Neutral Citation Number: [2026] EWCA Civ 86

Case No: CA-2024-001636

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE CAVANAGH
[2024] EWHC 1374 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2026

Before :

LORD JUSTICE BAKER
LADY JUSTICE ELISABETH LAING
and
SIR NICHOLAS UNDERHILL

- -

Between :

THE KING on the application of **(1) REFUGEE AND MIGRANT FORUM OF ESSEX AND LONDON** **(2) CECILIA ADJEI**	**Claimants/ Respondents**
- and - **SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Appellant/ Respondent**

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Zane Malik KC (instructed by **the Treasury Solicitor**) for the **Appellant**
Stephanie Harrison KC and **Shu Shin Luh** (instructed by **Bhatt Murphy Solicitors**) for the **Respondents**

Hearing dates: 22 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR NICHOLAS UNDERHILL:

INTRODUCTION

1. The background to this judgment appears from my earlier judgment in the same appeal, dated 19 November 2025, ("the November judgment") with which Baker and Elisabeth Laing LJJ agreed. As appears from paras. 91-102 of that judgment, we adjourned the second of the two grounds of appeal and directed further written submissions, to be followed by an oral hearing if necessary. Submissions have been filed accordingly, and we heard oral argument on 22 January 2026. The Secretary of State was again represented by Mr Zane Malik KC and the Respondents by Ms Stephanie Harrison KC and Ms Shu Shin Luh.

2. I will only recapitulate in summary the matters which are referred to in the November judgment. The claims in these proceedings arise from the difficulties faced by some migrants who enjoy so-called "section 3C leave", but who are not provided with any documentation which demonstrates that status to third parties ("status documentation"). It is common ground that that problem will eventually disappear as the result of gradual introduction of eVisas; but at the time of the issue of proceedings, and indeed at the time of the hearing before Cavanagh J, that process had not yet begun to benefit any migrants on section 3C leave. The reasons why that is so are explained in paras. 14-16, 24 and 60 of the November judgment.[1] It is important to appreciate that there are two elements in play:

   - first, the plan does not provide for the grant of eVisas to anyone *already* on section 3C leave, although once a migrant has been granted an eVisa they will continue to be able to use it to demonstrate their status if and when they subsequently transfer to section 3C leave; and

   - second, eVisas were introduced in phases for different categories of migrant over a two-year period.

   Ms Harrison confirmed in her oral submissions before us (though it is in fact apparent from how the case has been formulated throughout) that it is the former which is the Claimants' primary complaint: it was their case, which the Judge in due course accepted, that eVisas should have been granted forthwith to everyone on section 3C leave. She made clear, however, that they also complained about the categories of migrant who were chosen to receive eVisas in the earlier stages of the implementation programme ("prioritisation").

3. The adjourned ground concerns the Claimants' contention that in discharging the functions which led to that state of affairs the Secretary of State had not had regard to the best interests of children as required by section 55 of the Borders, Citizenship and Immigration Act 2009 – "the section 55 claim". The legal basis of that claim is

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[1] For the record, I should note that the further materials filed for the purpose of the adjourned hearing suggest that I may in the November judgment have oversimplified the position in one respect. I say at para. 24 that eVisas were only granted at the start of a period of primary leave. However, it appears that it has for some time been possible for current holders of a BRP to convert to an eVisa during the currency of the primary leave conferred by it. However, this makes no difference to the analysis.

considered at paras. 76-80 of the November judgment. For convenience, I will sometimes in this judgment refer to the discharge of functions attracting the operation of section 55 as a "decision", though that is not the statutory language.

THE PARTIES' SUBMISSIONS

4. Although we invited further submissions on a number of potential issues, before us Mr Malik focused in support of his appeal on only two submissions, which I will take in turn.

5. Mr Malik's main submission concerned the basis on which the claim had been pleaded and eventually decided. I start with the claim form. The section 55 claim was in fact initially pleaded only by RAMFEL, but following the consolidation of the two claims it was treated as being advanced by Ms Adjei also. Section 3.1 of RAMFEL's claim form, which is supposed to identify "the decision which you seek to have judicially reviewed", does not in fact identify any particular decision and refers only to "the Defendant's ongoing breaches to … section 55 of the Borders, Citizenship and Immigration Act 2009". In section 3.2, which asks for the date of that decision, RAMFEL answered simply "ONGOING".

6. Details of the section 55 claim are pleaded at paras. 94-96 of the Statement of Facts and Grounds ("the SFG"). These are analysed at para. 81 of the November judgment, and I need not repeat the exercise here. The important point for Mr Malik's purposes is that in those paragraphs too there is no attempt to identify any decision by the Secretary of State which is said to have given rise to the state of affairs complained of and thus to attract the operation of section 55. He referred us also to the summary of the claim in paras. 1-9 of the SFG, which likewise do not refer to any specific decision or policy of the Secretary of State but simply assert a generalised failure to provide status documentation to those on section 3C leave and (most relevantly to the section 55 claim) to carry out any proper inquiry into the impact of that failure.

7. The Secretary of State's response to the section 55 claim in her Detailed Grounds of Defence ("the DGD") proceeds on the basis that the Claimants' challenge was to decisions not to supply status documentation which she was alleged to take in every individual case at the point that a migrant transfers to section 3C leave. Her answer to the challenge so understood was that she did not exercise any function at that point because entitlement to section 3C leave arose automatically by operation of law: see paras. 42-45 of the DGD. It may be that that was not in fact the intended basis of the claim (or would not have been if those advising RAMFEL had turned their minds to the point); but Mr Malik submitted that the Secretary of State's understanding of it, and her consequent response, was reasonable in circumstances where there had been no pleaded challenge to any specified exercise of functions on her part but merely a complaint about an ongoing state of affairs. I would accept that submission.

8. Although that was the basis of the Secretary of State's pleaded defence, at paras. 46-50 of the DGD, and in the supporting evidence of Mr Wright, she did explain that since the publication of the *New Plan for Immigration* in May 2021 it had been her announced intention gradually to introduce digital proof of immigration status for all migrants, including those with section 3C leave, and that this process had begun on 26 January 2023. Consistently with her understanding of the pleaded case, she said at para. 46 of

the DGD that those facts were not "directly relevant", but they were nevertheless clearly raised and supported by evidence.

9. That was how matters stood at the start of the hearing before the Judge. But, as appears from para. 82 of the November judgment, the nature of the issue as regards the section 55 claim fundamentally changed in the course of the hearing when Mr Malik, as the Judge put it at para. 248 of his judgment:

> "… 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 … [and] … therefore … that section 55 applies".

10. It was on the basis of that "[decision] not to provide documentary proof to all those on section 3C leave" that the Judge held that section 55 had not been complied with. Mr Malik submitted that the Judge's reference to an unspecific "decision" did not fill the lacuna created by the Claimants' original pleading. He also submitted that it was a potentially misleading representation of the actual decision that the Secretary of State had made, both as pleaded in the DGD and as shown in Mr Wright's evidence. As there appears, she had decided to introduce a system under which in due course digital proof of status would be available to migrants with section 3C leave, but only after they had received an eVisa in relation to a period of primary leave and then transferred to section 3C leave.

11. Finally as regards this submission, Mr Malik took us to the terms of the relevant declaration. This is at para. 2 of the Judge's Order of 27 June 2024, but it is necessary also to set out para. 1 (which reflects his decision on the irrationality claim, now reversed) because para. 2 refers back to it. They read:

> "1. The Defendant's failure to provide a digital document proving the lawful immigration status and attendant legal rights to all those with leave extended under section 3C of the Immigration Act 1971 including the Second Claimant is unlawful because it is Wednesbury unreasonable, for the reasons given in the judgment.
>
> 2. In failing to provide the said digital document, the Defendant also acted unlawfully in breach of section 55 of the Borders Citizenship and Immigration Act 2009 and the duty to have due regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."

The terms of that order were agreed between the parties, on the basis that it reflected the Judge's reasoning, and accepted by him on the same basis: see para. 3 of his reasons dealing with consequential matters.

12. Mr Malik pointed out that the opening words of para. 2 do not identify the breach of section 55 as consisting in any decision which the Judge had found to have been taken without having regard to the best interests of children: rather, the breach is said, consistently with the defective pleading, to consist in a substantive state of affairs, namely the Secretary of State's failure to provide digital documentation to migrants on section 3C leave. That is more than a mere infelicity of drafting. Section 55 imposes

only a process duty. In a case where a decision-maker has failed to comply with the requirement to have regard to the best interests of children the correct relief is either to quash the decision or to declare that it was unlawful; but in either case the consequence is only that the decision-maker will be required to take the decision afresh having conducted a section 55 exercise. Such relief involves no implication as to what the substantive decision will be: it may in the end be identical to the original decision, but what matters is that it will have been taken as a result of a process which has had regard to the best interests of children. By contrast, the effect of para. 2 of the Judge's order is that the Secretary of State was obliged forthwith to provide digital proof of status (in effect eVisas) to "all those [on section 3C leave] including the Second Claimant" and thus illegitimately assumes that that would be the outcome of a section 55-compliant decision-making process.

13. Having thus addressed the basis on which, he submitted, the section 55 claim was pleaded and decided, Mr Malik acknowledged, consistently with his concession before the Judge, that it "could be said" that the *New Plan for Immigration* was an exercise of functions which engaged the section 55 duty; and he observed that Ms Harrison had at paras. 11-19 of her written submissions for this hearing sought to advance such a case, characterising the decision challenged as "the decision to prioritise certain immigration routes over others and not to roll out eVisas to those on existing s. 3C leave" (para. 19). But he submitted that that was not the case which the Claimants had pleaded nor the basis on which the Judge had decided the claim; and any such challenge would be out of time. No Respondent's Notice had been filed, and the Claimants should not now be permitted to base their case on a different decision.

14. Mr Malik's second submission was that it was clear from the evidence that it was simply not possible for the Secretary of State to have departed from the gradual and staged roll-out which she adopted. He relied on the evidence to that effect of Mr Wright set out at para. 59 of the November judgment (and see also para. 60) and on the fact that at para. 63 that evidence had been accepted. He submitted that it necessarily followed that, even if the Secretary of State had carried out a section 55 exercise at the time that she decided to introduce digital documentation, her decision to do so on a staged basis and not to provide it to migrants currently on eVisas would have been the same. That meant that even if there had been a breach of section 55 the Claimants should not have been granted any relief, whether as a matter of the overall discretion of the Court or by reference to section 31 (2A) of the Senior Courts Act 1981.

15. I turn to Ms Harrison's response. I should note by way of preliminary that she made it clear that she was not relying on any argument of the kind advanced by way of alternative in *R (DM) v Secretary of State for the Home Department* [2025] EWCA Civ 1273, [2026] 1 WLR 351 (see paras. 119-124), namely that the section 55 duty could be triggered simply by "the operation of a system": her case was, squarely, that the Secretary of State had discharged her functions by making a decision.

16. As regards RAMFEL's pleading, Ms Harrison took us to the summary of its overall case at para. 3 of the SFG, which asserts the basic fact that the Secretary of State does not provide migrants on section 3C leave with any status documentation. However, that does not meet Mr Malik's point that no decision is identified. In that regard the relevant part of the SFG is the pleading of the section 55 claim at paras. 94-96. As to that, Ms Harrison relied on the first sentence of para. 94, which reads:

> "S. 55 BCIA 2009 requires the SSHD 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."

With respect, that too does not meet Mr Malik's point. That sentence simply states a proposition of law: there is no identification of the immigration functions which the Secretary of State was said to be discharging which attracted the section 55 duty. Later in her submissions, Ms Harrison appeared tacitly to accept this, saying that it was "obviously implicit" in the Claimants' challenge that the state of affairs of which they were complaining was the result of a decision by Secretary of State but that issues about precisely what decision was taken when and by whom had only "become central" as a result of the Secretary of State's concession.

17. In this connection Ms Harrison also referred us to written submissions made by her on 27 March 2024, in the interval between the hearing before the Judge and his delivery of judgment. The Secretary of State had, in response to a request from the Judge, supplied details of the numbers of categories of migrant to whom eVisas had at that date been rolled out (being 23 out of a total of 88). At para. 12 of her submissions she had submitted:

> "Clearly a conscious decision was taken to extend eVisas to certain categories but not all of those who will need to rely on 3C leave. This was an exercise of discretion and a 'function' to which the duties under … s. 55 apply."

Ms Harrison fairly points out that at that stage at least, still prior to the judgment, the Claimants had clearly asserted a decision which was said to attract the section 55 duty. However, it is necessary to bear in mind the distinction made at para. 2 above. The decision in question is only about which groups to prioritise: the submission says nothing about the decision underlying the Claimant's primary claim, i.e. a decision not to grant eVisas to those already on section 3C leave.

18. As regards the Secretary of State's DGD, Ms Harrison did not dispute – indeed she asserted – that it was pleaded on the basis identified by Mr Malik. She drew our attention to the statement at para. 46 that the introduction of digital documentation was not directly relevant, but, as I have noted, that simply reflects the way in which the Secretary of State (rightly or wrongly) understood the Claimants' case.

19. Subject to her submission that the Claimants' case as to the relevant decision was already sufficiently identified, Ms Harrison made some further submissions as to the development of the relevant policy. She referred first to the *New Plan for Immigration*, making the point that, although it did announce a plan to introduce digital documentation, and to do so gradually by the end of 2024, that was only stated in the most general terms. She also referred to further documents published by the Secretary of State since 2021 which shed at least some light on the detailed development of that plan. These had not been adduced in evidence before the Judge, but Mr Malik did not object to their being admitted before us. She submitted that it was clear from these documents that the relevant decisions had been taken by Ministers and were not treated as merely operational matters which could be taken by officials of the kind to whom the guidance in *Every Child Matters* applied. She also submitted that they demonstrated

that the decisions about the groups for whom eVisas should be prioritised were not taken until shortly before the issue of proceedings, so that no limitation point could be taken.

20. As regards how the Secretary of State's decision about the implementation of the introduction of eVisas might have been different if she had carried out a section 55 exercise, Ms Harrison submitted that she could (and should) have chosen to give priority in the roll-out to those categories of migrant in whose cases children were more likely to be affected: cf. para. 13 above. That, however, does not correspond to the terms of the Judge's declaration, the effect of which is that it was unlawful for the Secretary of State not to extend eVisas to all migrants currently on section 3C leave. She did not suggest that the Secretary of State might have made a different decision on that issue: indeed the implication of her oral submissions was that she accepted that the evidence showed that that was not the case.

DECISION

21. The first point is that para. 2 of the Order is defective for the reason explained at para. 12 above – in short, because it declares the unlawfulness to consist in the substantive outcome of the Secretary of State's decision rather than in the process followed in reaching it. It follows that the appeal must be allowed at least to that extent. The real question is whether it would nevertheless be right for us not to dismiss ground 2 outright but to substitute an order of the kind which would be appropriate to a breach of section 55 – that is, one which required the Secretary of State now to re-take the decision whether to grant eVisas to all those on section 3C leave (or at least a declaration which would have that effect).

22. As to that, it is necessary to start with the fact that the confusion which resulted in the order being made in the terms that it was originates in the failure of the Claimants to identify the decision which they were challenging. For the reasons given in para. 91 of the November judgment, that is the correct analytical starting-point in any section 55 claim. As Ms Harrison acknowledged (see para. 2 above), their primary case is that the Secretary of State had made a decision not to make digital documentation of immigration status available to migrants *currently* on section 3C leave. Their whole section 55 case depended on such a decision having been taken, even if they had no direct evidence of it; but in fact such evidence did exist in the form of the *New Plan for Immigration*, published in May 2021, and the further details of its implementation published in the period up to the implementation of the introduction of eVisas in January 2023. There is no reason why that decision should not have been identified in the SFG (and even if the Claimants had failed to focus on it at that point, the essential facts were explicitly pleaded in the DGD and could have prompted an amendment). There may perhaps have been room for doubt about the date at which the relevant decision was taken (that is, whether it was part of the original Plan or emerged at some later stage in the process), but that would not prevent the decision itself being pleaded and information about its precise date being sought, if necessary, from the Secretary of State. It was that failure which led the Secretary of State to focus in the DGD on a case which was quite different from the one which emerged at the hearing and which led the Judge to proceed to make a decision on a basis which had never been pleaded.

23. That failure has also to be seen in the context of the point which I make at para. 67 of the November judgment. As I say there, the Claimants' misguided persistence in

pursuing a case based on a failure to provide "documentary" (i.e. non-digital) proof of status is likely to have made it more difficult for the parties, and the Court, to focus on the issues raised by the gradual implementation of the eVisa regime.

24. Having said that, I acknowledge that it is not uncommon for parties not to get their cases right first time round, and it is not the practice of the Court to refuse relief only because the true basis of the claim does not emerge until later in the proceedings, or even at the hearing. What matters is whether the initial failure has led to any prejudice. In this case I believe that the Claimants' failure to plead the nature of the impugned decision may have caused real prejudice to the Secretary of State. My reasons are as follows.

25. I start with Mr Malik's submission based on section 31 (2A) of the 1981 Act: see para. 14 above. I am bound to say that on the basis of the available evidence it does indeed seem unlikely that, if the Secretary of State had undertaken a section 55 exercise at the time of her original decision not to make eVisas available to migrants currently on section 3C leave, she would have reached a different decision. We have already rejected the case that the decision which she in fact took was irrational. In the November judgment I noted both the substantial measures which she had put in place to mitigate the difficulties faced by those on section 3C leave, which she believed would be effective, and also the likely practical problems of extending the availability of digital documentation in one go to hundreds of thousands of migrants (see principally paras. 63-64 of the November judgment, but NB also para. 67). It seems to me decidedly implausible that an explicit consideration of the potential impact of her policy on children whose parents might not be sufficiently protected by those measures would have led her to decide to make digital documentation available at once to all those on section 3C leave. Ms Harrison in her oral submissions did not indeed seek to suggest otherwise: rather, her point was that, even if eVisas could not practicably be extended to those on section 3C leave, priority might be given to groups of migrants who had, or were more likely to have, dependent children: see para. 20 above. In this context, it may be relevant to note that this was not a policy peculiarly directed at children, though I do not suggest that that means that section 55 did not apply.

26. I am not sure that the evidence before the Judge would have justified a refusal of relief on the basis of section 31 (2A). However, it is not necessary for me to go that far. If the Claimants had pleaded explicitly that it was their case that eVisas should have been made available from the start to everyone on section 3C leave, and/or that groups with dependent children should be prioritised in the roll-out, it is in my view likely that the Secretary of State would not only have sought to rely on section 31 (2A) but would have provided fuller evidence than Mr Wright gave in para. 13 of his witness statement (see para. 60 of the November judgment): as already explained, she understood that she was facing a case based on a wholly different decision (or decisions). I need not make a finding as to whether such a case would have succeeded, but I believe that there is a real chance that it would have done so; and it follows that the Secretary of State is prejudiced by the defects in the way in which the case was pleaded.

27. A similar point can be made about the way in which the Judge might have exercised his discretion as regards the grant of relief. By the time that he handed down judgment in June 2024 the Secretary of State's programme for the introduction of eVisas had been in place for almost eighteen months and was due to be completed by the end of the year. The case that it would be "practically impossible" to depart from the

programme at that stage by immediately making eVisas available to hundreds of thousands of migrants currently on section 3C leave (see para. 61 of the November judgment) seems *prima facie* highly plausible, in which case the Secretary of State would have had a strong case for asking the Judge to refuse relief on discretionary grounds even if he had found a breach of section 55. Similarly, as regards the Claimants' secondary case, it must be doubtful that he would have thought it appropriate to alter the prioritisation of groups, all of whom would have become eligible for eVisas by the end of the year in any event. No such case was in fact advanced, but there must be a real chance that it would have been if the target of the Claimants' claim had been clear from the beginning.

28. That is the principal prejudice which I believe was caused by the defect in the Claimants' pleading. If the nature of the decision had been pleaded the Secretary of State might also have been able to argue that the claim had not been brought promptly and/or to submit that the decision was taken by officials rather than by Ministers and accordingly that she had satisfied her duty by promulgating the guidance in *Every Child Matters*: see para. 91 of the November judgment. But Mr Malik did not develop either point, and, as we have seen, Ms Harrison contended that neither could have succeeded. In those circumstances I do not rely on them beyond observing that they are a further illustration of why in principle the identification of the impugned decision may be necessary in practice as well as in principle when pleading a section 55 claim.

29. For those reasons I would allow the appeal on ground 2. It is not wholly satisfactory to have to reach that conclusion on what might be regarded as procedural grounds, particularly since there is real reason to doubt whether the Secretary of State did in fact carry out a section 55 exercise when she decided how to implement the introduction of eVisas. But I am to some extent comforted by my doubts about whether any different decision would have been made if the Secretary of State had carried out such an exercise or would be made if she were now required to do so. The alleged breach of section 55 was also of course very much a secondary part of the Claimants' case.

30. I should emphasise that our decision in this case does not mean that a failure by a claimant in a section 55 claim to identify from the start the decision which attracts the duty will always be fatal. No doubt there will be cases where there are genuine difficulties about establishing precisely what was decided and/or by whom and when, and in such cases it may be sufficient to plead the basis for asserting that such a decision must have been taken, and if necessary seek further information. And even where a specific case could have been pleaded from the start, a failure to do so may not in the circumstances of the particular case cause any real problem. But that has not been so in the present case.

Elisabeth Laing LJ:

31. I agree.

Baker LJ:

32. I also agree.