JR-2024-LON-002556

In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

In the matter of an application for Judicial Review

The King on the application of
EK and Others
(Anonymity Direction Made)

Applicant

and

Secretary of State for the Home Department

Respondent

and

Kent County Council

Interested Party

ORDER

BEFORE UPPER TRIBUNAL JUDGE MANDALIA AND UPPER TRIBUNAL JUDGE HOFFMAN

UPON the Upper Tribunal having heard Ms Michelle Knorr for the Applicants and Sir James Eadie KC for the Respondent at a substantive hearing on 9 January 2025

AND UPON having read the written submissions on behalf of the Interested Party

AND in light of the judgment handed down by the Tribunal on 27 January 2025

IT IS ORDERED that:

1. Consent to the applicants' application to withdraw the claim is refused and the applicants' claim for judicial review is dismissed.

2. The costs of the claim shall be dealt with as follows:

a. The applicants shall file and serve their written submissions on costs (limited to 3 sides of A4) within 7 days of the judgment being handed down.

b. The respondent shall file and serve her written submissions on costs (limited to 3 sides of A4) within 7 days of the receipt of the applicants' submissions.

c. The applicants shall file a reply on costs if so advised (limited to 2 sides of A4) within 4 days of receipt of the respondent's submissions.

d. The issue of costs shall thereafter be determined on the papers.

3. In any event:

   a. As set out in the 6 December 2024 Order the Interested Party shall bear its own costs of participation in the claim and there shall be no order for costs against the Interested Party; and

   b. There shall be a detailed assessment of the Applicants' publicly funded costs.

2. Permission to appeal is refused

Signed: **V. L Mandalia**

Upper Tribunal Judge Mandalia

Dated: 27 January 2025

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 29/01/2025

Solicitors:
Ref No.
Home Office Ref:

Case No: JR-2024-LON-002556

UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

THE IMMIGRATION ACTS

Between:
THE KING
On the application of
EK and Others

Applicants

- and -

Secretary of State for the Home Department

Respondent

-and-

Kent County Council

Interested Party

APPLICATION FOR PERMISSION TO APPEAL TO THE COURT OF APPEAL
(being the relevant appellate court under s13(11) TCEA 2007)

DECISION OF UPPER TRIBUNAL JUDGE MANDALIA

Having considered all documents lodged, the application is **REFUSED**.

(1) The applicants' seek permission to appeal the decision of the Upper Tribunal (Upper Tribunal Judge Mandalia and Upper Tribunal Judge Hoffman) to refuse consent to withdraw their claim for judicial Review.

(2) Three grounds of appeal are relied upon by the applicants. Under article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008, permission to appeal to the Court of Appeal in England and Wales shall not be granted unless the Upper Tribunal (or, if the Upper Tribunal refuses permission, the Court of Appeal) considers that: (a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal.

(3) The grounds of appeal are unarguable.

(4) Ground 1: The claim that the Upper Tribunal was wrong to adopt a different approach to withdrawal of judicial review claims to that of the Administrative Court and/or the Upper Tribunal failed to identify and/or apply the appropriate test is unarguable. The Tribunal addressed the claim made by the applicants that the Tribunal should adopt, by analogy, the Civil Procedure Rules and the practice of the Administrative Court at paragraphs [36] to [51]. The Tribunal has a broad discretion when considering whether it should consent to the withdrawal. The Tribunal set out several reasons for refusing consent, *inter alia*: (i) The difference between the Civil Procedure Rules and the Tribunal Procedure Rules *(paragraphs [37] to [40]*; (ii) The applicants' pleaded case that anything short of reunification in the UK would be in breach of the applicants' Article 3 and 8 rights *(paragraphs [42] to [44];* (iii) The focus of the decision of the Court of Appeal was upon orders for interim relief *(paragraph 45);* (iv) The need for clarity in circumstances where there are parallel proceedings before the Family Division and the interested party was concerned about the uncertainty about the outcome of the Judicial Review claim before the Upper Tribunal *(paragraphs [46] to [48]*. In reaching its decision the Tribunal correctly had regard to the fact that Courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances *(paragraph [39]*.

(5) Ground 2: The claim that the only decision reasonably open to the Tribunal on the facts, was to consent to withdrawal is unarguable. The question whether the Tribunal should refuse consent to withdraw is always a highly fact sensitive task. It is inherent in the evaluative exercise involved in the fact sensitive decision that there is a range of reasonable conclusions which a Tribunal might reach. The decision of the Upper Tribunal was clearly within the lawful parameters of legitimate evaluative judgment for the Tribunal on the facts of the particular case and the evidence before it for the reasons set out in relation to ground 1 above.

(6) Ground 3: The claim that the reasons given by the Upper Tribunal for withdrawing consent, could not on any appropriate approach justify refusing consent is unarguable. This is, in effect, a rationality challenge. The implication in the grounds of appeal is that the evidence or points in question were considered by the Upper Tribunal but not resolved as desired by the applicants. It is necessary to guard against the temptation to characterise as an error of law, what is in truth, is no more than a disagreement with the conclusions reached by the Tribunal.

CONCLUSION

(7) I consider that the grounds do not raise arguable errors of law in relation to the decision of the Tribunal nor demonstrate that the appeal has a real prospect of success.

(8) In addition, I am not persuaded the appeal raises an important point of principle nor do I consider there is any compelling reason for the appeal to be heard by the appellate court.

(9) I accordingly refuse permission to appeal on all the grounds raised.

V. Mandalia
Upper Tribunal Judge Mandalia

27 January 2025

Notification of appeal rights
1. A further application may be made to the Court of Appeal itself, in accordance with paragraph 2, 3 or 4 below, as appropriate.

2. Subject to paragraph 4 below, where an application for permission to bring judicial review proceedings has been determined by the Upper Tribunal on the papers and recorded as being totally without merit and permission to appeal has been refused by the Upper Tribunal, any application to the Court of Appeal for permission to appeal must be made to that Court within **7 days** of service of the decision of the Upper Tribunal refusing permission to appeal (*Civil Procedure Rules 52.9(3)(b)*).

3. In any other case, but subject to paragraph 4 below, the appellant's notice must be filed in the Court of Appeal within **28 days** of the date on which notice of the Upper Tribunal's decision on permission to appeal to the Court of Appeal is sent to the appellant (*Practice Direction 52D 3.3*).

4. If your application to the Upper Tribunal for permission to appeal to the Court of Appeal was made out of time and the Upper Tribunal refused to grant an extension of time, the time limit for filing an Appellant's Notice in the Court of Appeal is **21 days** from the date of issue of the **substantive decision** you wish to appeal. You are therefore likely to be out of time for appealing to the Court of Appeal. You should therefore include in your Appellant's Notice an application for an extension of time (*CPR 52.12(2)(b)*).

Case No: JR-2024-LON-002556

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

29 January 2025

Before:

UPPER TRIBUNAL JUDGE MANDALIA
and
UPPER TRIBUNAL JUDGE HOFFMAN

- -

Between:

THE KING
on the application of
EK and Others
(ANONYMITY DIRECTION MADE)

Applicants

- and -

Secretary of State for the Home Department

Respondent

-and-

Kent County Council

Interested Party

- -

Michelle Knorr and Agata Patyna (instructed by Joint Council for the Welfare of Immigrants) for the applicants

Sir James Eadie KC, Jack Anderson, Paul Skinner and Alexander Laing (instructed by Government Legal Department) for the respondent

Hugh Southey KC (instructed by Bevan Brittan Solicitors) for the Interested Party by written submissions

Hearing date: 09/01/2025

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J U D G M E N T

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Upper Tribunal Judge Mandalia:

1. This is the judgment of the Upper Tribunal to which both members have contributed.

2. This claim for judicial review concerns two young children, MIK and MAK ("the children"), who were separated from their parents when the family attempted a perilous journey in a small boat across the Channel. The children are now 6 and 9 years old. The first and second applicants, EK and SK, are their parents. We mean no disrespect to the applicants by referring to them in this decision as "the children", "the mother", "the father", "the parents" or collectively as "the family". We do so for ease of reference and to protect their anonymity. The family are all nationals of Turkey and of Kurdish ethnicity. For reasons that we do not need to set out in this decision, the parents claim the family fled Turkey and travelled to Calais via Belgium hoping to cross the Channel together in a small boat in order to illegally enter the UK.

3. On 19 July 2024 they were due to make the crossing facilitated by agents. The two children were placed on the boat and their mother was pulled into the water when, according to the parents, other migrants rushed towards the boat attacking them. Their father jumped into the water to save her. The boat left with the children while their parents were still in the water.

4. After what was plainly a traumatic series of events, the children arrived in the UK and were referred to Kent County Council and placed with foster carers. The parents alerted the French authorities who in turn had contacted the British coast guards and they were assured later that day that the children had arrived in the UK safely, and were being looked after.

5. On 21 August 2024 the parents made applications for Entry Clearance to be reunited with their children in the UK. On 26 August 2024, a 'Pre-Action Protocol Letter' was sent to the respondent highlighting that the family had been separated for 35 days and seeking the grant of Entry Clearance 'without delay'. The applicants' representatives stated they expected a full and prompt response by 4pm on 2 September 2024. The respondent did not respond until 10 September 2024, simply stating that the relevant team has agreed to expedite the application although it was not possible to give a timescale for when the applications will be decided. Further correspondence was sent to the respondent on 12 September 2024 and 24 September 2024 with evidence highlighting the impact upon the children of the ongoing separation from their parents. In the absence of a response and a decision from the respondent, this claim for Judicial Review was issued on 30 September 2024.

THE GROUNDS FOR JUDICIAL REVIEW

6. The Grounds for Review open with the sentence; "This extremely urgent case concerns two young children aged 6 and 9…" At paragraph [10] it is said:

> "The Applicants seek an urgent mandatory order requiring the SSHD to admit EK and SK to the UK. The Applicants submit that her failure to do so to date is not only an egregious breach of Article 8 ECHR and the SSHD's section 55 Borders Citizenship and Immigration Act 2009 ('BCIA 09') duty, but also amounts to inhuman and degrading treatment of all the Applicants under Article 3 ECHR. The SSHD's failure to admit the parents including by initially leaving them to try to make their way by boat placing their lives at risk, and where evidence shows that the children have already been seriously harmed and every passing day carries with it an increasing risk of long-term damage to the children's physical and psychological health and development, amounts to treatment contrary to Article 3 ECHR."

7. The Grounds for Review set out the factual background at some length and, in summary, claim the respondent is: (i) in breach of her duties under Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009 ("s55 of the 2009 Act"); and (ii) in breach of Article 3 ECHR. At paragraph [57] of the Grounds for Review the applicants claim that in light of the fact that there can be no reasonable dispute about the ultimate outcome, namely that SK and EK must be reunited with MIK and MAK in the UK, the applicants request:

    a. An interim order for EK and SK to be admitted to the UK;

    b. A declaration that the respondent's failure to admit EK and SK to the UK/grant EC is unlawful and in breach of Articles 3 and/or Article 8 ECHR and s.55 BCIA 09.

    c. A mandatory order that EK and SK be admitted to the UK/granted EC forthwith; alternatively, a mandatory order that the respondent take a lawful decision on Entry Clearance in accordance with the declarations within 24 hours or other timeframe deemed appropriate by the Tribunal and

    d. Damages

8. On 30 September 2024 Upper Tribunal Judge Canavan abridged the time for the respondent to file and serve Summary Grounds of Defence. On 15 October 2024 Upper Tribunal Judge Reeds listed the application for interim relief and permission to claim JR for an oral hearing. On 31 October 2024 Upper Tribunal Judge Kamara granted permission to claim judicial review and, in a separate order, directed that the "respondent is to make arrangements to admit [the parents] to the UK as soon as practicable".

9. On 1 November 2024 the respondent applied for a stay of the interim relief order. On 11 November 2024 the applicants sought an order requiring the respondent to act upon the order made by Judge Kamara forthwith. The two applications were listed for hearing and, on 14 November 2024, Upper Tribunal Judge Hirst refused the respondent's

application for a stay and directed that the respondent shall by 4pm on 15 November 2024 confirm to the applicants, *inter alia*, that arrangements have been made to admit them to the United Kingdom.

10. On 19 November 2024 Lady Justice Elisabeth Laing granted the respondent a stay of the order made by Upper Tribunal Judge Kamara and listed the application for permission to appeal to the Court of Appeal for a rolled up hearing. The application for permission, and the appeal, was heard by Lord Justice Underhill, Lord Justice Singh and Lord Justice Baker on 17 December 2024 and the order for interim relief of Upper Tribunal Judge Kamara (made on 31 October 2024) and the order of Upper Tribunal Judge Hirst (made and issued on 14 November 2024) were set aside; [2024] EWCA Civ 1601. We will return to the judgment of Underhill LJ later in this decision. For the sake of completeness we note that the decision of the Court of Appeal was the subject of an application for permission to appeal to the Supreme Court. This however was refused by the Court of Appeal in an order dated 13 January 2025.

11. As far as the claim before the Upper Tribunal is concerned, on 21 November 2024 the applicants made an urgent application stating again that "This claim is extremely urgent" and in a draft order invited the Upper Tribunal to order that the full hearing of the judicial review be listed for a one day hearing on 11 December 2024. On 22 November 2024 I declined to make an order in the terms sought by the applicants but balancing the competing interests and the importance of the issues that arise, on 28 November 2024 I directed that the claim be listed for hearing on 9 January 2025 with consequential directions.

THE PROCEEDINGS BEFORE THE FAMILY DIVISION

12. In addition to this claim for judicial review, Kent County Council has now also applied to the High Court (Family Division) under the Court's inherent jurisdiction for orders in respect of the children. A first hearing took place on 29 November 2024 at which the SSHD was joined as an interested party. The children have also been joined as parties to those proceedings and their interests are represented by a CAFCASS Guardian and solicitor. The parents are represented in those proceedings by a different firm of solicitors.

13. The current position in the parallel proceedings appears to be that:

    a. There is ongoing communication and exchange of information between the International Child Abduction and Contact Unit (the English Central Authority) and the French Central Authority regarding the whereabouts of the parents and their plans for the children's care in France or elsewhere;

    b. A hearing was listed on 21 to 23 January 2025 to consider *inter alia,* issues of jurisdiction and whether as a matter of law, a court can order the return of a child to another State (and in this case, France) in circumstances where the child has been deemed to have

made an asylum application and has, according to the parents' representatives, an extant human rights claim;

c. The final hearing is listed before the Family Division on 18, 19 and 20 February 2025.

14. On 10 December 2024 Mr Justice Garrido ordered that the parents shall, in the event that they intend to change their residential address, inform their family solicitors, Messrs. Osbornes, prior to changing their residential address of their new address, and Messrs. Osbornes shall within 24 hours of receiving such address provide it to all other parties.

THE DECISIONS TO REFUSE ENTRY CLEARANCE

15. The respondent has now made decisions dated 30 December 2024 to refuse the applications for Entry Clearance made by the parents. The decisions are in the same terms for each of the parents. In summary, the respondent concluded that the parents do not qualify for entry to the UK under Appendix Family Reunion (Protection) of the immigration rules, and that Article 8 would not be breached by a refusal of the application to be admitted to the UK. The respondent states:

> "…In the present context, there is a particular public interest in not providing a route for an unaccompanied child to sponsor a parent (that public interest being in not creating an incentive that might lead to the lives and safety of children being put at risk). This public interest is reflected in the Immigration Rules…"

16. The respondent draws upon the decision of the Court of Appeal, and having considered the evidence, concludes that the parents can enjoy family life with the children in France, where all of the rights and freedoms provided for in the Refugee Convention and the European Convention on Human Rights are fully respected. The respondent states that there is a good prospect of the respondent being able to organise, with the agreement of France, the return of the children to France within a reasonable time and encourages the parents to take positive steps to assist with the reunification of the family in France. The respondent refers to the decision of the Family Division in *Re A* [2024] EWFC 110 and also to the need to discourage the risks created, specifically towards children, in criminal gangs organising such perilous journeys. The respondent considered the best interests of the children and concluded that the best interests lie in their being reunited with their parents, wherever their parents are. Reunification in the UK is outweighed, the respondent claims, by the public interest.

17. The respondent also concluded that the decision to refuse Entry Clearance is not in breach of Article 3 and that there are no other relevant factors that justify the grant of Entry Clearance.

18. The respondent's decisions to refuse the applications for Entry Clearance (as decisions to refuse a human rights claim) carry a right of appeal under s82 of the Nationality, Immigration and Asylum Act 2002 on the ground

that the decision is unlawful under section 6 of the Human Rights Act 1998.

19. During the course of the hearing before us, we were told that a Notice of Appeal has been filed with the First-tier Tribunal ("FtT"). We were told by Ms Knorr that there has been no application for the hearing of the appeal to be expedited and Ms Knorr was unable to confirm whether any such application for expedition will be made. She said that the appeal has been lodged and the applicants will now turn their mind to the evidence to be relied upon before the FtT.

20. We draw the parties' attention to the judgment of the President of the Family Division and Upper Tribunal Judge Mandalia in *Re HR (Parallel Child Abduction and Asylum Proceedings)* [2024] EWHC 1626 (Fam), and in particular, the observations and guidance set out concerning the practical interplay between the 1980 Hague Convention proceedings and asylum claims. There are plainly steps that can be taken by the parties to ensure matters are expedited.

THE NOTICE OF WITHDRAWAL

21. After the Court of Appeal handed down its judgment the applicants sought to have the hearing of this claim adjourned, and when that was refused, proposed terms of settlement. The parties were unable to reach agreement and on 6 January 2025 the applicants filed a Notice of Withdrawal. The draft order provided makes provision for the question of costs to be dealt with by written submissions.

22. The respondent invites the Tribunal to refuse consent to withdraw. The respondent claims the Upper Tribunal should determine, on its merits, the claim made that the refusal to grant entry clearance or otherwise admit the parents to the UK is a breach of Article 3 and/or 8 ECHR.

23. On 7 January 2025 I directed that the Tribunal would consider whether it consents to the withdrawal of the case at the hearing of the claim listed on 9 January 2025. In the event that the Tribunal does not consent to the withdrawal, the hearing of the claim will continue as listed.

THE HEARING

24. At the outset of the hearing Ms Knorr submitted that the applicants' submissions as to the whether the Tribunal should grant or withhold consent to withdraw the claim are broadly aligned with the applicants' submissions as to the substantive claim. Due to the time constraints we therefore heard the parties' submissions as to the Notice of Withdrawal and then heard briefly from Ms Knorr and Sir James Eadie KC regarding the substantive claim. We said that we would reach a decision and set out our reasons in writing. Plainly if we give consent to withdraw, we do not need to address the substantive merits of the claim.

25. As far as the Notice to Withdraw is concerned, in summary, Ms Knorr submits this claim concerns a challenge to the delay in taking entry clearance decisions and in admitting the adult applicants to the UK. The

applicants have now received decisions dated 30 December 2024 upon the applications for Entry Clearance that give rise to a right of appeal to the FtT. The applicants therefore have an alternative remedy. She submits the question whether reunification in France can be achieved within a reasonable timeframe or at all, and the outcome of the proceedings in the Family Division, will now be capable of being taken into account in the appeal before the FtT.

26. Ms Knorr submits the applicants have reflected upon the decision of the Court of Appeal. The applicants do not now seek any remedies in these proceedings and there is no good reason for the Tribunal to withhold its consent to the withdrawal of the claim as required by Rule 17(2) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Tribunal Procedure Rules").

27. In response the respondent claims the decision of the applicants to withdraw the claim for judicial review is in truth, an attempt to 'game the system'. It is an attempt to avoid the Tribunal from reaching a decision upon the claim and the applicants will seek, going forward, to present the immigration proceedings as complex, undetermined, ongoing and unlikely to be resolved soon. That will also be used to suggest in the parallel proceedings before the Family Division that there will be further prolonged disruption for the children. At the same time, the parents are not actively and urgently co-operating with the French authorities with a view to securing the earliest reunification with their children in France. The respondent submits the Tribunal should refuse to consent to the Notice of Withdrawal and to dismiss the pleaded claim for Judicial Review on its merits.

28. We have received written submissions filed by the interested party, Kent County Council. The interested party does not take any position in relation to the substantive legal disputes between the parties regarding immigration control. The focus of the interested party is upon its responsibility by reason of section 22(3) of the Children Act 1989 to safeguard and promote the welfare of the children. The interested party is still gathering evidence. The written submissions state:

> "KCC relies on a witness statement filed on 6 January 2025 setting out its current position. KCC highlights the fact that the uncertainty about the best interests of the children arises largely because it remains unclear where the family can be reunited. KCC has no control over where reunification can take place."

29. During the course of the hearing before us Ms Knorr maintained that the parents are anxious to ensure that they are able to be reunited with their children at the earliest opportunity. We canvassed with Ms Knorr the possibility that it is open to the parents, who have parental responsibility for the children, to withdraw their consent to the interested party accommodating the children and the effect of that would be that arrangements could be made for them to be reunited with their children without delay.

30. During the course of the hearing the Tribunal and the parties received an email from Virginia Cooper, a Partner at Bevan Brittan LLP, who act on behalf of the interested party. Having taken instructions upon the interested party's position in the event that the parents withdraw their consent for the children to be accommodated, the interested party confirms that the children are currently accommodated under section 20 of the Children Act 1989. If that consent is withdrawn, the interested party has no legal basis to accommodate the children and arrangements would have to be made for them to be returned to France if that is what the parents seek. Best practice dictates that a handover plan is put before the court for approval, for example, by providing for a member of the social work team to fly with the children and reunite them with their parents in France. If there are concerns about the reception arrangements then an application for wardship or an interim care order might be considered. That is not currently anticipated as the interested party has no immediate parenting concerns and the parents have agreed to undergo an assessment to enable reunification. The interested party will work to achieve reunification as quickly as possible and the actual arrangements for sending the children to France is unlikely to take much time. The interested party would expect reunification could take place within a two to four week period.

DECISION ON THE NOTICE OF WITHDRAWAL

31. We refuse consent for the withdrawal of the claim. As far as relevant Rule 17 of the Tribunal Procedure Rules is as follows:

> "**Withdrawal**
>
> **17.**—(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—
>
> (a) by sending or delivering to the Upper Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.
>
> (3) A party which has withdrawn its case may apply to the Upper Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Upper Tribunal within 1 month after—
>
> (a) the date on which the Upper Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).
>
> (5) The Upper Tribunal must notify each party in writing that a withdrawal has taken effect under this rule.

…**”**

32. By analogy Ms Knorr referred to the procedure for discontinuing proceedings set out in Part 38 of the Civil Procedure Rules and to the Administrative Court guide (2024) which states that a claim may be ended by filing a notice of discontinuance and serving it on all parties. The Civil Procedure Rules bring to an end any claim without any requirement for the consent of the Court save in the very limited circumstances set out in Part 38.2. In *McDonald v Excalibur & Keswick Groundworks Ltd* [2023] 1 W.L.R 2139 Nicola Davies LJ referred to the time limit within which a defendant can apply to have a Notice of Discontinuance set aside and the discretion which should be exercised so as to give effect to the overriding objective of dealing with the case justly and at a proportionate cost. Ms Knorr submits that a similar approach should be adopted by the Tribunal and the Tribunal should only refuse consent and force the applicant to pursue the claim where there is an abuse of process or other egregious conduct.

33. Ms Knorr submits that the withdrawal of the claim is consistent with the indication given by Underhill LJ that the parties give careful consideration as to the future of the judicial review claim. The Court of Appeal has reached a decision as to the Article 3 and 8 claims and said that some further delay is lawful. There is now nothing to be gained by continuing this claim and there is no wider point of public interest that needs to be determined by the Tribunal. The parents, Ms Knorr submits, have co-operated throughout and will continue to co-operate. The children continue to face disruption and the applicants have nothing to gain by seeking to delay matters.

34. Here, Ms Knorr submits the claim was issued at a time when the respondent had not made any decision. There was evidence of harm being suffered by the children and the underlying claim was pleaded on the basis of the respondent’s failure to grant entry clearance to reunite the children with their parents. Mr Knorr submits the decision of the Court of Appeal setting aside the decision of the Upper Tribunal and refusing the application for interim relief makes it clear that the pursuit of reunification in France can in principle justify the interference with the Article 8 rights where there is a reasonable prospect of reunification being achievable within the timeframe of the family proceedings. Underhill LJ however made it clear that nothing said in his judgment should inhibit the Court in the family proceedings from making any decision that it believes appropriate.

35. Ms Knorr submits the local authority acknowledges that its focus is on the children and its position is that it is still gathering evidence in circumstances where it remains unclear where the family can be reunited. She submits that for reasons that are not clear the respondent has now had a sudden change in direction and issued a decision before the proceedings before the Family Division have been concluded.

36. It is clear that it is open to the applicants to withdraw their claim but that is not to say that the claim is thereby withdrawn. Rule 17(2) makes clear

the withdrawal does not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.

37. In claims where the Civil Procedure Rules apply the court's consent is only required in limited circumstances. In general, the service of a notice of discontinuance served in accordance with the Civil Procedure Rules brings the claim to an end with liability for costs as set out in Part 38.6. A defendant may apply to have the notice of discontinuance set aside as set out in Part 38.4. In *McDonald* the Court of Appeal held that the court has a broad discretion to set aside a notice to give effect to the overriding objective and r.38.4 did not impose a particular test. Nicola Davies LJ said:

> "36. CPR 38.4 provides a procedure and a time limit for a defendant to apply to have a Notice of Discontinuance set aside. In approaching applications to set aside a Notice, the court has a discretion which should be exercised so as to give effect to the overriding objective of dealing with a case justly and at a proportionate cost. In *Sheltam Rail Company (Proprietary) Ltd v Mirambo Holdings Ltd [2008] EWHC 829 (Com) at para 34* Aikens J stated in respect of CPR 38.4(1) :
>
> > "The working of the Rule does not impose any particular test that has to be satisfied before the court will set aside a notice of discontinuance that has been issued under 38.2(1) without the court's permission…"
>
> 37. Henderson J (as he then was) in *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank [2015] EWHC 55 (Ch)* stated at para 46:
>
> > "… I consider that the court should approach an application to set aside a notice of discontinuance under CPR rule 38.4(1) on the basis that the court has a discretion which it should exercise with the aim of giving effect to the overriding objective of dealing with the case justly and at proportionate cost. If the facts disclose an abuse of the court's process that will, no doubt, continue to be a powerful factor in favour of granting the application but it would, in my view, be wrong to treat abusive process as either a necessary or an exclusive criterion which has to be satisfied if the application is to succeed."
>
> 38. Given the breadth of the discretion accorded to the court to set aside a Notice of Discontinuance, coupled with the fact that a claimant can discontinue as of right subject to limited exceptions, in my view the Judge was right to state that there need to be powerful reasons why a Notice of Discontinuance should be set aside. Further, I agree with the reasoning of Lavender J in *Shaw* and May J in *Mabb* that evidence of abuse of the court's process or egregious conduct of a similar nature is required on an application which has the effect of depriving a claimant of his right to discontinue."

38. In *McDonald* the Court was not persuaded that the notice of discontinuance should be set aside where the notice of discontinuance had only been filed to stop the claim being struck out and had unfairly deprived the defendant of his entitlement to costs. The Tribunal Rules are not circumscribed or prescriptive in the same way as the Civil Procedure

Rules. There is no unqualified right to withdraw a case with costs consequences. The consent of the Tribunal is required in every case except where the notice of withdrawal relates to an application for permission to appeal.

39. Here, the applicants have reflected upon the decision of the Court of Appeal and Ms Knorr submits the claim before us is now academic. It is common ground between the parties that it is now well established that Courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances where there is good reason in the public interest for doing so and because of their potentially wider implications.

40. Ordinarily the Tribunal will have little difficulty in reaching the conclusion that it should consent to the withdrawal where there is nothing to be gained by the case proceeding when notice of withdrawal of the case or any part of it is given. That might be described as the 'default position'. It is not however inconsistent with the rules and the purpose of the rules for the Tribunal to refuse consent if it considers it appropriate in all the circumstances. An abuse of the Tribunal's process is a powerful factor for refusing consent to withdraw but given the breadth of the discretion in the Tribunal Rules it would be wrong to treat abuse of process as either a necessary or an exclusive criterion.

41. Any challenge to the delay in reaching a decision upon the applications for Entry Clearance now falls away since the respondent has reached decisions. The question whether the respondent's decisions are unlawful under section 6 of the Human Rights Act 1998 will now be a matter for the FtT to consider. We accept, as Ms Knorr submits, that the respondent's decisions on the individual facts and merits, based on the circumstances as at the date of the hearing of the appeal, can be looked at in detail and in the round by the FtT Judge. We accept it would be quite wrong for a Court or Tribunal of supervisory jurisdiction to intervene prematurely in that process for which Parliament has provided.

42. The applicants' pleaded claim for judicial review is not, however, simply that the respondent's failure to make a decision upon the applications for entry clearance made by the parents is unlawful. Although the delay in reaching a decision is implicit in the Grounds for Review, Ms Knorr accepted in her submissions before us that the claim as pleaded by the applicants goes further than that. That is demonstrated by what is said in paragraph [44] of the Grounds for review

> "…Here, reunion in the UK would plainly be the most adequate means, indeed the only means, for the development of family life and it is apparent from KCC and the SSHD's correspondence that both public authorities have been aware from the outset that the parents must come to the UK to join the children…" *(our emphasis)*.

The applicants' pleaded case is, as Ms Knorr acknowledged, that nothing less than the grant of Entry Clearance will do in these circumstances. It is in that context that the applicants were seeking a declaration that the

respondent's failure to admit the parents to the UK is unlawful and in breach of Articles 3 and 8 ECHR and in breach of the respondent's duty under s55 of the 2009 Act.

43. There is in our judgment a good reason in the public interest for the Tribunal to address the applicants' pleaded case because of the potentially wider implications that arise from such claims. It is clear that claims such as this must proceed relatively quickly given they concern separation of a family and any delay is inimical to the best interest of children. The grounds for review have not evolved in light of the decision of the Court of Appeal or the decisions upon the applications for Entry Clearance but there remains a strong public interest in the Tribunal addressing the fundamental claim made by the applicants that the only way of averting a breach of the Article 3 and 8 rights of the family is to grant Entry Clearance and or for the Tribunal to make a declaration that the respondent's failure to admit the parents to the UK is unlawful.

44. We accept, as Sir James submits, that this is a case of importance for two particular reasons:

    a. the real concerns regarding the highly damaging behaviour of criminal gangs operating the perilous journey putting families, and in particular children, at real risk of death in small boats crossing the channel; and

    b. the concern that parents who are in a safe third country such as France or Belgium (or for that matter, any EU member state) where they could claim asylum would call for their entry to the UK to be reunited with children rather than by doing all they can to assist and facilitate the return of their children to the safe third country.

45. The decision of the Court of Appeal was concerned only with the specific question of whether the respondent should be ordered to admit the parents to the UK in the context of an order for interim relief. The Court of Appeal referred to the ongoing proceedings before Family Division and considered the evidence relied upon by the applicants as to the background, the applications for entry clearance and the effect of separation on the children. The Court of Appeal also referred extensively to the evidence relied upon by the respondent regarding ongoing discussions with the French authorities and officials regarding reunification of the family in France. Having set aside the orders made by the Upper Tribunal for interim relief, the Court of Appeal referred to the evidence relied upon by the respondent and the high level discussions between the Home Office and the French Ministry of the Interior regarding reunification in France and the analysis of the risk that could result from obtaining permission to enter and remain in the UK in these circumstances.

46. We have been provided with a statement from Anne Nerva dated 6 January 2025, the Service Manager in the East Kent Children in Care Service. The statement is provided on behalf of the interested party and addresses the interested party's statutory obligation under section 22(3)

of the Children Act 1989. The statement exhibits much of the evidence that was previously before the Court of Appeal and that which has been relied upon by the interested party in the parallel proceedings before the Family Division. In summary, the interested party seeks to explore the return of the children to France. Anne Neva states:

> "That is because on the information available it does not appear to be accepted that the parents can lawfully enter the UK (albeit it is accepted that there is uncertainty about this)…"

47. Anne Nerva refers to the ongoing communications with the French authorities via a Senior Case Manager at the International Child Abduction & Contact Unit ("ICACU") regarding the services and assistance that would be available to the children in the event that the children were to return to France. Anne Nerva states that as matters stand, the interested party does not know when it will receive the further information it needs from the French Authorities to enable it to reach a final view on whether reunification of the children with their parents in France or the UK would be in their best interests. Delay is not in the best interests of the children but equally, neither is an uninformed decision. Anne Nerva concludes:

> "30. To date, given the continued positive indications the Home Office received from French authorities about the ability of the children to enter France and the uncertainty about the outcome of the judicial review proceedings in the Upper Tribunal, KCC has sought to assess whether reunification in France is in the best interests of the child. It does not, however, rule out reunification in the UK if the evidence shows that it would be in the children's best interests."

48. Clarity about the outcome of the claim for Judicial Review is therefore likely to assist the interested party to reach its conclusions as to the best interests of the children and the position it adopts in the proceedings before the Family Division.

49. As we have said, an abuse of the Tribunal's process is a powerful factor for refusing consent to withdraw. We accept the withdrawal of the claim is not an attempt to abuse the Tribunal's process. It is consistent with the observation made by Underhill LJ in the Court of Appeal that the parties will no doubt give careful consideration to the future of the judicial review proceedings, and the view of the respondent until recently that the applicants should withdraw the claim.

50. In his judgment Underhill LJ referred to the evidence filed by the parents to rebut the suggestion that they had sought to conceal their whereabout, the reasons why the children should not be returned to France and the position of the Kurdish community in France. Underhill LJ accepted that there is a reasonable prospect of reunification in France being achievable within the timeframe of the family proceedings; and that being so, it would be wrong to undermine the process now by requiring the respondent to admit the parents. He said that the only obvious reason reunification might not be possible within that timeframe, or something close to it, would be if the parents fail to co-operate with the authorities in France.

Underhill LJ acknowledged that the parents would prefer to be admitted to the UK, but said that does not mean that they will not choose to seek asylum in France if it becomes clear that that is the surest way of achieving early reunification with their children. We do not go as far as to say that there is evidence that the applicants are trying to 'game the system' in the way claimed by the respondent. The parents position appears to be that although they maintain that reunification in the UK is in their children's best interests, they remain willing to co-operate in exploring the potential for reunification in France. There are however features of the parents' conduct that has caused us some concern.

a. The parents have a right of appeal before the FtT against the refusals of the applications for Entry Clearance but Ms Knorr informed us that no application for expedition had yet been made. Neither was it clear to us whether such an application would be made in the immediate future.

b. Despite the passage of time and the availability of advice, there is no evidence of the parents having taken any steps to make a claim for international protection in France.

c. Ms Knorr refers to the respondent's Detailed Grounds of Defence in which the overarching submission made by the respondent is that "no order directing that the parents be admitted to the UK is appropriate - still less legally required - until those processes [i.e. the proceedings before the Family Division] have reached a conclusion." The decision of the Court of Appeal did not require an immediate decision and there was, Ms Knorr submits, a process to be followed. Although at one point she went as far as to say that the respondent was bound to await the outcome of the proceedings before the Family Division before making a decision upon the applications for Entry Clearance, when pressed, Ms Knorr accepted that would simply result in on-going unjustifiable delay.

d. The ICACU reported on 24 December 2024 that the French social worker was having trouble contacting the parents to arrange a visit. A request was made to Kent County Council for any other contact details that may be available for them. It seems that on 31 December 2024 the applicants' representatives were instructed that the parents were waiting to be contacted by the French authorities.

e. In the proceedings before the Family Division, on 10 December 2024, at a hearing attended remotely by the parents with the assistance of interpreters, Mr Justice Garrido made the direction we have referred to at paragraph [14]. It appears that in response to an attempt made by the 'French welfare authorities' to meet the parents on 31 December 2024 as part of a child protection assessment, the parents informed the French Welfare authorities on 6 January 2025 that their address had changed and provided their new address. In discussions with the applicants'

representatives on 6 January 2025, the father said he had checked his email and for the first time he had seen the email sent to him by Ms Briquet and he replied right away providing their new address. The parents claim they were living at a temporary address in Drancy, Paris and had to move because on 1 January 2025 the mother of the family with whom they were living went into labour and on 2 January they travelled to a new address in Pont De Buis Les Quimerch, some 500 km away from their previous location. It is not clear why the parents failed to inform their solicitors of their change of address as required by the order of Mr Justice Garrido.

51. It is appropriate in all the circumstances for the Tribunal to refuse to consent to the withdrawal and to address the applicants pleaded that on its merits, the respondent's failure to admit the parents to the UK is unlawful and in breach of Articles 3 and 8 ECHR and in breach of the respondent's duty under section 55 of the 2009 Act.

DECISION UPON THE MERITS OF THE ARTICLE 3 AND 8 CLAIMS

52. No further evidence has been filed by the applicants or the respondent following the decision of the Court of Appeal to refuse the application for interim relief. We have already referred to the evidence that is set out in the witness statement of Anne Nerva filed on behalf of the interested party.

53. Ms Knorr acknowledged that in light of what has been said by the Court of Appeal regarding the Article 3 and 8 claims being made by the parents, it is highly unlikely that this Tribunal would reach a different conclusion. She submits the Tribunal should refrain from making any factual findings. We have not done so. The parents will in due course file and serve any further evidence they rely upon in support of their appeal and it is for the FtT to decide whether the refusal of entry clearance is unlawful under section 6 of the Human Rights Act 1998.

54. Ms Knorr submits it is entirely unfair for this Tribunal to now consider what is said by the interested party as to what would happen if the parents withdrew their consent to the children being accommodated. The position of the interested party has thus far been that they have yet to determine whether the best interest of the children lie in them being reunited with their parents in France or the UK. The fact that as a matter of law, the parents can withhold their consent to the children being accommodated by the local authority so that arrangements would have to be made to reunite the children with their parents in France can come as no surprise to the applicants' representatives since it was a matter referred to by the respondent in her skeleton argument before the Court of Appeal and it is alluded to in paragraph [69] of the respondent's skeleton argument filed in readiness for the hearing before us. Furthermore, the parents have been advised by legal representatives' expert in family law, including King's Counsel, in both the Court of Appeal and Family Division proceedings. Nevertheless, it is not a matter that we need to address in determining the

limited ground for review that we are addressing, since there are proceedings afoot in the Family Division, and Ms Knorr accepts the Court of Appeal considered that any delay to reunification caused by those proceedings will not result in a breach of the applicants Article 3 and 8 rights.

55. We make it clear from the outset that nothing we say about the merits of the Article 3 and 8 claims as pleaded is intended to trespass upon the quite separate decisions that are to be taken by the FtT in the appeal before it and by the Family Division in the proceedings there. Sir James acknowledges that it will be for the FtT in the appeal before it to determine on the evidence presented whether the decisions to refuse entry clearance are unlawful. The issue in any appeal is likely to be whether the decision to refuse entry clearance is proportionate to the legitimate aim, which requires a fact sensitive assessment.

56. We have confined our decision to the applicants' claim, in summary, that in the circumstances that prevail here, anything other than a grant of Entry Clearance will be a breach of Articles 3 and 8 on public law grounds.

57. There can be no doubt that Article 8 is engaged and that any delay in reaching a decision that prolongs separation of the family has consequences of such gravity as to engage the operation of Article 8 and is to be regarded as an interference with the Article 8 rights of the family.

58. For the avoidance of any doubt we have considered the evidence for ourselves and we are satisfied that the evidence is properly summarised in the judgment of Underhill LJ in the Court of Appeal. Summarising the evidence regarding the steps being taken to reunite the family Underhill LJ said:

> "42. The effect of that evidence, in summary, is that there is a clear political will at the highest level of the French government to facilitate the reunification of the family in France. It follows that there would be no difficulties about the admission of the children to France as such. However, there are assessment procedures which it is necessary to go through before reunification with the parents can be achieved. How long that will take depends on the co-operation of the parents and the outcome of the assessment. But the implication of what was said at the meeting of 3 December is that if the parents co-operate the assessment should take substantially less than three months; and it is clearly realistic to expect that the result will be known in good time before the scheduled final hearing in the family proceedings."

59. The Court of Appeal also considered the evidence that is relied upon by the respondent in the form of witness statements made by Julia Farman, Head of the Family Reunion Team within UK Visa and Immigration, Dr Meirav Elimelech, the Deputy Director of the Asylum and Protection Unit in the Home Office and the statement of Daniel Hobbs, Director General of the Migration and Borders Group in the Home Office. The evidence refers to the consequences of simply permitting the parents entry to the UK and highlights:

a. The risk in northern France that the grant of entry clearance will incentivise traffickers and people smuggling gangs to manipulate families and separate children from their parents, sometimes forcibly, to make an unsafe journey to the UK placing their lives at risk.

b. The real risk that allowing parents to enter the UK because their children arrived in the UK unaccompanied on a small boat will lead to more children being placed on small boats, unaccompanied.

c. The high level discussions between the Home Office, Foreign Commonwealth & Development Office ("FCDO"), the Prefecture of the Pas de Calais and the French Minister of the Interior. The Home Secretary and the French Minister of the Interior unanimously agree that the UK and France must act together to reunite the children in France given the risk of further children crossing by small boat, which both want to avoid.

60. The perils of an unlawful crossing by boat cannot be understated. Underhill LJ considered whether the interference with the Article 8 rights of the family is justified by reference to any of the interests specified in Article 8.2. Underhill LJ said:

> "53. In my opinion this Court is obliged to accept the Secretary of State's assessment of that risk, now more fully set out and explained in the further evidence of Dr Elimelech, as reasonable and legitimate – and certainly in the context of a summary process involved in an application for interim relief. It is based on the experience of officials who are far better placed than we can be to make judgments about the likely behaviour of the people-smuggling gangs and their clients. I place weight also on the fact that the French authorities, who were under no legal obligation to agree to reunification in France rather than the UK, have agreed to do so in this case because they share the fears of the UK government about the risk to other children: see para. 37 above.
>
> 54. In my opinion also the wish to avert that risk is clearly capable in principle of justifying the Secretary of State in pursuing the possibility of reunification in France notwithstanding that that process would inevitably take longer than a straightforward grant of entry. No humane person would take lightly the impact on the children of any prolongation of their separation from their parents beyond the minimum period necessary. But the Secretary of State has to balance the harm to them against serious policy considerations designed to prevent the risk of far worse harm to others. It is worth repeating that the initial separation is not of her making: on the contrary, she is having to address the consequences of a situation created the illegal and dangerous activities of the people-smugglers – and, it has to be said, by the parents in seeking to take advantage of those activities rather than seeking asylum in Belgium or France. Also, without wishing in any way to minimise the children's distress, it must be recognised that they are being very well looked after by experienced foster-carers in a stable and appropriate environment, and they are in daily contact with their parents. In that context the continuation of their separation does not weigh as heavily in the balance as it otherwise might. In reaching that conclusion, I of course take into account the obligation in section 55 of the 2009 Act to

> safeguard and promote the welfare of the children, but although the best interests of a child must be a primary consideration, they are not paramount.
>
> 55. Ms Kilroy submitted that even if Dr Elimelech's evidence were accepted the eventuation of the risk was uncertain, and that it was wrong to subject the children to the certain harm of prolonging the separation in order to avoid an uncertain future harm to others. I do not accept that. It is necessary to take into account the relative scale and gravity of the two harms. If the gangs do alter their behaviours as predicted, many children will be separated from their parents, and some may die as a result.
>
> 56. My conclusion that the pursuit of reunification in France can in principle justify the interference with the children's article 8 rights resulting from their continued separation from their parents does not mean that it will do so indefinitely. It is necessary to assess both the chances of a successful outcome and the timescale within which it may be achieved. As to timescale, it is clear from the Secretary of State's evidence as summarised above that there is a reasonable prospect of reunification in France being achievable within the time-frame of the family proceedings; and, that being so, it would in my view be wrong to undermine the process now by requiring the Secretary of State to admit the parents.
>
> 57. The only obvious reason why reunification might not be possible within that time frame, or something close to it, would be if the parents fail to co-operate with the authorities in France. I see no reason to proceed on the basis that that will occur. I realise of course that they would prefer to be admitted to the UK and to seek asylum here. But that does not mean that they will not choose to seek asylum in France if it becomes clear that that is the surest way of achieving early reunification with their children. Even if, as Ms Kilroy urged on us, their belief that France is not a safe country is genuine, the evidence on which they rely falls far short of establishing that that is the case, as they may come to appreciate. I note also that EK believes that a further move will be disruptive to the children, but that might be judged to be a problem worth facing for the sake of early reunification. In short, I do not believe that speculation about the conduct of the parents is a proper basis for determining the prospects of reunification in France."

61. Although the judgment of the Court of Appeal arises from an appeal against an order for interim relief, as Ms Knorr was bound to accept, there is no reason why we should reach a different decision when considering the applicants' pleaded claim that there is no general interest that can conceivably be identified which could displace or outweigh reunion in the UK. The public interest identified amply establishes that there is good reason why a claim such as this is likely to fail. A decision to delay reaching a decision on an application for Entry Clearance whilst the respondent embarks upon enquiries to establish whether reunification can take place somewhere other than the UK, and in particular a safe third country, is unlikely to be unlawful, unreasonable or irrational where there remains a prospect of the family being reunited elsewhere within a reasonable timescale.

62. What a 'reasonable timescale' is will depend upon all the circumstances but will inevitably include a timeframe during which any Hague Convention proceedings that are required before the Family Division are determined. Absent some other compelling factor, where a decision to refuse an application for Entry Clearance is made, it is also likely to include the period during which an appeal before the FtT and Upper Tribunal is considered.

63. Dr Elimelech accepts that in certain circumstances children may be able to reunite with their parents in the UK where there are exceptional and compelling circumstances but that will require a consideration of all the relevant circumstances of the case as well as relevant policy considerations. Given the overwhelming public interest at play, such cases are in our judgment likely to be very rare.

64. As far as the Article 3 claim is concerned, neither Ms Knorr nor Sir James sought to persuade us that we should do other than adopt what was said by Underhill LJ:

> "60. I turn to the case based on article 3. I can deal with this shortly, because I do not believe that there is a strong case – let alone a particularly strong case – that the suffering which the children are undergoing as a result of any action or inaction on the part of the Secretary of State reaches the threshold for a breach of article 3. We are not of course concerned with the trauma attributable to the events of 19 July or the period of separation immediately following but only with the prolongation of the separation thereafter. As regards the distress which the children are suffering on that account, I repeat what I say in para. 53 above. Ms Kilroy referred us to the decisions of the European Court of Human Rights in *Mayeka v Belgium [2006] ECHR 1170* and *Tarakhel v Switzerland [2014] ECHR 1185* , but the facts in those cases were very different."

65. Finally, we observe that in circumstances where a family is separated, it will usually be in the gift of the parents, even where their primary position is that reunification in the UK is in the best interests of the children, to ensure that decisions are made within a reasonable timeframe. They retain parental responsibility and can influence the timescales within which any assessments required are completed, and decisions are made to reunite the family. Much depends in any appeal before the FtT and in any assessment required by local authority or Court upon the timely co-operation of the parents, who we have no doubt, acting responsibly, will wish to ensure the family can be reunited as soon as possible. Although we have rejected the claim made by the respondent here that the parents are seeking to 'game the system', any evidence of a failure to engage or co-operate or to engineer a situation where the children lay down greater ties because of the passage of time is likely to impact adversely on the parents' claims.

CONCLUSION

66. For the reasons we have set out, we refuse consent for the claim to be withdrawn and we dismiss the claim for Judicial Review.

67. The applicants' claim for interim relief was refused by the Court of Appeal. It follows from our decision to dismiss this claim that we do not make a declaration that the respondent's failure to admit the parents to the UK is unlawful and in breach of Articles 3 and 8 as at the date of our decision on the evidence before us. It follows that we also decline to make any mandatory order for the parents to be admitted to the UK. The applicants' claim that the respondent make a lawful decision on the application for entry clearance is now academic.

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