Neutral Citation Number: [2022] EWHC 534 (Admin)

Case No: CO/145/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

11th March 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of ANTHONY BROWN)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Rowan Pennington-Benton (instructed by Charles Russell Speechlys) for the **Claimant**
Edward Brown (instructed by Government Legal Department) for the **Defendant**

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Hearing date: 24/2/22

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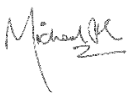
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a claim for judicial review, arising out of the "Windrush Scandal" (see §2 below). The parties have drawn the Court's attention to three previous such claims: R (Howard) v SSHD [2021] EWHC 1023 (Admin) [2021] 1 WLR 4651 (Swift J, 23.4.21) (see §§8, 12 below); R (Mahabir) v SSHD [2021] EWHC 1177 (Admin) [2021] 1 WLR 5301 (Tim Smith, 6.5.21) (see §§9, 13 below); and R (Vanriel & Tumi) v SSHD [2021] EWHC 3415 (Admin) (Bourne J, 16.12.21) (see §§10-11, 14 below). Permission for judicial review was refused on the papers by Farbey J. My task, at an oral in-person hearing, was to consider afresh whether the claim is viable. With the parties' assistance, I encountered a number of 'key features of the contextual setting' for the present claim. I am going to devote some time to identifying these (see §§2-18 below), because I see them as important for a proper understanding and discussion of the arguments concerning Article 14.

Key features of the contextual setting

The "Windrush Scandal"

2. As this Court explained in Mahabir (at §37), "a comprehensive history of the Windrush scandal, of the reasons why it occurred and of the Government's response to it can be found in the 'Windrush Lessons Learned Review' (HC93) undertaken by Wendy Williams and published in March 2020". As this Court explained in Vanriel (at §2), the "Windrush scandal" has been summarised in this way ("the Summary"):

> ***Between 1948 and 1973, nearly 600,000 Commonwealth citizens came to live and work in the UK with the right to remain indefinitely. But many were not given any documentation to confirm their immigration status, and the Home Office kept no records. In the last ten years, successive governments have introduced the 'compliant environment' where the right to live, work and access services including benefits and bank accounts in the UK is only available to people who can demonstrate their eligibility to do so. Towards the end of 2017 the media began to report stories of members of the Windrush generation being denied access to public services, being detained in the UK or at the border, or being removed from, or refused re-entry to, the UK. This has been referred to as the Windrush scandal.***

The "Windrush Generation"

3. In Howard Swift J identified (at §19) the following 'cohort' as being "the Windrush generation", for the purposes of the analysis in that case (paragraph numbers added):

> ***… all those [i] who had a right to remain in the UK by virtue of section 1(2) of the 1971 Act [ii] who, prior to 1 January 1988, could have obtained British nationality by registration.***

I will call this 'cohort' (identified in Howard at §19) the "Windrush Generation" (with a capital "G"). As can be seen, two "Components" – [i] and [ii] – are involved, each of which must be satisfied by a person in order to be a member of this group. (The "1971 Act" in [i] is the Immigration Act 1971.)

i) *First Component: 'had a s.1(2) right to remain' (at 1.1.73).* The First Component of the Howard Windrush Generation is [i]: those "who had a right to remain in the UK by virtue of section 1(2) of the 1971 Act". This Component

is also reflected in the Summary (§2 above), when it speaks of "Commonwealth citizens" who "between 1948 and 1973 … came to live and work in the UK with the right to remain indefinitely". The First Component is a description of "Commonwealth citizens" who were "settled" (ordinarily resident) in the UK by 1 January 1973. That was the date on which the 1971 Act came into force. This "right to remain indefinitely" ("ILR") was a legal status which arose automatically, without any application being necessary. It arose by virtue of section 1(2) of the 1971 Act (Howard §2), by which Parliament conferred the right on "those in the United Kingdom at its coming into force, if they are then settled there". As the Summary explains, it was this right which was not documented by the Home Office, either by issuing documents to those with the right, or by keeping and retaining records. Having been put in that position – as the Summary also explains – those with this right suffered (a) 'domestic exclusion' in terms such as access to "work" and "services" and/or (b) 'external exclusion' in terms such as being removed from the UK or refused re-entry into the UK (ie. being "stranded" elsewhere in the world).

ii) *Second Component: 'could have obtained British nationality by registration' (until 1.1.88)*. The Second Component of the Howard "Windrush Generation" is [ii]: "who, prior to 1 January 1988, could have obtained British nationality by registration". This is a description of a right which was contained in section 7(1) (Howard §4) of the British Nationality Act 1981 ("the 1981 Act"). The 1981 Act came into force on 1 January 1983. The phrase "prior to 1 January 1988" reflects the fact that section 7(1) conferred a statutory entitlement, for a limited time-window of 5 years until 1 January 1988 ("the Cut-Off Point"). This was an entitlement, upon application, to British citizenship by registration for "Commonwealth citizens", provided that they met a substantive criterion. The criterion had been found in Schedule 1 §2 to the 1971 Act (Howard §3). It was continuous ordinary residence in the UK – without being subject to an immigration restriction on the period for which they might remain – for the 5 years immediately preceding the application (the "5 Year Rule"). Necessarily implicit in the 5 Year Rule is UK ordinary residence at the time of application. The phrase "could have obtained" reflects the facts that (a) no application was made by the Cut-Off Point and (b) British citizenship by registration would have been obtained had such an application been made. In other words, these are people who would have satisfied the 5 Year Rule if they had made an application prior to the Cut-Off Point.

The "Schedule 1 Criteria"

4. As has been seen from its Second Component [ii], members of the Windrush Generation – at and after the Cut-Off Point – "lost the opportunity to gain British citizenship by application" (Howard §5). But what was "lost", by not making an application for registered British citizenship prior to 1 January 1988? To answer that question, it is necessary to identify the position which applied after the Cut-Off Point. After the Cut-Off Point, it would be necessary to apply (under section 6 of the 1981 Act), for British citizenship by "naturalisation" (rather than "registration"). Whether such an application would be granted would depend on the application of substantive criteria, found in Schedule 1 to the 1981 Act ("the Schedule 1 Criteria") (Howard §5; Vanriel §26). The Schedule 1 Criteria include the 5 Year Rule, substantially as before,

but applicable and needing to be met as at the time of the later application for naturalisation, whenever it was made. And necessarily implicit in the 5 Year Rule is the requirement that the applicant has UK ordinary residence at the time of application for naturalisation. In addition to the 5 Year Rule, the other Schedule 1 Criteria are: (a) good character; (b) language knowledge; (c) UK life knowledge; and (d) intention to make the UK their principal home (Howard §17; Vanriel §26).

The "Windrush Statement"

5. As this Court has explained (Howard §15), the Windrush Statement was made by the Defendant to Parliament on 23 April 2018, the material parts of which were these (paragraph numbers added for clarity of cross-referencing):

> ***[1] From the late 1940s to the early 1970s, many people came to this country from around the Commonwealth to make their lives here and to rebuild Britain after the war. All members will have seen the recent heartbreaking stories of individuals who have been in the country for decades struggling to navigate an immigration system in a way that they should never, ever have had to. [2] These people worked here for decades. In many cases, they helped establish the National Health Service. They paid their taxes and enriched our culture. They are British in all but legal status, and this should never have been allowed to happen… [3] Since 1973, many of the Windrush generation would have obtained documentation confirming their status or would have applied for citizenship and then a British passport. [4] From the 1980s, successive Governments have introduced measures to combat illegal immigration… But steps intended to combat illegal migration have had an unintended, and sometimes devastating, impact on people from the Windrush generation, who are here legally, but who have struggled to get the documentation to prove their status. This is a failure by successive Governments to ensure these individuals have the documentation they need. [5] This is why we must urgently put it right, because it is abundantly clear that everyone considers people who came in the Windrush generation to be British, but under the current rules this is not the case. Some people will still just have indefinite leave to remain, which means they cannot leave the UK for more than two years and are not eligible for a British passport. That is the main reason we have seen the distressing stories of people leaving the UK more than a decade ago and not being able to re-enter. [6] I want the Windrush generation to acquire the status they deserve – British citizenship – quickly, and at no cost and with proactive assistance through the process. [i] First, I will waive the citizenship fee for anyone in the Windrush generation who wishes to apply for citizenship. This applies to those who have no current documentation, and also to those who have it. [ii] Secondly, I will waive the requirement to carry out a knowledge of language and life in the UK test. [iii] Thirdly, the children of the Windrush generation who are in the UK are in most cases British citizens. However, where that is not the case and they need to apply for naturalisation, I shall waive the fee. [iv] Fourthly, I will ensure that those who made their lives here but have now retired to their country of origin can come back to the UK. Again, I will waive the cost of any fees associated with the process and will work with our embassies and High Commissions to make sure such people can easily access this offer. In effect, that means anyone from the Windrush generation who now wants to become a British citizen will be able to do so, and that builds on the steps that I have already taken . . . [7] We were too slow to realise that there was a group of people that needed to be treated differently, and the system was too bureaucratic when these people were in touch…***

The "Windrush Scheme"

6. As this Court has explained, this was a scheme which on 30 May 2018 the Government brought into effect, describing it as follows in a press release (Vanriel §3) (paragraph numbers added for clarity of cross-referencing):

> ***[1] The Home Secretary has today announced that legislation has been introduced to bring into force a package of measures under a Windrush scheme. [2] The legislation will enable***

> ***the government to begin processing citizenship applications for the Windrush generation – Commonwealth nationals who settled in the UK before 1973 – free of charge. Free citizenship applications for children of the Windrush generation who joined their parents before they turned 18 and free confirmation of the existing British citizenship for children born to the Windrush generation in the UK where needed – will also be able to commence. [3] People applying for citizenship under the scheme will need to meet the good character requirements in place for all citizenship applications but will not need to take the knowledge of language and life in the UK test or attend a citizenship ceremony. [4] The scheme also covers the government's commitment to help members of the Windrush generation who are looking to return to the UK having spent recent years back in their home countries. These people will also be able to apply for the relevant documentation free of charge. In addition, Mr Javid confirmed that non-Commonwealth citizens who settled in the UK before 1973 and people who arrived between 1973 to 1988 who have an existing right to be in the UK are not expected to pay for the documentation they need to prove their indefinite leave to remain. [5] Home Secretary, Sajid Javid said: "I am clear that we need to make the process for people to confirm their right to be in the UK or put their British citizenship on a legal footing as easy as possible. That is why I have launched a dedicated scheme which brings together our rights, obligations and offers to these people into one place. I want to swiftly put right the wrongs that have been done to this generation and am committed to doing whatever it takes to make this happen."***

Changes regarding the Schedule 1 Criteria

7. The next key feature concerns the ways in which the applicability of the Schedule 1 Criteria did, or did not, change in light of the Windrush Statement and the Windrush Scheme, so far as concerns applications for British citizenship by naturalisation. The key points are these. (1) The need to make an application was retained, but with a waiver of application fees (Windrush Statement §[6][i]; Windrush Scheme §[2]: see §§5-6 above). (2) The Schedule 1 Criteria remained on the statute book, in the 1981 Act. (3) The 5 Year Rule remained in place, as did the necessarily implicit requirement of UK ordinary residence at the time of application for naturalisation. As will be seen, the applicability of the 5 Year Rule was a reason why Mrs Mahabir could only receive recognised ILR status; it was the reason why citizenship was refused to Mr Vanriel and Ms Tumi. (5) The other substantive criteria also remained in the 1981 Act, namely: (a) good character; (b) language knowledge; (c) UK life knowledge; and (d) intention to make the UK their principal home. (6) As to the good character criterion, which was retained (Windrush Scheme §[3]: see §6 above), its applicable content was the subject of guidance issued by the Defendant. The good character guidance was retained unamended for the Windrush Generation. As will be seen, the retained good character criterion, and unrevised good character guidance, were why Mr Howard's British citizenship was refused in November and December 2018. (7) The 'language knowledge' and 'UK life knowledge' criteria remained as Schedule 1 Criteria in the 1981 Act. But they were in substance disapplied. Parliament had provided that their applicable content be prescribable by regulations made by the Defendant (section 41 of the 1981 Act). By introducing 2018 amending regulations (Howard at §18), the Defendant changed that content, so as to waive these criteria (Windrush Statement §[6][ii]; Windrush Scheme §[3]: see §§5-6 above) for those to whom the First Component was applicable.

Case illustrations: the previous judicial review claimants

8. The previous cases, through the 'lived experience' of the claimants in those cases, provide helpful practical illustrations of how the picture fits together. I start with Mr Howard. He was born in Jamaica in December 1956 and became a citizen of the United Kingdom and Colonies by virtue of the British Nationality Act 1948 ("the 1948 Act").

He came to the UK in November 1960 and lived in the UK for 59 years from that date until his death in November 2019. When Jamaica gained independence (5.8.62) Mr Howard became a Jamaican national and ceased to be a citizen of the UK and Colonies, becoming a "Commonwealth citizen", by virtue of the Jamaican Constitution and associated legislative instruments. Being ordinarily resident in the UK on 1 January 1973 he had the right to reside pursuant to section 1(2) of the 1971 Act. He was therefore a person to whom the First Component was applicable. He could, moreover, have met the 5 Year Rule at any time up to 1 January 1988, and would have obtained British citizenship by registration had he made an application. He did not do so. He lost that opportunity at the Cut-Off Point. He was therefore a person to whom the Second Component was applicable. In the absence of documentation evidencing his s.1(2) right to remain, he lost his job, in 2012. Having lost the opportunity at the Cut-Off Point, any application for British citizenship by naturalisation now needed to meet the Schedule 1 Criteria. That included the good character requirement. Following the Windrush Statement (23.4.18) a decision was made (10.5.18) recognising Mr Howard's s.1(2) right to remain (from 1.1.73). His application for British citizenship by naturalisation was refused (on 5.11.18, and again on 3.12.18) on the basis that he could not meet the good character criterion within the Schedule 1 Criteria, whose content was regulated by the good character guidance. His claim for judicial review (5.4.19) challenged the lawfulness of the refusals (5.11.18 and 3.12.18), impugning the continued applicability of the good character criterion and unrevised guidance. After the proceedings were commenced, British citizenship was granted exceptionally (16.10.19). Soon afterwards, Mr Howard died (12.11.19) and his daughter was substituted as claimant. The judicial review Court considered the lawfulness of the refusals of citizenship by naturalisation, in the application of the good character criterion within the Schedule 1 criteria and the good character guidance applicable to it. What the Court decided is described at §12 below. So, Mr Howard's case plainly illustrates an individual falling within the Windrush Generation, described in Howard itself by Swift J.

9. Mrs Mahabir was born in Trinidad and Tobago in 1969 and came to the UK later in 1969 as a baby. Trinidad and Tobago had gained independence in 1962 and she was a Commonwealth citizen pursuant to the 1948 Act. She was ordinarily resident in the UK as at 1 January 1973 and was therefore a person to whom the First Component was applicable. She received no documentation evidencing her s.1(2) right to remain. In 1977 she was taken to Trinidad and Tobago by her father. In 2008 she was 'stranded' in Trinidad and Tobago when refused entry clearance to the UK. Being absent from the UK from 1977 onwards Mrs Mahabir was not present in the UK, nor did she meet the 5 Year Rule, for the purposes of obtaining British citizenship by registration by 1 January 1988. The Second Component was therefore not applicable to her. Following the Windrush Statement (23.4.18) she obtained a returning resident visa (24.10.18) conferring Indefinite Leave to Enter (ILE) and, after her arrival in the UK, she was granted a Biometric Residence Permit (20.11.18) recognising her ILR status. The question which then arose was whether family members – her husband and children – could join her in the UK from Trinidad and Tobago. In particular, a question arose concerning the fees – unaffordable by them – which were applicable to out of country applicants. The claim for judicial review challenged the decision to impose those fees. What the Court decided is identified at §13 below. Mrs Mahabir was acknowledged to be – "undeniably" – a "Windrush victim" (§§1, 131). But she is illustrative of a person who would not fall within the Windrush Generation as described in Howard. That is because, although the First Component would apply to her, the Second Component did

not. By virtue of the Schedule 1 Criteria Mrs Mahabir would need to be ordinarily resident in the UK for five years, after arriving back here on 24 October 2018, in order to obtain registered British citizenship by means of application for naturalisation.

10. Mr Vanriel was born in Jamaica in 1956 and came to the UK in 1962. In light of Jamaican independence (August 1962) he was a Commonwealth citizen. Like Mr Howard and Mrs Mahabir, he was ordinarily resident in the UK on 1 January 1973 and the First Component therefore applied to him. Mr Vanriel lived in the UK until 2005. At any time during the period 1 January 1983 and 1 January 1988 Mr Vanriel would have obtained British citizenship by registration, by meeting the 5 Year Rule, had he made an application. But he did not make such an application. Like Mr Howard, the Second Component was therefore also applicable to him. Having returned to Jamaica in July 2005 for an extended period, he was then 'stranded' there in December 2008, not being permitted to return to the UK. Following the Windrush Statement (23.4.18) Mr Vanriel returned to the UK (on 6.9.18) having been granted a visa as a returning resident under the Windrush Scheme. On 21 November 2018 a decision was communicated confirming that Mr Vanriel's ILR status had been recognised. On 18 February 2020 Mr Vanriel's application for British citizenship by naturalisation was refused. That was because of his inability – unlike Mr Howard – to meet the 5 Year Rule under the Schedule 1 Criteria. His claim for judicial review challenged that refusal. Like Mr Howard – and unlike Mrs Mahabir – Mr Vanriel's case illustrates a case in which the First and Second Components of the "Windrush Generation" description in Howard were both met. One difference between Mr Howard and Mr Vanriel was that Mr Howard could meet the 5 Year Rule under the Schedule 1 Criteria for the purposes of British citizenship by naturalisation. Another is that Mr Vanriel could meet the good character criterion.

11. Ms Tumi was born in Ghana in 1963. She came to the UK in 1964 and was subsequently a Commonwealth citizen for the purposes of the 1948 Act. She was outside the UK, in Ghana, between 1972 and 1980. She was therefore not a person to whom the First Component applied: she was not ordinarily resident in the UK on 1 January 1973. However, her Ghanaian passport had an ILR stamp in it. Ms Tumi returned to the UK in 1980 and left for the United States in June 1984. She was subsequently 'stranded' outside the UK from October 1986 onwards. The Second Component was not applicable to Ms Tumi, since at no stage between 1 January 1983 and 1 January 1988 could she meet the 5 Year Rule for registered British citizenship on application. Following the Windrush Statement (23.4.18) Ms Tumi was granted a visit visa (on 9.5.18) and returned to the UK (on 15.5.18), following which a decision (on 11.6.18) informed her that she had been granted ILR. On 24 March 2020 her application for British citizenship by naturalisation was refused, on the basis that – like Mr Vanriel – she could not meet the 5 Year Rule. Alongside Mr Vanriel, Ms Tumi brought judicial review proceedings to challenge the refusal of citizenship by naturalisation. What the Court decided in their case is identified at §14 below. Ms Tumi is an example of someone to whom neither the First Component nor the Second Component were applicable.

Issues determined in the previous claims

12. As a next feature, it is helpful to identify the legal issues which have been resolved by this Court in the three cases whose claimants I have just described. In Howard the Court granted Mr Howard's claim for judicial review, concluding as follows. The decisions

in November and December 2018, refusing Mr Howard's application for British Citizenship by naturalisation: (1) could not be impugned on the basis that the good character criterion in the Schedule 1 Criteria was incompatible with Mr Howard's right not to be the subject of unjustified discrimination (Human Rights Act 1998: Article 14, read with Article 8); but (2) was vitiated in public law terms by reason of an unreasonable failure to amend the good character guidance. Conclusion (1) rested on the conclusion (Howard at §§22-23) that the 'target' of the claim were the decisions to refuse citizenship, whose lawfulness was secured by section 6(2) of the 1998 Act, given the duty to apply a clear duty under primary legislation. However, the Court also reasoned – obiter – (at §§24-25) that the maintenance of the good character criterion among the Schedule 1 Criteria, as applicable to Windrush Generation applicants, was not incompatible with Article 14 (read with Article 8). That is what Howard decided. I was told that Howard – alone among the three cases – is under appeal to the Court of Appeal.

13. In Mahabir the Court granted the judicial review claim concluding, given the unaffordability of the fees for Mrs Mahabir's husband and their children to apply to join her in the UK, that the Secretary of State's approach to fees: (a) was incompatible with Mrs Mahabir's Article 8 rights (§169); and (b) was incompatible with the family members' Article 14 rights, because (i) failing to afford family members of a Windrush victim 'preferential treatment' as to fees (compared with other out of country applicants) was a 'failure to differentiate' without proportionate justification (§§108, 175) and moreover (ii) permitting fee-free applications from UK-resident children (compared with overseas-resident children) of a Windrush victim was a 'difference in treatment' without proportionate justification (§§109, 176).

14. In Vanriel the Court granted judicial review of the decisions to refuse, based on non-fulfilment of the 5 Year Rule, Mr Vanriel and Ms Tumi's applications for British citizenship by naturalisation. The Court reasoned that: (1) this was not a "challenge to the legislation per se" but "to its application in the claimants' individual cases" (§§40-41); (2) Article 14 (with Article 8) was applicable to a "wider cohort" than the Windrush Generation as described in Howard (§48), and applied to those recognisable as "people to whom the Windrush Scheme applies" who have been "prevented from satisfying" the 5 Year Rule by the "denial of entry which made the Windrush Scheme applicable to them" (§§53, 55); (3) the rigidity of the 5 Year Rule within the Schedule 1 Criteria was a 'failure to differentiate' without proportionate justification incompatible with Article 14 (§§43, 81, 86); and (4) the incompatibility was avoided by applying the interpretative obligation in section 3 of the 1998 Act to identify a discretion to disapply the 5 Year Rule to avoid such rigidity (§§113, 126).

Thlimmenos discrimination: unjustified failure to differentiate

15. A next key feature is a legal principle. It concerns Article 14 incompatibility by reason of 'failure to differentiate'. This is the recognised type of Article 14 discrimination challenge identified in Thlimmenos v Greece (2001) 31 EHRR 411. That type of challenge is based on a "failure to treat different situations differently" (Vanriel §43). It involves the "failure without objective and reasonable justification to treat differently persons whose situations are significantly different" (Howard §21). To understand how this type of 'failure to differentiate' Article 14 challenge can succeed, it is worth noting the key features of Thlimmenos. In December 1983 Mr Thlimmenos had been convicted of the felony of insubordination, his crime being his refusal to serve in the

Greek army, for religious reasons (§7). By virtue of Greek legislation, no person convicted of a felony could be appointed as a chartered accountant (§§15-16). As a consequence, when (in June 1988) Mr Thlimmenos passed his chartered accountant's exams, he was nevertheless refused an appointment as a chartered accountant, on grounds of his felony conviction (§8). That refusal was a straightforward application by Greek public authorities of the Greek legislation (§48). Mr Thlimmenos succeeded in the Strasbourg Court in showing that the refusal constituted unjustified discrimination in violation of Article 14 (with Article 9). The breach arose because the State had failed to introduce exceptions into the legislation (§48). This meant that the legislation failed, without an objective and reasonable justification, to 'treat differently' persons whose situations were 'significantly different' (§§44, 49). Since his felony conviction could not imply any unfitness, and since Mr Thlimmenos had already been punished for the offence, the exclusion did not pursue a 'legitimate aim' (§47).

16. As this Court has explained (see Vanriel §44), when the Court is addressing this kind of Thlimmenos Article 14 claim, the disciplined sequence of questions is:

> ***(i) Does the subject matter of the complaint "fall within the ambit" of one of the substantive Convention rights? (ii) Does the ground on which the Claimants claim to have suffered the discrimination constitute a "status"? (iii) Have they been treated in the same way as other people whose situation is relevantly different from theirs because they do not share that status? (iv). Did the Claimants' treatment have an objective and reasonable justification?***

Question (iv) itself involves a familiar four-stage test (see Vanriel §44), asking:

> ***(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.***

17. In a Thlimmenos claim, what has to be justified is "the measure itself", albeit that "regard must be had to the discriminatory impact when deciding whether the measure … is justified" (see Vanriel §§59-60). Mr Howard alleged this Thlimmenos type of Article 14 breach – for 'failure to differentiate' – in seeking to impugn as incompatible with Article 14 the good character criterion within the Schedule 1 Criteria (Howard §§19, 21). He failed (Howard §§22-25): see §12 above. Mrs Mahabir and her family also alleged this Thlimmenos type of Article 14 breach – failure to differentiate – in seeking to impugn as incompatible with Article 14 the approach to fee-waivers for family members (Mahabir §108), because the general overseas-applicant rules were applied to them (§§108, 115-118). They succeeded (§175): see §13 above. Mr Vanriel and Ms Tumi alleged this Thlimmenos type of Article 14 breach – failure to differentiate – in seeking to impugn as incompatible with Article 14 the rigidity of the 5 Year Rule in the Schedule 1 Criteria (Vanriel §43). They also succeeded (Vanriel §86): see §14 above.

Discrimination: 'differential treatment'

18. The final key feature is another legal principle. Alongside Thlimmenos 'failure to differentiate' there is a (more conventional) type of Article 14 discrimination. This is a 'differential treatment' type of Article 14 breach, where measures "treat differently persons in analogous situations without providing an objective and reasonable

justification" (Thlimmenos at §44). In this kind of challenge, what must be justified is "the discriminatory impact" (Vanriel §59). Mrs Mahabir and her family, as a further Article 14 argument, also alleged this 'differential treatment' type of Article 14 breach, in seeking to impugn as incompatible with Article 14 the approach to fee-waivers for family members (Mahabir §109), because there was a fee-free provision for UK-resident children of Windrush victims (§§109, 120). They succeeded (§176): see §13 above. An example relied on in argument before me as illustrating unjustified discrimination in breach of Article 14 through 'differential treatment', concerns provisions of primary legislation in the case of R (Johnson) v SSHD [2016] UKSC 56. They were provisions which imposed a good character test, except on those who would automatically have acquired citizenship, which exception had been attainable by those whose parents had been married at the date of their birth, but not to those whose parents were unmarried. The Supreme Court held that those provisions breached Article 14 and gave a declaration of incompatibility.

Article 14: The Claim

19. Having identified these various features of the contextual setting, I can turn to identify the first – and main – ground on which permission for judicial review is sought. The essence of the Article 14 claim advanced by Mr Pennington-Benton for the Claimant, as I see it, is as follows:

i) The threshold for the purposes of permission for judicial review is arguability with a realistic prospect of success. The 'target' of the claim is the incompatibility with Article 14 rights of the Schedule 1 Criteria in the primary legislation, as applied to the Windrush Generation. The remedy would be a declaration of incompatibility, for which the 1998 Act made provision. The Claimant has a "sufficient interest" for the purposes of the general judicial review standing test. He does not need to meet the 1998 Act "victim" test since (at least arguably) that test does not apply to bar a claim a declaration of incompatibility (reference was made to Re Northern Ireland Human Rights Commission [2018] UKSC 27 at §62).

ii) Applied to the Windrush Generation as described in Howard §19 (§3 above), the otherwise-justifiable Schedule 1 Criteria (§4 above) are unjustified discrimination of the Thlimmenos 'failure to differentiate' type (§§15-17 above). That is the primary argument. The fact that those criteria are found in legislative provisions, which criteria are moreover in other cases justifiable, is no answer; just as it was no answer in Thlimmenos itself (§15 above). A refusal of citizenship is within the "ambit" of Article 8, so Thlimmenos question (i) (§16 above) is satisfied: see Vanriel §45. The Windrush Generation is a class identifiable by statutory provisions, constituting a "status", satisfying question (ii): see Howard §19 and Vanriel §47. There is a 'failure to differentiate'. That is because Schedule 1 Criteria are still applied (§7 above) to the Windrush Generation, in that respect treating the Windrush Generation in the same way as those others who do not currently have the recognised legal status of British citizenship. But those 'others' are 'relevantly different' from the Windrush Generation, because they do not share the same 'status'. This means question (iii) is also satisfied, as it was treated as being in Howard (see §24) and Vanriel at §§54-55. The focus is therefore on question (iv): whether there is objective and reasonable justification – in terms of a legitimate objective and a reasonable

relationship of proportionality – for the failure in the 1981 Act to treat the Windrush Generation differently from others applying for British citizenship by naturalisation.

iii) There is an alternative way of putting the Article 14 argument, just as there was in Mahabir (see §13 above). Applied to the Windrush Generation as described in Howard §19 (§3 above), but not to those others who do already have the recognised legal status of British citizenship, the otherwise-justifiable Schedule 1 Criteria (§4 above) constitute unjustified discrimination of the more conventional Johnson 'differential treatment' type (§18 above). That is the secondary argument. As with the primary 'failure to differentiate' argument, a refusal of citizenship is within the "ambit" of Article 8. The Windrush Generation, as a class identifiable by statutory provisions, constitutes a "status". There is a 'differential treatment'. That is because Schedule 1 Criteria are still applied (§7 above) to the Windrush Generation, in that respect treating the Windrush Generation 'differently' from those 'others' who currently have the recognised legal status of British citizenship. Those 'others' are 'comparable' from the Windrush Generation. The focus is therefore on whether there is objective and reasonable justification – in terms of a legitimate aim and a reasonable relationship of proportionality – for the 1981 Act treating the Windrush Generation differently from others already having the recognised status of British citizenship.

iv) On the key question of 'objective and reasonable justification' – whichever of the two ways in which the argument is put – there is a critical feature in the analysis. It is this. The Windrush Generation is already recognisable – and already accepted – as being and having been "British", at all relevant times in the past and present. It is this critical feature – acceptance of the Windrush Generation as "already British" – that prevents the Schedule 1 Criteria from having a legitimate aim and/or a reasonable relationship of proportionality, when those Criteria are applied to the Windrush Generation: (1) focusing on the fact that they are applied to others lacking recognised British citizenship status, so that it is the measure and its failure to 'differentiate' which is unjustified discrimination (the primary argument); and/or (2) focusing on the fact that they are not applied to others already having recognised British citizenship status, so that it is the 'differential treatment' which is unjustified discrimination (the secondary argument).

v) This critical feature is supported by the following five points. (1) Parliament's recognition between 1983 and 1988 of the Windrush Generation as substantively British, reflected in the statutory entitlement to British citizenship by registration. (2) The rationale for that recognition by Parliament, based on the satisfaction of the First and Second Components. (3) A general recognition of this same substantive 'Britishness' on the part of others including the general public, reflected in news and other media reports. (4) The recognition that one of the reasons why the Windrush Scandal is described as a "scandal" (§2 above) is because members of the Windrush Generation – such as Mr Howard and Mr Vanriel – were required to meet the Schedule 1 Criteria (including good character in the case of Mr Howard and the 5 Year Rule in the case of Mr

Vanriel). (5) The deliberate and thought-out public statements of the Government, epitomised in the Windrush Statement.

vi) So far as point (5) is concerned, the key parts of the Windrush Statement (§5 above) are these: "They are British in all but legal status"; "we must urgently put it right, because it is abundantly clear that everyone considers people who came in the Windrush Generation to be British, but under the current rules this is not the case"; "I want the Windrush generation to acquire the status they deserve – British citizenship – quickly, and at no cost and with proactive assistance through the process". If these straightforward words mean what they say, then maintaining the Schedule 1 Criteria is a position which lacks objective and reasonable justification. That is the position when members of the Windrush Generation are compared with foreign nationals seeking British citizenship by naturalisation, when the justification for the 'measure' is considered, having regard to the discriminatory impact. The Schedule 1 Criteria, viewed in this way, do not pursue a "legitimate aim", any more than did the Greek legislative measures in Thlimmenos. Even if and insofar as there is a "legitimate aim", there is no "reasonable relationship of proportionality" between the means employed and the aim sought to be realised.

vii) This is the position, alternatively, when members of the Windrush Generation are compared with those already treated as having the status of British citizenship, when the justification for the 'differential treatment' is considered. The Schedule 1 Criteria, viewed in this way, do not pursue a "legitimate aim". Even if and insofar as there is a "legitimate aim", there is no "reasonable relationship of proportionality" between the means employed and the aim sought to be realised. The Schedule 1 Criteria constitute a measure which directly discriminates, just as did the fee arrangements applicable to the family of a Windrush victim who are resident abroad but not such a family residence in the UK; just as did the statutory provisions relating to good character and parental married status regarding automatic entitlement to citizenship at birth in Johnson. The differential treatment, in terms of the position of the other established British categories and the Windrush Generation who must satisfy the Schedule 1 Criteria, fails to pursue a legitimate aim; but in any event the difference in treatment is not justified in terms of a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

viii) That is the position in relation to each of the Schedule 1 Criteria which have not now been waived: the 5 Year Rule (including the implicit requirement of current presence in the UK); the good character requirement; and the permanent home intention criterion. The maintenance of these criteria, before a member of the Windrush Generation can secure British citizenship on application perpetuates, rather than cures, the injustice which the Windrush statement identified and which the Windrush scheme was created to address.

20. That, then, is the essence of the Claimant's Article 14 claim. Is it a viable claim in law? Is it properly arguable with a realistic prospect of success?

Article 14: Arguability

21. I do not think it is. In my judgment, there is no realistic prospect that this Court at a substantive hearing would uphold the Claimant's Article 14 claim, either on the primary way in which it is put, or on the alternative way in which it is put. In my judgment, the claim does not pass the permission-stage threshold of arguability.

22. It is, I think, appropriate to start by identifying the ambition of what is being put forward on behalf of the Claimant, by Mr Pennington-Benton. He submits that it is incompatible with Article 14 for the statute book to maintain the Schedule 1 Criteria – any one of them – in the case of any person falling within the Windrush Generation. That means each and every individual who meets the First Component (because they were a Commonwealth citizen ordinarily resident in the UK at 1 January 1973) and who meets the Second Component (because they were in the UK and could meet the 5 Year Rule on any date between 1 January 1983 and 1 January 1988), is required by Article 14 to be recognised on the statute book as having a present entitlement to obtain British citizenship on application. That means no further substantive criterion can be applied to them, by Parliament, compatibly with Article 14. It means Article 14 compatibility requires a statutory entitlement to citizenship on application for anyone who could have secured it in the five years before the Cut-Off Point, without more.

23. The ambition of that claim can be encapsulated in other ways. It can be seen by reference to the reasoning and analysis in the previous cases:

    i) If the Claimant is right, it would mean that the analysis of Swift J in Howard was unsound in law. Swift J reasoned (strictly obiter: see §8 above) in that case at §§24-25 that the presence of the good character criterion on the statute-book, as one of the Schedule 1 Criteria applicable to a member of the Windrush Generation, was compatible with Article 14. The Claimant's inexorable logic is that this was wrong. That is because any one of the Schedule 1 Criteria, applicable to a member of the Windrush Generation, is of itself incompatible with Article 14.

    ii) If the Claimant is right, it would also mean that the analysis of Bourne J in Vanriel was unsound in law. Mr Vanriel was a member of the Windrush Generation as described in Howard. Bourne J identified (at §§80-86) an Article 14 vice in the application of the 5 Year Rule in the Schedule 1 Criteria to Mr Vanriel (and others). That vice lay in the rigidity of a 5 Year Rule within the Schedule 1 Criteria, whose rigidity meant there was no discretion in the case of a person "stranded" outside the UK by virtue of Home Office action, denying them entry into the UK, which Home Office action served to place the affected individual in the position of being a 'Windrush victim'. The Claimant's inexorable logic is that this was wrong. Again, that is because any one of the Schedule 1 Criteria, applicable to a member of the Windrush Generation, is of itself incompatible with Article 14.

    iii) If the Claimant is right, it means that Mr Buttler QC – who represented Mr Vanriel and Ms Tumi – would have been wrong to accept, in the context of Windrush victims, the "legitimate role and policy which requires citizenship applicants to show sufficiently strong connection with and commitment to the UK" (Vanriel §75). The Claimant's inexorable logic is that this was wrong. Again, that is because any one of the Schedule 1 Criteria – including the 5 Year Rule (with its implicit requirement of presence in the UK) and also including

the Schedule 1 Criterion which requires an application to intend to make the UK their principal home – would, when applicable to a member of the Windrush Generation, of itself be incompatible with Article 14.

iv) If the Claimant is right, it means that Bourne J would have been wrong in Vanriel to accept, in the context of any Windrush victim who (like Mr Vanriel himself) is a member of the Windrush Generation, that the 5 Year Rule "clearly has the legitimate aim of ensuring that an applicant for citizenship has a clear, strong connection with the UK evidenced by presence here" as is seen in policy statements emphasising the requirement to "demonstrate close links with, and a commitment to the UK" (Vanriel §61). Once again, the Claimant's inexorable logic is that this was wrong. Again, that is because any one of the Schedule 1 Criteria – including the 5 Year Rule (with its implicit requirement of presence in the UK) and also including the Schedule 1 Criterion which requires an application to intend to make the UK their principal home – would, when applicable to a member of the Windrush Generation, of itself be incompatible with Article 14.

v) If the Claimant is right, it would mean that Swift J would have been wrong in Howard to identify the good character requirement within the Schedule 1 Criteria as "quite plainly" pursuing "a legitimate objective", viewed in the context of Article 14 and the Windrush Generation (Howard at §24). Swift J would also have been wrong in characterising the attempt to "wind back of the clock to the period prior to January 1988" as "an objective not capable of being secured by resort to any measurable legal standard available to the court" (Howard at §25).

It is fair – as well as transparent – to say that implications of this nature, arising from the logic of the argument, do serve to have an exacting effect so far as concerns judicial scrutiny of the viability of the claim.

24. In my judgment, the Article 14 claim could not lead the judicial review Court to a finding of a lack of objective justification for the claimed discrimination – whether in terms of absence of a legitimate aim or absence of a reasonable relationship of proportionality to a legitimate aim – whichever of the two ways the Article 14 discrimination is characterised. The starting-point is that the objective justification part of the Article 14 analysis, without which the claim cannot succeed, would fall to be viewed against a broad and principled 'latitude' (sometimes called a 'margin of discretionary judgment') which is applicable in the context of primary legislation in the areas of immigration and nationality (as to which, see Vanriel at §64).

25. Entirely understandably, the point has been made on behalf of the Claimant (see §19(v) above) that the entitlement to British citizenship by registration, which Parliament extended by section 7 of the 1981 Act so as to be applicable in the five years from 1 January 1983 to 1 January 1988, reflects a statutory recognition of "Britishness" by Parliament, under that statutory regime, and at that time. That is, in its nature, a specific point about the design of past primary legislation and about the fact of it being changed by Parliament. The difficulty with that specific point is this. It is, in its nature, a point which could be made in any situation where a citizenship statute has changed so as to introduce more exacting substantive criteria, with or without transitional provisions allowing a further period for applications under the pre-existing criteria but with a cut-

off date, and with the consequence that a category of people who could have obtained citizenship on application. This same difficulty can be put in another way. It is true that this entitlement was indeed recognised by Parliament, through the design of section 7, but it is nevertheless also true that what Parliament was requiring through section 7 was an application having been made within a prescribed time window, before the Cut-Off Point, at which that particular unqualified entitlement was and would be lost. For these reasons, there are limits to the reliance that can be placed on the position which Parliament adopted until 1 January 1988.

26. In my judgment, the high water-mark of Mr Pennington-Benton's Article 14 'justification' argument is to be found in the language of the Windrush Statement. The Government's position – in that Statement – was put in this language. It is striking:

> ***They are British in all but legal status …***
>
> ***… we must urgently put it right, because it is abundantly clear that everyone considers people who came in the Windrush generation to be British, but under the current rules this is not the case.***
>
> ***I want the Windrush generation to acquire the status they deserve – British citizenship – quickly, and at no cost and with proactive assistance through the process.***

This language, of the then Home Secretary, describing the policy position of the British Government, does bring into sharp focus the subsequent continuation on the statute-book of the Schedule 1 Criteria. It clearly gives pause for reflection.

27. On the other hand, the Windrush Statement – with its striking language – was front and central in Howard and again in Vanriel. The Windrush Statement featured strongly in Swift J's analysis of the reasonableness of the failure to revise the good character guidance: see Howard at §34. The Windrush Statement also featured strongly in the argument, and seemingly in the analysis, of the Article 14 challenge to the rigidity of the 5 Year Rule in the context of Windrush victims "stranded" by reason of Home Office action: see Vanriel §§78 and 82. Yet neither in Howard nor in Vanriel was the Windrush Statement treated as supporting a finding of inconsistency, in Article 14 terms, with the continuation in the primary legislation of Schedule 1 Criteria. Mr Pennington-Benton accepts that the Windrush Statement cannot be treated, by any recognisable public law standard, as a Government "promise" as to the ongoing content of the primary legislation. It can also be pointed out that the Windrush Statement would need to be read and understood in context, and as a whole. The Windrush Statement went on to identify specific ways in which actions were going to be taken and requirements were going to be waived. But these did not extend to any statement relating to the maintenance and applicability, in the primary legislation, of the Schedule 1 Criteria. Furthermore, when the Windrush Scheme was announced – a month after the Windrush Statement – specific reference was made (see §6 above) to the change regarding the knowledge of language and life aspects of the Schedule 1 Criteria but with no reference to any discontinuance of other aspects of the Schedule 1 Criteria, nor to any action promoting any change in the primary legislation so that the Schedule 1 Criteria would be disapplied. Nor was there ever any statement as to which of the further Schedule 1 Criteria should be disapplied, in the context of which of the constituent groups (or cohorts) associated with the Windrush Scandal (§2 above). To illustrate that point, it is worth remembering that Mrs Mahabir was a "Windrush victim" (§9 above), and would be regarded as falling within aspects of the Windrush Statement, but she

does not fall within the Howard "Windrush Generation" (§3 above), the Schedule 1 Criteria were applied to her, and she would not benefit from the Claimant's Article 14 argument. Nor would Ms Tumi (§11 above).

28. Also relevant, in my judgment, is that there are known to have been various reports into the Windrush Scandal. There have been various responses to the Windrush Statement and the Windrush Scheme. There have been concrete conclusions and recommendations. These include the various recommendations in the 'Windrush Lessons Learned Review' published in March 2020, which Mr Brown for the Defendant told me the Government has accepted in their entirety. The Court was not shown any conclusion or recommendation, identifying the (or an) obvious injustice (or remedial justice) of the Windrush Scandal – in light of the Windrush Statement – along the straightforward lines that the Schedule 1 Criteria on the statute book must now be disapplied, across the board, in the case of anyone falling within the Howard Windrush Generation. This point, as with the points about how the Windrush Scheme was announced, has particular resonance given the contention which is made on behalf of the Claimant: that the maintenance of the Schedule 1 Criteria "fails to cure the injustice that the Windrush Scheme was created to address". I was told by both Counsel that the Lessons Learned Review included a recommendation (Recommendation 21) about simplifying the legislation. But nobody has said or suggested that this was or included a recommendation of the wholesale disapplication of the Schedule 1 Criteria for those within the class identified in Howard as the Windrush Generation. Linked to this, it is also relevant, in my judgment, for the judicial review Court to have in mind – as Mr Brown for the Defendant reminded me – that there has been a Bill before Parliament which addresses the Schedule 1 Criteria, including in the context of the Windrush Scandal, and specifically the 5 Year Rule and the question of rigidity and discretion. This was the Bill which Bourne J noted was "on the horizon" (Vanriel §36). From this, the point can fairly be made that the Windrush Scandal, the Windrush Statement and the Windrush Scheme are all matters which have featured in scrutiny in Parliament on the extent to which the Schedule 1 Criteria should be maintained or adjusted.

29. Legislation on immigration and nationality necessarily involve lines being drawn, maintained, redrawn – including by Parliament by way of primary legislation – for policy reasons. This is recognisably in an area for scrutiny in the political and Parliamentary process. It is recognisably an area where there is a broad policy latitude. There is no immunity from human rights scrutiny, including compatibility with Article 14, as is exemplified by Johnson (§18 above). In light of the features which I have identified, and whether viewed in Thlimmenos terms, or alternatively characterised as 'differential treatment' through the application to the Windrush Generation of measures not applied to those already recognised conferred with the status of British citizen, I can see no realistically viable pathway of analysis which might lead to the outcome of the Court characterising the continued Schedule 1 Criteria (§7 above) as being: a measure 'failing to differentiate' which, having regard to its impact on the Windrush Generation, lacks objective and reasonable justification, whether as to the pursuit of a legitimate aim or as to a reasonable relationship of proportionality between the means employed and aims sought to be realised; nor of being a measure 'treating differently' the Windrush Generation from others recognised as British without an objective and reasonable justification, again whether as to justification for the 'different treatment' in terms of the pursuit of a legitimate aim or as to the reasonable relationship of proportionality.

30. Finally, there is an important distinction – reflected in the cases – between a criterion on the statute book and its fact-specific and context-specific 'application'. This was a point encapsulated by Swift J in Howard, when he spoke of criteria "capable of pursuing" a legitimate purpose "in a reasonable and proportionate way", with the primary legislation leaving "open to the Home Secretary to identify the specifics … either in Regulations or … through a policy" (at §24); and again when he spoke of the "true nature" or Mr Howard's case as concerning "the way in which the good character requirement" was "applied to Mr Howard and other members of the Windrush Generation" (at §25). What the cases in this area recognise is that there can be a public law vice, warranting judicial intervention, in the context-specific 'application' of the Schedule 1 Criteria in cases arising under the Windrush Scandal. There was a specific Article 14 vice in the absence of any discretion in the 'application' of the 5 Year Rule in cases of those "stranded" by Home Office action (Vanriel). There was a specific reasonableness vice in the unchanged content of the good character guidance governing the 'application' of the good character criterion (Howard). The cases show that public law (Howard) and human rights (Vanriel) principles can have an impact requiring a measured recalibration in the 'application' of Schedule 1 Criteria based on principle standards of reasonableness (Howard) and the need for proportionate justification for a 'failure to differentiate' (Vanriel). The nature – which includes what I earlier characterised as the 'ambition' – of the Article 14 analysis which the Court is being invited to adopt in the present claim, to characterise as unjustified discrimination the retention (see §7 above) of all (and any) of the Schedule 1 Criteria, on the face of the primary legislation, in my judgment, stretches beyond breaking point the possible viability of a human rights discrimination argument, for the reasons which I have endeavoured to explain. Since I cannot see a claim with any realistic prospect of success it would not be appropriate to grant permission for judicial review.

Test for challenging 'legislation per se'

31. There was common ground in the argument before me as to the applicable legal test. Mr Pennington-Benton for the Claimant accepted, as Mr Brown for the Defendant contended, that – since this is not a claim challenging the application of legislation to individual cases but is rather a challenge to the legislation per se – the appropriate and applicable legal test would involve asking whether "the relevant legislative provision is incapable of operation in a proportionate way in all, almost all, cases": see Vanriel at §§40-41. My conclusion on arguability does not rest on the applicability of that test. Still less does it rest on treating "all, or almost all, cases" as applicable beyond "all or almost all" of the Windrush Generation. But the test, accepted as applicable, is plainly designed to be a heightened one. It can but reinforce the conclusion on viability at which I have, in any event, arrived.

Article 14: 'pleading' and 'standing' points

32. Before leaving the Article 14 claim, I record that at the oral permission hearing Mr Brown for the Defendant did not take his stand on any "pleading point" or any point relating to the Claimant's "standing". In my judgment, he was wise not to do so. As to pleading and Article 14, the question of a declaration of incompatibility based on Article 14 and the Schedule 1 Criteria was, in my judgment, sufficiently squarely identified on the face of Claimant's "Additional Grounds for Judicial Review", on which it had properly been agreed by the Defendant that the Claimant could rely. The precise 'class' (cohort) which was relied on lacked precision. But one of the virtues of

the oral hearing is to examine the logic (and clarity) of what is being put forward. In the present case, and without any possible prejudice to the Defendant, Mr Pennington-Benton's analysis of the relevant cohort settled into a reliance on the very same 'class' which Swift J had identified as the Windrush Generation in Howard. Turning to 'standing', the Claimant is a member of the Windrush Generation who has, for his part, achieved British citizenship by naturalisation. In the papers before the Court, he expresses an anxious concern for those whom he sees as dispossessed and excluded. The papers also describe his active work undertaken, for the benefit of Windrush victims, in conjunction with the "Windrush Defenders Group", and working with lawyers, law students and community organisers (pro bono) to help other people in conjunction with the Windrush Scheme. Mr Brown did not contend, for the purposes of this permission stage, that the Claimant would need "victim" status in order to make a claim for a declaration of incompatibility. In these circumstances, had I been able to identify any viable ground for judicial review for a declaration of incompatibility based on Article 14, regarding the Schedule 1 Criteria as applicable to the Windrush Generation, with a realistic prospect of success as a substantive hearing, I would have granted permission for judicial review.

The Windrush Compensation Scheme

33. There was a further aspect to the claim for judicial review. There is a Windrush Compensation Scheme, details of which are (see Mahabir at §56) "found in the National Audit Office's report *Handling of the Windrush Situation*, published on 5 December 2018, at paras 4.5-4.8". I was shown the NAO's May 2021 report entitled "Investigation into the Windrush Compensation Scheme", describing the scheme as "aimed to compensate members of the Windrush generation and their families for the losses and impacts they have suffered due to not being able to demonstrate their lawful immigration status". In the papers before me, the Claimant has submitted that the Windrush Compensation Scheme can be seen to be unfit for purpose, and to fall foul of applicable public law standards. Two points were emphasised in the brief written and oral submissions made by Mr Pennington-Benton. One point concerns the Defendant's refusal to adopt a proposal which the Claimant made for a £10,000 'reparation' sum, which he said should be applied to an identified class of compensation scheme claimant. The class was, in essence, this: any Caribbean claimant, satisfying the First Component, who 'succeeds' in their claim under the Windrush Compensation Scheme. The answer to that point was identified by Farbey J refusing permission for judicial review on 13 August 2021: "The Secretary of State is not bound by any principle of public law to accept the Claimant's idea of a £10,000 symbolic payment." That is unanswerable and nothing written or said on the Claimant's behalf begins to answer it. The other Compensation Scheme point which was emphasised relates to the proportion of claims, and the level of compensation amounts, which are recorded to have been paid by the scheme. The answer to this point is different. The nature of the pleaded grounds for judicial review and of the written and oral submissions – alongside the materials which have been placed before the Court – come nowhere near reaching, to an appropriate standard of clarity and rigour – any identifiable viable ground for judicial review having a realistic prospect of success. I am not saying that the Compensation Scheme is, beyond reasonable argument, being operated in a way which would satisfy relevant and applicable legal standards, including those applicable to systemic challenges. The brevity and generality of the points made come nowhere near identifying a viable systemic – or other – claim for judicial review. In discharge of his duty of candour, Mr

Brown for the Defendant creditably informed the Court that there is on foot a judicial review pre-action letter, relating to aspects in the operation of the compensation scheme, to which the Defendant would be responding, in the context of a possible legal challenge brought by the Good Law Project. I do not know whether is, or is not, any viable issue relating to the operation of the Compensation Scheme, whether referable to the concrete facts of specific individuals, or more generally. All that I can properly conclude, as I must, is that the Claimant identified no viable ground for judicial review in the very brief, and general, points that were made on this part of the case.

Conclusion

34. For the reasons that I have given, permission for judicial review is refused. In refusing permission on the papers, Farbey J expressed the Court's gratitude to the Claimant's legal representatives for the pro bono assistance which they had given to the Court in this case. I repeat that expression of gratitude. I thank both Counsel, and their teams, for their assistance, in the preparation of the materials and in the preparation and presentation of the arguments.