination contrary to Article 14, read with Article 8, of the Convention

67. It is common ground that the application for Indefinite Leave to Remain made by the Claimant falls within the ambit of Article 8 of the Convention, and that the Claimant had 'status' for the purposes of Article 14: that is, as the child of a category 1 Windrush person, who arrived in the United Kingdom under the age of 18, who was lawfully present in the United Kingdom, but had left at some point between the initial arrival and the present. The questions I need to consider are (i) whether the Claimant was in an analogous position to a hypothetical comparator; and (ii) if so, whether the continuous residence rule was justified.

68. With respect to (i), I consider that the Claimant was in an analogous position to a hypothetical comparator: that is, someone who was the child of a category 1 Windrush parent, arrived in the United Kingdom under the age of 18, is lawfully present in the United Kingdom at the time of application, and can satisfy the continuous residence requirement. Mr Hansen had argued that the Claimant was not in an analogous position to this hypothetical comparator because as a visitor to the United Kingdom she was not lawfully present. I have already rejected this argument above at paragraph 65.

69. The only difference, therefore, between the Claimant and the hypothetical comparator is the very requirement that is sought to be justified: the lack of continuous residence. This is not, for the purposes of considering whether the situations are analogous an "obvious difference": see In *Re McLaughlin* [2018] 1 WLR 4250 at [24] and [26].

70. As for (ii), Mr Buttler KC explained in oral argument that the present challenge is not to the continuous residence rule *per se* – that is, it is not a policy challenge. Rather, it is a challenge to the application of the rule to the Claimant. I consider that the continuous residence rule as applied to the Claimant's case was justified, in accordance with the *Bank Mellat* test.

71. In considering the Secretary of State's decision under that test, it is necessary to afford the decision-maker a high degree of deference. The decision is taken in the immigration field, in which the Strasbourg Court has held that:

> "a wide margin is usually allowed to the state under the Convention when it comes to matters of immigration. In particular, a state is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country".

See *Pajić v Croatia* (2018) 67 E.H.R.R. 12 at [58]. This is also not a case where the difference in treatment is based on a 'suspect' ground, such as race, which would call for more intense review: see *R(SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [158].

72. The continuous residence rule is a proxy for demonstrating whether an applicant has strong and subsisting ties with the United Kingdom. As Mr Buttler KC accepts, and I agree, the objective of the measure is sufficiently important to justify the limitation of a protected right; and the measure is rationally connected to the objective.

73. The Secretary of State contends that the application of the bright line rule, avoids uncertainty and arbitrariness. It leaves no room for doubt for those applying and for decision-makers. These are cogent reasons, and I do not consider that a less intrusive measure, such as individual assessment of whether an applicant had "strong and subsisting ties" (as suggested by Mr Buttler KC), could have been used without unacceptably compromising the achievement of the objectives of avoiding uncertainty and arbitrariness, and leaving no doubt for applicants and decision-makers. Individual assessment necessarily means that there is doubt as to the outcome for applicants and decision-makers, and there is a risk of uncertainty and arbitrariness in the decision-making.

74. It is also the case that the rule had not been chosen arbitrarily by the Secretary of State. The contents of the *Windrush Scheme* followed extensive consultation. A conscious choice had been made to ensure that the necessary degree of connection between the applicant and the United Kingdom was in place. Furthermore, no criticism had been made of the use of the continuous residence rule, and no campaign had been made for it to be changed, even though the *Windrush* scheme has been amended on a number of occasions.

75. These points all weigh strongly in favour of the application of the rule to the Claimant. Weighed against that is the obvious negative impact to the Claimant of the application to her of the continuous residence rule: she is not granted Indefinite Leave to Remain, in circumstances where she clearly wishes to remain in the United Kingdom with her children and her other family members, having herself spent significant periods of time in the United Kingdom. Nevertheless, the impact is lessened by the fact that the Claimant can still seek to avail herself of other lawful routes to remain in the United Kingdom, such as under Appendix FM, given the presence here of her young children, one of whom has learning difficulties.

76. In oral argument, Mr Buttler KC gave the example of an individual who had spent only a short period of time abroad, spoke English and had strong family ties in the United

Kingdom. I can see that it would be extremely harsh on such an individual if the continuous residence rule was applied to them, and that might be the kind of hard case in which the justification balance would fall in favour of disapplication of the rule. The Claimant's case is, however, very different from that example. Whilst it is correct that the Claimant has significant ties to the United Kingdom, she has lived elsewhere for much of her life following her departure in 2002.

77. Applying the wide margin of appreciation that is afforded to the Secretary of State, I consider that the effects of the application of the continuous residence rule to the Claimant are outweighed by the importance of the objective that the Secretary of State seeks to achieve by the rule, and so Article 14 of the Convention is not breached in her case.

78. I should also add that I do not consider that the present case is comparable to R(*Vanriel) v Secretary of State for the Home Department*. In that case, Bourne J held that the application to those otherwise qualifying under the *Windrush Scheme* of the requirement that applicants for citizenship needed to be present in the United Kingdom on a date five years before the application, was not justified. The statutory requirement to be present five years before the application was intended to prove commitment and connection to the United Kingdom by citizen applicants. In the context of the *Windrush Scheme*, however, Bourne J held that less intrusive means, such as applying a discretionary requirement rather than a rigid one, could have been applied. As Bourne J explained at [84]: "That is all the more apparent in light of the fact that the detailed requirements other than the five-year rule all contain some discretion or possibility of exception".

79. *Vanriel* is clearly distinguishable from the present case. In *Vanriel*, Bourne J was considering a statutory requirement of general application to all applicants for citizenship. There were particular reasons why that rule may work harshly for *Windrush Scheme* applicants for whom it was "impossible" to prove their connection to the United Kingdom by being present in the country on a particular day when "through no fault of their own", but for reasons that gave rise to the *Windrush Scheme* itself, "they were prevented from being in the UK": *Vanriel* at [83]. In the instant case, the Claimant is not seeking the disapplication of a rule of general application. Rather, she is seeking disapplication of a rule that has been designed for the *Windrush Scheme* itself.

Conclusion

80. For the foregoing reasons, therefore, I dismiss this application for judicial review.