Case No: JR-2022-LON-000488

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

In the matter of an application for Judicial Review

Field House,
Breams Buildings
London, EC4A 1WR

31st March 2023

Before:

THE HON. MRS JUSTICE THORNTON

- -

Between:

THE KING
on the application of

FRS

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- and -

AB (a minor by his brother FRS and litigation friend)
CD (a minor by his brother FRS and litigation friend)

Interested parties

FINAL ORDER

UPON hearing from leading counsel for the Applicant and counsel for the Respondent; and

UPON the Respondent stating at paragraph 4 of her Detailed Grounds of 6th January 2023 that, if the Respondent agrees to waive the requirement to enrol biometrics prior to considering the application, she would then consider the Applicant's application for family reunion under Part 11 of the Immigration Rules, and leave outside the rules, such that no fee would be payable

IT IS ORDERED that:

1. The application for judicial review is dismissed.
2. The Respondent shall pay the Applicant's reasonable costs to 11 January 2023.
3. The Applicant shall pay the Respondent's reasonable costs to be assessed if not agreed from 11 January 2023.
4. If the Respondent seeks to enforce the order, the amount of costs payable by the Applicant under section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is to be determined in accordance with the Civil Legal Aid (Costs) Regulations 2013.
5. There shall be a detailed assessment of the Applicant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.
6. Permission to appeal is refused.

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Sonali Naik KC
Justine Fisher
(instructed by Duncan Lewis), for the applicant

Tom Tabori
(instructed by the Government Legal Department) for the respondent

Hearing date: 23rd February 2023

- -

J U D G M E N T

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The Hon. Mrs Justice Thornton:

Introduction

1. The Applicant is a national of Afghanistan who left the country in fear of persecution after his father and uncle were killed by the Taliban. He has been granted refugee status by the Respondent. His two young brothers remain in Afghanistan. The elders looking after them received death threats from the Taliban for doing so. As a result, the brothers were asked to leave their care. In September 2021, the Applicant applied to the Respondent for a visa for his brothers to join him. The application stalled when the brothers were unable to travel to Pakistan to enrol their biometric data (fingerprints and facial image) and the Applicant brought this claim for judicial review.

2. Since proceedings were issued, the Respondent's policy on the requirement for biometric data in entry clearance applications has evolved, following a series of decisions by the Courts and the Upper Tribunal. The Respondent now accepts she has discretion under the Immigration (Biometric Registration) Regulations 2008 (2008/3048) to waive or defer the requirement for biometric data in any application for entry clearance. The Respondent is due to publish guidance to address the situation the Applicant's brothers find themselves in, namely where the enrolment of biometric data will require an applicant for entry clearance to make an unsafe journey in a conflict zone.

3. The evolution of the Respondent's policy has led to a change of position in the decision making in the present case. In January of this year, the Respondent agreed to consider the Applicant's request for a waiver/deferral of biometric data. She intends to do so once the relevant guidance is published. In the meantime, she has also agreed to consider any application for waiver/deferral as a matter of urgency should she be requested to do so. To date, the Applicant has not made any such application.

4. The Respondent primary position in these proceedings, therefore, is that the claim is now academic, or premature, or else requires the Applicant to advance substantive arguments that were not pleaded in the grounds of claim. It is said that the Court should not permit a 'rolling' judicial review of this nature.

5. The Applicant contends that the claim remains 'live' because of concerns about the Respondent's proposed approach to its reconsideration, given the 'compelling facts of the present case'. The Applicant seeks a mandatory order requiring the Respondent to take a decision 'in principle' on the merits of the application for family reunion prior to any decision on the Applicant's application for deferral of the provision of biometric data.

6. Accordingly, as at the date of the hearing (23 February 2023) the issues arising in the claim were: 1) is the claim now academic? If so; 2) should the Tribunal nonetheless entertain the claim? If so; 3) is the

Respondent's decision making unlawful? If so; 4) should the Tribunal exercise its discretion to make the mandatory order sought?

7. The precariousness of the brothers' situation in Kabul is evident. However, the question for the Tribunal is whether the Respondent has acted unlawfully in her decision making.

Background

Leave to enter and the requirement for a visa

8. Non-UK nationals wishing to come to the UK require leave to enter (Section 3 Immigration Act 1971). For nationals of Afghanistan the grant of leave is by way of entry clearance granted overseas, which takes the form of a visa.

9. The Secretary of State's practice governing the grant of leave to enter is set out in the Immigration Rules, but the Secretary of State retains a discretion to grant leave to enter in circumstances not provided for in the Rules. This is referred to as leave outside the rules (LOTR). Relevant Home Office guidance emphasises the exceptional character of LOTR (S & AZ v Secretary of State for the Home Department [2022] EWCA Civ 1092 at [13]).

The visa application process

10. Applications for a visa must typically be made online, on the 'gov.uk' website. The most typical visa "routes" are identified (visitor visas, student visas and family visas) and have separate online application forms. Overseas applicants for LOTR must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges.

The requirement for biometrics

11. Subject to the power to waive, applicants for leave to enter are required to "enrol their biometrics" – that is, to have their fingerprints and a photograph taken and supplied to the Home Office for registration. The relevant regulations are the Immigration (Biometric Registration) Regulations 2008 (2008/3048) (Regulation 3A). A failure to comply with the requirement may lead to the refusal of entry clearance (Regulation 23). As is now common ground, there is a discretion available to the authorised person to waive or defer the requirement for biometric information (Regulations 5(1) and 8).

12. Enrolment of biometric data takes place at authorised "Visa Application Centres" ("VACs"). There are VACs in most, but not all, overseas countries. There is no VAC in Afghanistan.

C's visa application – September 2021

13. On 30 September 2021, the Applicant submitted an online application, outside the rules, for family reunion of siblings. The application was for his two young brothers, who remain in Afghanistan, to join him in the UK.

14. At the time, following submission of an online application, an applicant was given a reference number and asked to complete further tasks, one of which was to identify the country in which they wished to enrol their biometrics. Once an applicant had done so, the system would redirect them to the VAC provider in that country and the applicant would then arrange an appointment and travel to that Centre to provide the biometrics.

15. In accordance with this procedure, an appointment was booked for the Applicant's brothers at the VAC in Islamabad (Pakistan). However, the brothers were refused a visa to enter Pakistan so were unable to attend the appointment. By email dated 7 December 2021, the Applicant's counsel (Junior Counsel) emailed the Respondent explaining the situation and requesting the application be considered without biometrics.

16. On 12 January 2022, the Respondent replied. No mention was made of the request to waive the biometric data. Instead, the letter disputed the visa route chosen by the Applicant concluding that it would be necessary to demonstrate that the most appropriate visa route had been pursued.

The issue of proceedings

17. The Applicant's representatives treated the Respondent's email of 12 January 2022 as a decision and sought judicial review. A pre action letter was sent on 22 March 2022 and the claim was issued on 8 April 2022.

18. Paragraph 1 of the grounds of claim states that the Applicant challenges the Respondent's:

> 1. Failure to accept the application for family reunion. In this respect, the body of the grounds refer to the Respondent's failure to grant the application on the basis of non-payment of a fee which is said to be unreasonable and unlawful [§23]). It is said that the applicant should not be required to apply for a fee waiver due to the delays involved [§23]). The application should be considered 'as a matter of urgency' [§21].
>
> 2. Failure to make provision for those like the brothers who are unable to attend a VAC by waiving the requirement for biometrics [§24 & 25].
>
> 3. Unlawful family reunion policy: the definition of "family members" under the family reunion policy is said to be limited and the Applicant's siblings (minors) should be considered "qualified family members" under the definition [§26 – 28].
>
> 4. Breach of the Equality Act on the basis Afghan nationals are being treated differently from Ukrainian nationals, on the basis of their nationality and race [§29].

19. The following relief was sought: a declaration that the failure to consider the application is unlawful; a declaration that the Applicant's rights under Article 3 and/or Article 8 of the European Convention on

Human Rights (ECHR) have been violated; and an order that the Respondent should consider the application forthwith.

20. The Respondent served summary grounds of defence on 31 May 2022. The summary grounds questioned whether the email of 12 January 2022 could be said to be a decision. The grounds suggested the Applicant make a visa application and request a fee waiver and waiver/deferral of the biometric data, whilst noting that the discretion to waive would only be exercised in 'exceptional and extraordinary circumstances' (emphasis added). The grounds also state that the existing application has lapsed because of a failure to enrol biometrics within the 240 days stipulated on the website.

The evolving policy framework

21. The Respondent's policy has evolved during the proceedings following a series of decisions by the Courts/Upper Tribunal. The following is a brief summary of the Tribunal's understanding of the policy evolution, as extracted from the cases cited to the Tribunal.

22. At the time of the Applicant's application for a visa the Respondent's policy was to treat an application as invalid unless and until biometric information had been provided. Junior Counsel for the Applicant, who made the application (acting on a pro bono basis) explained that the form required either the submission of biometric data or an appointment to be made at a VAC. There was no option to apply for waiver or deferral. Once the brothers could not get to the VAC in Islamabad, the application did not progress, which led to her email of 7 December 2021 to the Respondent requesting a waiver of the biometrics requirement.

23. Subsequently, the Respondent's policy guidance on family reunion was found to be unlawful in failing to recognise the discretion available under the 2008 Regulations in relation to the enrolment of biometric information (R (SGW) v Secretary of State for the Home Department (Biometrics – family reunion policy) [2022] UKUT 15). The Respondent's subsequent approach of requiring 'extraordinary' circumstances before biometric data could be waived (referred to in the summary grounds of defence) was also considered unlawful (MRS & FS v ECO (JR 202 LON 000178). The online application forms were criticised in various respects (S & AZ v SSHD [2022] EWHC 1402 (Admin) and [2022] EWCA Civ 1092.

24. The Respondent's family reunion policy has since been updated and the online application form has been amended to allow applicants to request waiver of the requirement to submit biometric information when they make their application.

25. The most recent development of relevance in this regard is that the Respondent intends to produce guidance to address the situation where the provision of biometric data requires an applicant to expose themselves to personal risk by making an unsafe journey in a conflict zone. The current timetable for the publication of the guidance is said to be 'the early part of 2023'.

The Respondent's decision making in other cases

26. The Respondent's decision making on the provision of biometric data has evolved in other similar cases, in line with the policy developments explained above. During the substantive hearing in KA & Ors v SSHD & Ors [2022] EWHC 2473 (Admin), Counsel for the Secretary of State indicated that any application for entry clearance without biometrics made by the claimants in that case would not be rejected automatically but considered on its merits (including whether to waive or defer the biometrics requirement). Having remarked that the evidential position of the defendant had shifted over time, the judge considered the challenge was academic:

> "*… Issue 1 has now largely, if not entirely, fallen away. The premise on which it was based, namely that D1 will not even consider an application for entry clearance without biometrics, is unsound. She will." (117)*

27. Similarly, in AB v SSHD & Ors [2023] EWHC 287 (Admin), the Secretary of State accepted, after the issue of proceedings, that she would at least consider whether an application for LOTR could be substantively determined in advance of receiving biometric data. As at the hearing date in that case the Secretary of State had not yet made that decision. Having also observed that the issues in the case had 'somewhat shifted during the course of proceedings', the judge in that case went on to say as follows:

> *"(18) The issues raised in the Claimant's Skeleton Argument are as follows:*
>
> 1. *That the Defendant did not operate a fair procedure in her consideration of "workarounds" for biometric testing;*
> 2. *That the Defendant acted unlawfully and/or irrationally in treating the Claimant different from those who were granted ARAP;*
> 3. *That the Defendant erred in law in not considering entry clearance pursuant to Article 8 ECHR;*
> 4. *That the Defendant unlawfully discriminated under Article 14 ECHR against Afghan applicants as compared to Ukrainian nationals seeking to enter the UK.*
>
> *(19) I raised with Ms Naik that Issues One to Three have been overtaken by the Defendant's acceptance that she will consider waiving the biometric requirements, and that she is in the process of making that decision in respect of the Claimant. In those circumstances the only relief the Court could order in respect of those Grounds would be to require the Defendant to do precisely what she is already doing. Ms Naik decided to withdraw those Grounds, and therefore, save to the degree they impact on Issue Four, I need say no more about them."*

The Respondent's position in the present case (January 2023)

28. On 3 January 2023, the Respondent wrote to the Applicant's legal representatives as follows:

> *"If your clients are claiming that they need to make an unsafe journey in order to travel to a VAC, please be aware that new guidance will be published shortly setting out the unsafe journey policy. Your request is being placed on hold pending the new unsafe journey guidance being published. However, should there be an urgent requirement to resolve your request, consideration will be given as to your client's circumstances based on the evidence you provide to the email address above. If your request is deemed urgent, we will contact you within 28 days of receipt of your request.*
>
> *Please note that a request will only be deemed urgent where your client has family in the UK and your clients have demonstrated that there is a clear need to travel urgently to the UK, for example where the UK sponsor has a serious medical condition or acute terminal illness; or where the individual is an unaccompanied child living alone without family or an NGO that is able to support them.*
>
> *If there are other reasons your clients cannot attend a biometric appointment that are not in relation to an Unsafe Journey, we will consider them in line with our published policy."*

29. The Respondent's revised position was reflected in detailed grounds of defence filed the same day (3 January 2023), save that the grounds propose a particular order to the decision making, which became a focus of submissions at the hearing:

> *"4. If the Respondent agrees to waive the requirement to enrol biometrics prior to considering the application, she will then consider the Applicant's application for family reunion under Part 11 of the Immigration Rules, and leave outside the rules. If the Respondent refuses to waive the requirement to enrol biometrics, then there will be no valid application and no substantive decision will fall to be taken."*

30. The grounds went on to state that:

> *"5. The Respondent submits that this is the most the Applicant can realistically hope to achieve by these proceedings. It is premature to challenge a "refusal" to waive biometrics since no such decision has been taken. It is likewise premature to consider arguments that would go to the substantive determination of the application.*
>
> *6. The Respondent should note one further practical point in relation to the family reunion application itself. That substantive application itself no longer exists on the Respondent's system as applications are only available to be linked to biometrics or uploaded manually onto the caseworking system for a limited period following submission online, currently 240 days. After that, the application is no longer accessible so, while a decision could in principle be taken on the basis of the material submitted, there*

would be no formal record of this on the Respondent's electronic system and no vignette to facilitate travel could be produced in the event of a positive substantive decision. In order for the substantive application to be processed in the event that the requirement to enrol biometrics is waived, a new online application will need to be made in order to generate a live application on the Respondent's electronic system. That does not prejudice the substance of the Applicant's application but is a practical, administrative step, that would need to be taken for each applicant."

The run up to the hearing

31. Before the hearing the parties sought various extensions of time for the submission of documents including the detailed grounds of defence and skeleton arguments. The parties also sought permission to stay the challenge based on the Equality Act, pending the judgment of the Administrative Court in AB v SSHD, in which a similar issue had been raised. The Court in AB handed down judgment on 10 February 2023 dismissing a claim (advanced pursuant to Article 14 ECHR) that the Respondent had unlawfully discriminated against Afghan applicants for entry clearance to the UK as opposed to Ukrainian applicants. Following hand down, the parties sought a revised case management direction that all grounds would be argued before this Tribunal.

32. The day before the hearing (23 February 2023), the Applicant applied to file additional evidence comprising a letter from the Foreign Ministry of Pakistan ordering a visa ban for Afghan nationals/origins, effective from 08 February 2023 and a newspaper article on the decision. The Applicant also sought to introduce a note produced by the Respondent in response to a request from the Court at the hearing in AB v SSHD [2023] EWHC 287. The note addresses the likely timeframe for the consideration of an application to waive biometrics and any subsequent decision on the merits for the claimant in that case. The Respondent objected to the introduction of the note on the basis it related to a different case and different timescales.

33. The Respondent also applied to adduce further evidence, an application the Tribunal only became aware of during the hearing. The evidence comprises a witness statement from the casework lead for operational policy and complex casework at the Home Office. The statement explains that online applications for entry clearance submitted overseas by applicants unable to complete the identity verification stage of their application are only available to be linked to biometrics for a limited period following submission online. The period is currently 240 days which is considered an appropriate length of time for a visa applicant to make arrangements to travel to a VAC. Where an application is not completed by provision of the data within the requisite time period it is automatically deleted, for data storage and data protection reasons. This is said to be the position with the Applicant's application which no longer exists.

The hearing

34. At the hearing itself, some time was spent clarifying the extent of the current dispute between the parties in light of the Respondent's agreement to reconsider.

35. Counsel for the Respondent submitted that the claim was academic, in so far as the challenge is to the Respondent's failure to consider waiver/deferral of the biometric data and premature, in so far as the Applicant challenges any substantive failure to waive or defer.

36. In response, Counsel for the Applicant submitted that the claim remains live because the Respondentis not willing to guarantee the application for family reunion will be considered on its merits prior to considering whether to defer the requirement for biometrics. Counsel explained that this particular order to the decision making is important. The concern is that the children will fall foul of a generic policy on waiver/deferral of biometric data, with the result that the merits of their application for family reunion will fail to be considered in circumstances where the brothers may decide to take the risk of travelling to Iran to provide their biometric data if they know they have the benefit of an in principle decision in their favour on the substantive application. Counsel went on to explain that the brothers only seek a deferral (not waiver) of the data and the relief now sought now is a mandatory order requiring the Respondent to make an 'in principle' decision prior to considering the request to defer the provision of biometric data.

37. At the hearing Counsel informed the Tribunal that there was no challenge to Respondent's family reunion policy or the alleged breach of the Equality Act (in light of the decision in AB) (the third and fourth ground raised in paragraph 1 of the Grounds of Claim). As to the unlawfulness of the Respondent's decision making, Counsel's focus in her skeleton argument and at the hearing was on "the lawfulness and proportionality of the obstacles placed in the way of the Applicant and his two minor siblings for the last 17 months by the Respondent since they attempted to make the application."[§1 skeleton]. The challenge to the Respondent's conduct was said to be premised on Articles 8 and 14 of the ECHR "on the very compelling facts of the case." [§2]. It is said that "The SSHD has failed to establish a reasonable, rational and fair process to enable applications for Family reunion by persons such as the Applicant's brothers. Here they have been waiting 16 months for a decision on Family reunion outside the rules and to allow an application for LOTR to be processed" [§78]. It was also said that "the Defendant has unreasonably refused to consider the application for a visa outside the immigration rules in principle to date" [§68]. It is said that "preventing an entry clearance through procedural barriers will interfere with family life." [§81]

Is the claim now academic?

38. A claim will be considered to be academic where there is no longer a case to be decided which will directly affect the rights and obligations of the parties to the claim. The discretion to hear disputes must be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so (R v SSHD ex parte Salem [1999] 1 AC 450 (House

of Lords). More recently, the Court of Appeal has explained the rationale for the rule in the context of the resources of the Administrative Court (R(L) v Devon County Council [2021] EWCA Civ 358 at §50). Judicial review is a flexible and practical procedure. The Administrative Court has at its disposal, a range of doctrines, with discretionary elements, to control access to its scarce resources. The discipline of not entertaining academic claims is part of this armoury. It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court's intervention is not required, because the Applicant has obtained, by one means or another, all the practical relief sought. As a matter of judicial policy, the best way of controlling access to the court for claims such as these is the rigorous filter of the test in Salem.

39. Turning then to apply these principles to the present case.

40. The challenge to the Respondent's family reunion policy and to the alleged breach of the Equality Act is no longer pursued (third and fourth grounds as set out in paragraph 1 of the Grounds of claim). The remaining grounds set out in the first paragraph of the Grounds of Claim challenge the Respondent's failure to accept the visa application for family reunion and the Respondent's refusal to waive the requirement for biometrics. The relief sought comprised a declaration that the failure to consider the application is unlawful; a declaration that the Applicant's rights under Article 3 and/or Article 8 ECHR have been violated; and an order that the Respondent should consider the application forthwith. At its heart, therefore, this claim was pleaded as the inability of the brothers to make a valid application for entry clearance without the provision of biometric data.

41. Permission for judicial review was granted on the basis that "it is arguable that the failure to accept the applications for family reunion outside the immigration rules was Wednesbury unreasonable…" and "it is arguable that requiring the applicant to make a further application was Wednesbury unreasonable."

42. The Respondent has now said she will accept an application outside the immigration rules. She will also consider a request for waiver or deferral of biometrics and any request for urgent consideration.

43. In my judgment, by reference to the pleaded grounds the Applicant has obtained the practical relief sought. In this context, I note that the Respondent's position in the present case appears to be no different from the position arrived at in the cases of KA v SSHD [2022] EWHC 2473 (Admin) and AB v SSHD [2023] EWHC 287 (Admin). In both those cases, the Court came to the conclusion, by reference to the grounds of claim, that the claim was rendered academic by the change in the Respondent's position.

Should the Tribunal hear the claim nonetheless?

44. Counsel for the Applicant sought to submit that the Tribunal should entertain the claim because the Respondent's reconsideration must proceed in a particular order (an in principle decision on the merits following by consideration of the deferral of biometric data). She

explained (with some cogency) the concerns underlying this submission (see [§36] above). She also emphasised that her submissions on the appropriate order for decision making were focussed on the particular facts of this case and not on seeking a more general policy concession from the Respondent .

45. The difficulty with these submissions is that the Applicant's concerns are premature because the Respondent has yet to publish her guidance or reconsider her decision in the present case. They are, at present, hypothetical concerns. In effect, the Tribunal is being invited to step beyond its supervisory role in judicial review and into the shoes of the primary decision maker by micromanaging the Respondent's forthcoming decision making. Moreover, it is being asked to do so in an area of immigration policy acknowledged by the judiciary to be a central aspect of immigration control (ensuring people are who they say they are) (SGW at §50). I consider it is also relevant that the Respondent is due to issue relevant policy guidance for decision making in the area. It is perfectly appropriate, indeed even desirable, for the Secretary of State to formulate policies in the form of guidance in the exercise of an administrative discretion to secure the coherent and consistent performance of administrative functions (Begum v Secretary of State (Special Immigration Appeals Commission [2023] 2 WLUK 353, citing Lord Reed in R (Begum) v SSHD [2021] UKSC 7). Counsel emphasised the particular and compelling facts of the present case but in Salem, the House of Lords said that an academic claim should only be considered if it is in the public interest to do so.

46. Accordingly, applying the rigorous filter of Salem, the Tribunal should not exercise its discretion to entertain the claim.

Is the Respondent's decision-making unlawful?

47. In light of the dispute between the parties at the hearing as to whether or not the claim was academic, the parties also addressed the Tribunal on the underlying unlawfulness of the Respondent's conduct. Given the decision not to entertain the claim, the submissions are considered in brief, in the event the Tribunal is wrong to refuse to entertain the claim.

48. In light of the Respondent agreeing to reconsider the Applicant's application, Counsel sought to develop the Applicant's case beyond a 'failure to consider' to a case based, in essence, on an Article 8 ECHR claim arising from the Respondent's delay in decision making to date. This was not, however, the case pleaded. The result was that neither side had put sufficient evidence before the Tribunal to enable proper assessment of a claim based on delay.

49. On the (limited) material before the Tribunal, a case on delay appears to run into the following difficulties, which would necessitate further inquiry. Whilst the brothers were asked to leave the care of the elders due to death threats from the Taliban, the Tribunal understands they are currently being cared for by a relative. There is no evidence before the Tribunal that they are under imminent threat. It is apparent that the Respondent's policy is evolving, and she ought to be permitted some space in which to formulate policy. Of significance is the Respondent's

invitation, in January 2023 for an application for waiver/deferral from the Applicant, including an application for urgent consideration. As at the date of hearing no application had been made.

Should the Tribunal exercise its discretion to make a mandatory order?

50. The question of relief does not arise given the conclusions above. Nonetheless the point is addressed briefly as Counsel for the Applicant sought to rely on the decision of the Court in R(JZ) v Secretary of State [2022] EWHC 771 (Admin). The Court in JZ ordered, by way of interim relief, that the Secretary of State consider the application for LOTR without submission of the biometric data. However, the context of that case is readily distinguishable from the present case because the defendant had taken the decision to refuse the request for deferral/waiver of the biometric information. In any event, in making the order the Judge emphasised the fact specific nature of the grant of relief (§53).

51. As a general rule, relief should not be granted in judicial review absent a finding that a public authority has acted, or is proposing to act, unlawfully (R(Richards) v the Environment Agency [2022] EWCA Civ 26). Moreover, the Courts will not normally grant a coercive order to compel a public body to exercise a discretion in a particular way for practical and constitutional reasons. It is the public authority in whom the power is vested and which will have access to the full range of material relevant to the decision.

Procedural rigour

52. Whilst there is no hard and fast rule it will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving" (Spahiu v Secretary of State for the Home Department [2018] EWCA Civ 2604 [§60-63] and R(Dolan) v SS for Health and Social Care [2020] EWCA Civ 1605).

53. The present case is an example of an evolving judicial review. The Respondent agreed to reconsider her decision making whereupon the focus of the claim turned to the manner of the reconsideration. Both parties sought to submit evidence the day before the hearing. At the hearing itself, it took some time to clarify the nature of the extant dispute between the parties. There was insufficient evidence before the Tribunal to properly assess a revised claim based on delay. The Tribunal was not made aware that the Equality Act and policy challenges were no longer pursued until part way through the hearing ("It should not be left to parties (or, for that matter, the court) to have to infer…what grounds of claim have been abandoned. If a party no longer pursues a ground of claim, that ought to be made clear to the court and to the other parties" (R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport [2022] EWHC 960 (Admin)). The outcome was a less than satisfactory hearing.

54. The Court of Appeal has emphasised that procedural rigour is important for justice to be done (Dolan at §117). It is important that there must be fairness to all concerned, not just to the parties, for whom the stakes are high. It is also necessary for the wider public interest in enabling

the important issues at stake in the claim to be considered by the Tribunal with appropriate care.

Conclusion

55. For the reasons set out above the claim is academic and/or premature and there is no public interest which merits the Tribunal exercising its discretion to hear the claim. The claim is dismissed.