UT Neutral Citation Number: [2024] UKUT 00236 (IAC)

R (on the application of LR (Afghanistan)) v Secretary of State for the Home Department (Ukrainian Family Scheme – discrimination, nationality)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Heard at Field House

Heard on 19 and 20 March 2024
Promulgated on 14th May 2024

Before:

MR JUSTICE SHELDON
UPPER TRIBUNAL JUDGE JACKSON

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Between:

THE KING
on the application of
LR
(Anonymity Order made)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms M Knorr of Counsel
(instructed by Birnberg Peirce Solicitors LTD), for the Applicant

Mr J Holborn of Counsel
(instructed by the Government Legal Department) for the Respondent

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J U D G M E N T

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1. *The Ukrainian Family Scheme ("UFS") falls within the ambit of Article 8 for the purposes of a claim under Article 14 ECHR.*

2. *The Applicant, an Afghan national who was resident in Ukraine prior to the Russian invasion and who has a relative in the United Kingdom was in an analogous situation to a Ukrainian national and the refusal of his application for failing to meet the requirement to be a Ukrainian national was direct discrimination on the grounds of nationality.*

3. *The discrimination between the Applicant as an Afghan national compared to a Ukrainian national was objectively justified.*

ANONYMITY ORDER

No-one shall publish or reveal any information, including the name or address of the Applicant or their Sponsor, likely to lead members of the public to identify the Applicant or their Sponsor. Failure to comply with this order could amount to a contempt of court.

Mr Justice Sheldon and Judge Jackson:

1. In this application for Judicial Review, the Applicant challenges the Respondent's refusal of his application for entry clearance to the United Kingdom dated 2 May 2023 (albeit served on 1 June 2023) under the Ukrainian Family Scheme (the "UFS") and the Homes for Ukraine Sponsorship Scheme (the "HUSS").

2. The Applicant is an Afghan national who obtained a visa to study in Ukraine in September 2015 and arrived there on 8 October 2015 shortly after his eighteenth birthday. He studied at the University of Ukraine for a number of years with various visa extensions to 15 August 2020. The Applicant's visa was cancelled prior to its end date following a new law which required students to leave the country and make a new application for a visa from outside of it. The Applicant could not return to Afghanistan to do so because there was no Ukrainian Embassy there from which to apply and because he feared for his safety on return to Afghanistan. The Applicant remained in Ukraine and on 1 September 2021 he was recognised as a refugee by the UNHCR there. His initial certificate for this expired and he was awaiting a

response on his request to extend his refugee certificate at the time of the Russian invasion.

3. On 25 February 2022, following the Russian invasion in to Ukraine, the Applicant fled first to Poland and then to Germany on 3 March 2022 where he currently remains. The Applicant was granted a visa in Germany on 4 March 2022 which expired on 4 March 2024, but he is in the process of renewing it. In Germany, the Applicant had until very recently been living with his cousin's son (he now lives in different shared accommodation) and has been supported at times by a small stipend from the German Government and by his brother ("the Sponsor"). He has had part-time employment and has accessed health care in Germany.

4. On 26 September 2022, the Applicant applied for entry clearance to the United Kingdom to join the Sponsor who has indefinite leave to remain here granted on 8 April 2022 under the Afghan Relocation and Assistance Policy ("ARAP"). The Sponsor was in the Afghan army and worked as an Air Liaison Officer for the Special Forces of the British General Command Police Special Unit in Afghanistan and consequently is now at risk from the Taliban if he returned to Afghanistan. The Sponsor has made separate applications for the Applicant and other family members (who were at the time of application still in Afghanistan but now understood to be in Pakistan) to join him in the United Kingdom under ARAP on the basis that they are also at risk from the Taliban because of his connections with the British armed forces. There are examples of other family members already having been targeted, injured and killed in Afghanistan. The application under ARAP is a separate application which is not the subject of the current claim and the details of which are not therefore referred to in any detail in this decision[1].

5. The application on 26 September 2022 was under both the UFS to join the Sponsor in the UK as his closest relative in Europe and because he would be unable to return to Afghanistan; and under the HUSS with accommodation offered by one of the Sponsor's former teachers in the Defence Academy in the UK (an approved sponsor under the HUSS) on the basis that at the time of the application, the Sponsor was in bridging accommodation which the Applicant could not join him in. The intention has however always been for the Applicant and Sponsor to live together in the United Kingdom, with plans to rent appropriate accommodation for the Applicant's arrival.

6. The Respondent initially refused the Applicant's application for entry clearance on 16 January 2023 on the basis that the Applicant was not a Ukrainian national, however that was withdrawn subsequent to an earlier

[1] The hearing bundle in this claim included a significant volume of documents and statements about this separate application, inexplicably, as none of this material was directly referred to or relied upon, nor was this level of detail relevant to the issues in the present claim.

application for Judicial Review (JR-2023-LON-000604) and reconsidered in a decision dated 2 May 2023.

7. In the decision dated 2 May 2023, the Respondent refused the application (without initially specifying which but it is not in dispute that the decision and reasoning covers both the UFS and HUSS) on the basis that the Applicant did not meet the nationality requirements. The Respondent refers to the Ukraine Scheme guidance containing discretion, but noted that this was only in relation to the evidence required and to relationships not explicitly catered for within the Immigration Rules and did not extend to the nationality requirements.

8. In relation to Articles 8 and 14 of the European Convention on Human Rights ("the Convention"), the Respondent expressly stated that the application made was not a human rights claim but that, in any event, it was not arguable that family life was engaged in circumstances where the Applicant was living an independent life and in circumstances where he has lived apart from the Sponsor for many years, even if there is financial support. In the absence of Article 8 being engaged, the Respondent considered that Article 14 of the Convention could not independently be relied upon. In any event, the scheme can be objectively and reasonably justified.

9. Finally, the Respondent gave separate consideration to whether there were exceptional circumstances to exercise discretion to grant leave to enter outside of the Immigration Rules. The relationship between the Applicant and the Sponsor was considered, noting that they have lived in different countries to each other since 2015 and, apart from two visits, all of their contact has been using modern means of communication which could continue. The Respondent noted that no reasons were given for the assertion that the family dynamic has changed, nor was there any evidence of a strengthening of family life between the Applicant and the Sponsor since the former left Ukraine. It was considered that family life could continue as it does now and there was no evidence of any other ties to the United Kingdom.

10. There was reference to the Applicant's circumstances in Germany where he has leave to remain, financial support, some ties and a support network; such that the Applicant could obtain the support he needed where he was currently living. The Applicant's circumstances in Ukraine were also considered, but overall it was found that there were no exceptional circumstances and in particular, that there was no obligation under Article 8 or otherwise for foreign nationals to be granted leave to remain in the United Kingdom.

11. The Applicant submitted further evidence on 18 December 2023, including a report by Dr Galappathie dated 14 December 2023; which led to a further decision by the Respondent dated 15 February 2024. The earlier decision was

maintained. In his report, Dr Galappathie assessed the Applicant as suffering from an episode of severe depression; generalised anxiety and Post-Traumatic Stress Disorder. There has been no direct challenge to that part of his report by the Respondent.

12. The Respondent's decision dated 15 February 2024 essentially repeats the same reasons for refusal under the Immigration Rules and in respect of Article 8 and Article 14 of the Convention. There is however further consideration of the exercise of discretion on the basis of exceptional circumstances by reference to Dr Galappathie's report. It is noted that in some respects this report simply repeats the Applicant's account of his family life with the Sponsor and does not address the support given to the Applicant in Germany, including by the family member he has been living with there. Further, the report does not assess why support can only be given by the Sponsor in the United Kingdom, nor as to why treatment would not be available in Germany (where other health care has been provided) particularly where the Applicant has a level of stability in terms of employment and residence. The same overall conclusion was then reached to refuse to grant the Applicant any form of entry clearance.

13. The parties agreed by consent for the grounds of challenge to be amended to include a further ground challenging this later decision. The grounds of challenge are therefore as follows:

    (i) The Respondent's refusal is discriminatory on grounds of nationality, without objective justification, in breach of Article 14 of the Convention in conjunction with Article 8 of the same;

    (ii) The Respondent's refusal is in breach of Article 8 of the Convention;

    (iii) The Respondent's refusal to exercise his discretion outside of the Immigration Rules was inconsistent with his obligations under the Human Rights Act 1998 and in any event failed to assess relevant matters properly.

Legal and Policy background

14. The rules for the UFS and the HUSS were, at the relevant time[2], set out in Appendix Ukraine Scheme in the Immigration Rules. The appendix sets out the three different routes by which those affected by the conflict in Ukraine could make an application. The relevant parts of the rules for the UFS are as follows:

[2] Applications under parts of the scheme closed on 19 February 2024 such that certain provisions have been deleted from this date.

Residence requirement for the Ukraine Family Scheme
UKR 5.1. An applicant applying for entry clearance under the Ukraine Family Scheme must have been ordinarily resident in Ukraine immediately before 1 January 2022, …

Relationship requirement for a family member under the Ukraine Family Scheme
UKR 6.1. The applicant must be the family member (as set out at UKR 6.2) of a UK-based sponsor who is one of the following:

(a) …
(b) a person who is settled in the UK; or
(c) …
(d) …

UKR 6.2. When applying as a family member under UKR 6.1., the applicant must be a family member in one of the following relationships (and, if the applicant is not Ukrainian, at least one of the immediate family members under (a) must be a Ukrainian national as in UKR 7.1.):

(a) an immediate family member meaning the:
(i) partner of the UK-based sponsor; or
(ii) child aged under 18 on the date of application of the UK-based sponsor or of the UK-based sponsor's partner; or
(iii) parent of a child (who is under 18 on the date of application), where the child is the UK-based sponsor; or
(iv) fiancé(e) or proposed civil partner of the UK-based sponsor; or …

(b) extended family member, meaning a:
(i) parent of a UK-based sponsor, or of the UK-based sponsor's partner (where the sponsor or partner is aged 18 or over on the date of application); or
(ii) parent of the UK-based sponsor's child or of the UK-based sponsor's partner's child (where the child is under 18 on the date of application); or
(iii) grandparent of the UK-based sponsor or of the UK-based sponsor's partner; or
(iv) grandchild of the UK-based sponsor or of the UK-based sponsor's partner; or
(v) sibling of the UK-based sponsor or of the UK-based sponsor's partner;
(vi) adult child (aged 18 or over on the date of application) of the UK-based sponsor or of the UK-based sponsor's partner; or
(vii) aunt or uncle of the UK-bases sponsor; or
(viii) cousin of the UK-based sponsor; or
(ix) niece or nephew of the UK-based sponsor; or

(c) an immediate family member of an extended family member, meaning a:
(i) partner of an extended family member; or

(ii) child aged under 18 on the date of application of an extended family member; or
(iii) parent of a child aged under 18 on the date of application, where the child is the extended family member; or
(iv) fiancé(e) or proposed civil partner of an extended family member.

Nationality requirement for the Ukraine Family Scheme
UKR 7.1. The applicant must either be:
(a) a Ukrainian national; or
(b) part of a family group (meaning a group of people as set in UKR 6.2.) which includes an immediate family member of the UK-based sponsor who is a Ukrainian national who would qualify under the scheme (whether or not applying at the same time as the applicant).

15. The rules for the HUSS contain materially similar provisions requiring the Applicant to be ordinarily resident in Ukraine immediately before 1 January 2022 (UKR 16.1) and that the Applicant is a Ukrainian national or part of an immediate family group which includes an immediate family member who is a Ukrainian national (UKR 17.1). There are separate provisions in UKR 15.1 as to the requirement to have an approved HUSS sponsor, which are not in dispute in these proceedings.

16. The 'Ukraine Scheme', version 4, dated 11 March 2022 contains guidance to decision makers in relation to applications under the UFS. In particular, it contains reference to some cases to be referred to an Entry Clearance Manager or Senior Caseworker if the requirements of the rules are not met to allow decisions on a case-by-case basis. An example is in relation to relationships not covered by the scheme, which states:

> "Applications received by applicants who do not meet the relationship requirements may be refused. However, caseworkers may apply discretion to accept and consider applications from other family members where they are evidenced and there are exceptional reasons to do so. Caseworkers should take a pragmatic approach and consider the applicant's circumstances as well as what meaningful connection the applicant has to their immediate family unit, their sponsor and the UK. A case may be exceptional where, for example, the decision to refuse would mean separating an individual from their long-term family unit. An applicant should provide evidence of their situation where possible, and all decisions should be made on a case-by-case basis."

17. There is similar reference under the heading of 'Nationality and mixed families' with provision to refer the case where a Ukrainian national resident in the UK is the sponsor and no immediate family members are Ukrainian but are ordinarily resident in Ukraine.

18. An updated version of the policy, now called the 'Ukraine Family Scheme', version 5, was published on 7 December 2023. This contains materially

identical provision to that set out above as to relationships not covered by the scheme (with minor changes to the wording only). In relation to nationality, the policy now states:

> "Nationality and mixed families
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> …
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> Where a Ukrainian national resident in the UK is the sponsor and none of their immediate family members are Ukrainian (for example the partner and child are both Indian) but are ordinarily resident in Ukraine, they do not qualify under the Ukraine Family Scheme and you should consider the application with the information available.
>
> Other non-Ukrainian nationals
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> Unless they meet the relationship requirements set out above non-Ukrainian nationals who are or were ordinarily resident in Ukraine who have family members in the UK do not qualify under the scheme. For example, a Nigerian national who was studying in Ukraine, and has family members who are in the UK, even if the family members are British or settled, would not qualify under the Ukraine Family Scheme.
>
> Individuals who wish to join family members who are British or settled in the UK may be eligible to apply to enter the UK under the family Immigration Rules."

19. In a witness statement for these proceedings, David Ramsbotham, a civil servant at the Home Office, stated that the UFS was launched on 4 March 2022, initially as a concession to the Immigration Rules. Mr Ramsbotham explains that following the Russian invasion of Ukraine, the United Kingdom Government's first priority was to protect British citizens living in Ukraine and to facilitate their departure. As British citizens were understandably reluctant to leave without their family members, a concession to the Immigration Rules was made to ensure that the usual requirements for bringing in family members (paying an application fee, meeting minimum income and language requirements) did not act as a barrier to getting them to safety quickly. The scheme was extended to Ukrainian nationals whose eligible family member was resident in the United Kingdom at the time of the Russian invasion, and a broad definition of family members was adopted. The rationale for the broad definition– to include siblings, adult children, aunts, uncles, nieces, nephews and in-laws – was to keep families together and ensure that as many as possible were able to get to safety as quickly as possible in the context of the invasion.

20. An Equality Impact Assessment dated 2 March 2022 set out the justification for the scheme as follows:

"The policy rationale is set out above and is intended to take a flexible approach to an ongoing conflict. The aim is to benefit the family members of British nationals and settled persons whose situation is such that there is a genuine and imminent threat to life. We will monitor the situation closely and adapt our approach accordingly.

This scheme gives rise to direct discrimination on the basis of race (nationality), as it is being implemented in favour of Ukrainian nationals. The scheme can be objectively justified as it aims to support those applicants who are significantly impacted by a rapidly deteriorating situation in Ukraine. This includes the risk of military incursion, war and air strikes; the potential for cyber-attacks affecting applications for visas or passports made online; and the need to facilitate rapid travel out of Ukraine, for safety and security reasons.

Potential applicants for a visa may need to change their plans very quickly and have had little notice. They may therefore have difficulty demonstrating they meet all the requirements of the Family rules, or have time to apply for or qualify for a fee waiver.

The non-application of this scheme to individuals in other countries experiencing conflict is justified owing to the exceptional and unique circumstances in Ukraine, and the need for dependants to leave the country quickly and safely."

21. The Equality Impact Assessment pointed out that, pending the scheme being set out in the Immigration Rules, there would be need to be a Ministerial Authorisation for the direct race discrimination under paragraph 17(4) of Schedule 3 to the Equality Act 2010. It was stated that:

"The direct discrimination which arises on the basis of race (nationality) because of this scheme will be authorised in the rules, and under an MA until the rules are laid on 15 March 2022. The underlying rationale for discriminating on the basis of race is to support Ukrainian nationals who are significantly impacted by the rapidly deteriorating security situation in Ukraine and have a connection to someone settled in the UK.

The non-application of this scheme to individuals in other countries experiencing conflict is justified owing to the exceptional and unique circumstances in Ukraine, and the need for dependants to leave the country quickly and safely. The non-application of this scheme to non-Ukrainian nationals who are resident in Ukraine (unless they have a Ukrainian family member) is considered to be justified and proportionate as it is anticipated they would be able to travel to a safe third country.

The scheme has been introduced in response to the exceptional and unique circumstances in Ukraine. Unlike other conflicts, the closer proximity of Ukraine and the UK's diplomatic links and foreign policy objectives mean the interests of the UK are more directly and specifically impacted than in other

> conflicts in other parts of the world. The role of the UK and our NATO partners, including the stance taken on the right for Ukraine to choose to pursue joining NATO and the practical support provided for defensive preparations, are key factors in the escalating situation. The particular risks posed by Russia, including hostile-state threats, have also been factored into our assessment. We will monitor the situation closely and adapt our approach accordingly."

22. In a Ministerial Submission dated 24 March 2022, the Secretary of State and the Minister for Safe and Legal Migration were informed that there were 1190 cases under the UFS which did not fall to be granted under the scheme or had individual complexities, and there was a need to agree an approach to these cases. The cases included 118 Third Country Nationals ("TCNs") who potentially could return to their home country, and 71 TCNs who could not. The recommended approach for the former was to refuse their applications; and for the latter their cases should continue to be deferred pending further advice. With respect to the latter, the submission noted that "These applicants are primarily from Afghanistan, and many of them appear to have been evacuated to Ukraine from Afghanistan during 2021. We therefore believe that an outright refusal, as with [TCNs who could return to their home country], is not the appropriate approach and more support for next steps might be needed."

23. The Minister for Safe and Legal Migration expressed a willingness to grant leave under the UFS in cases where was clear evidence that the TCN was previously resident in Ukraine and was the immediate family member (spouse, civil partner, durable partner, under 18 child or parent of a child aged under 18) of a person settled in the United Kingdom (or with limited humanitarian leave or pre-settled status under the EU Settlement Scheme). That is, the Minister was suggesting that there would need to be a closer family link between the TCN and the family member in the United Kingdom, as compared to the Ukrainian national who was applying under the UFS.

24. In a further Ministerial Submission dated 14 April 2022, officials noted that there were now approximately 2000 applications under the Ukraine schemes from TCNs which did not fall to be granted. Officials' advice was that there were significant reasons for not including the TCN cases identified by the Minister in the Ukraine Schemes:

> "A deliberate component of both these Schemes is that they have a nationality requirement whereby the applicant must either be Ukrainian or part of a family group of which at least one member is Ukrainian and qualifies under the Schemes. This is because the Schemes were established primarily to provide Ukrainians, displaced from their country and unable to return, a safe place to reside. TCNs in Ukraine, who have the option to return to their home country, are in a fundamentally different position."

25. It was explained that the Ukraine Schemes were designed to be light touch, and the operational processes and resources had been tailored for this. If TCNs were allowed access to the Ukraine Schemes it was expected that they would receive large volumes of applications from TCNs who may never have been in Ukraine, or were not in Ukraine immediately before 1 January 2022, but seek to take advantage of the more relaxed evidential requirements. Having more cases to process would undermine the ability to process quickly cases from genuine Ukrainian family groups. It was not considered possible to apply the generous evidential flexibility policy to Ukrainians only, and applying a stricter standard for everyone would slow down caseworking and penalise genuine applicants who may have difficulty accessing the required evidence. A particular feature of the Ukraine Schemes was that they were free of fees: officials considered that this could be attractive to TCNs to make human rights and other protection-based claims, instead of using the family migration or refugee family reunion routes. There was also concern that extending the scheme to TCNs would run the risk of making the Ukraine Schemes

> "a precedent for humanitarian visas on a larger scale, such as being open without reference to nationality or the specific nature of the conflict involved. Calls for the Home Office to do this are already made on a regular basis, so any move perceived to be acknowledging the need for such routes is likely to add to that pressure. If our long-term position is that we want our response to be specific to the nature of the conflict involved then it is worth preserving the shape of the Ukraine Scheme as set out."

26. The TCNs who were unable to return were specifically referred to. Officials understood that there were currently 353 of these, and these were from Afghanistan. It was recommended that these individuals "should avail themselves of the arrangements that exist in the safe European country in which they are residing after leaving Ukraine. These arrangements will either be under the Temporary Protection Directive, which caters for stateless persons and holders of refugee status, or the asylum system of that country. Countries can include TCNs in their temporary protection offer and some already have". Officials also stated that:

> "**We do not think it would be desirable to consider the inability of a person to return as part of an application to the Ukraine Schemes.** If we accepted there was a protection need to be considered, this is highly likely to be viewed as accepting an asylum claim from overseas. The Home Office has a clear and long running position that this is not an option available to people wishing to claim asylum or humanitarian protection
>
> **Were we to consider such matters through the schemes it would be difficult to maintain our policy position that they are … not Human Rights-based routes attracting a right of appeal.** We have specifically designed these schemes not to be a legal protection routes and those successful are not given

refugee status, humanitarian protection or indefinite leave to remain. If the schemes attract a right of appeal, the judiciary will be entitled [to] consider the human rights and/or protection elements of a claim in addition to the core components of the scheme e.g. eligibility and suitability requirements. We may come under pressure to consider our wider position on Ukrainians who are currently given three years leave to remain and provide refugee or humanitarian protection status as an alternative, although this risk is mitigated by the generous provision within the schemes including the right to work and access benefits.

The current casework resource allocated to the schemes is not equipped to deal with protection type issues. We would need to redeploy appropriate resource from elsewhere in the system to consider a person's ability to return. Having to consider a claimed protection need would also significantly slow down application processing, at a time when we are under external pressure to increase our speed of processing."

(Emphasis in original). The submission also repeated the earlier advice that cases with particularly compelling, compassionate or exceptional circumstances would be considered for leave outside of the rules.

27. The Minister for Safe and Legal Migration and the Secretary of State agreed with the recommendation from officials to refuse applications from TCN applicants who cannot return to their country of nationality but are currently in a safe country. The Minister and the Secretary of State did not agree, however, that not opening the scheme to TCNs resident in Ukraine immediately before 1 January 2022, except where they were in a family group of which at least one member is Ukrainian and qualifies under the Schemes, was necessary to maintain the key policy aims. The observations of the Minister for Safe and Legal Migration were reported as follows:

"• Minister Foster does not agree with the premise of the second paragraph which underpins this sub; that TCNs in Ukraine, who have the option to return to their home country, are in a fundamentally different position to those with UKR nationality or part of a family group with one member who qualifies for the schemes.

o Minister Foster comments that this argument does not hold up if the person concerned has been forced to leave their home due to the war and the (very close) family to reside with is in the UK.
o Some may not have an easy option to return and the core reason for launching this scheme was impact on the ground, not just nationality, hence our residence requirement.
o Minister Foster would draw this tightly to immediate family, to prevent abuse and apply to UFS only. Not doing this will see some harsh outcomes where someone with parents/partner in the UK is perceived as being simply sent on their way.

> • On paragraph three (our ability to prove or disprove residence and our limited capacity to do so, thus slowing down case working) Minister Foster comments this risk is present already and only a certain number of applications received. We can ask for additional evidence for TCNs where necessary to prevent abuse, which few would argue with.
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> • LOTR Policy (paras 5-10) Minister comments that these arguments are ones which go against the routes as a whole and he is concerned with the recommended approach.
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> o The Minister notes it is the specific circumstances which justify the route and a potential approach to it plus, like with covid concessions, we can remove aspects of our provisions as the circumstances change, e.g., remove provision for TCNs or increase requirements for evidence of residence in UKR as the schemes gets more established and the WIP reduces.
>
> • Minister Foster does agree we should now proceed to refuse applications made to the Ukraine Schemes by TCNs who claim to be unable to return to their country of nationality (para 14).
>
> o He comments unless there is a close family link which is basis of the UFS, then the right approach is for them to seek sanctuary in the safe and democratic country they are in."

In other words, the Minister for Safe and Legal Migration was suggesting that TCNs – including those who could not return to their country of nationality – with close family links to someone in the United Kingdom might be accommodated within the Ukraine Schemes without undermining their rationale.

28. Further advice was provided on 6 May 2022. This maintained the position previously expressed by officials, recommending that TCNs with no immediate or extended Ukrainian family members should be excluded from the scope of the UFS. It was said to be "problematic to make TCNs eligible for the scheme whilst restricting that eligibility to *immediate* family members, when Ukrainian nationals can rely on *extended* family members" (emphasis in the original). It was considered to be "difficult to argue that a TCN extended family member of a UK-based sponsor is in a different position to a Ukrainian extended family member of a UK-based sponsor and should return to their country of nationality (or safe third country) but an immediate family member could not". The officials stated that:

> "If the intention behind the scheme is to protect those resident in Ukraine with family links to the UK, and that this applies as much to TCNs as to Ukrainians, **there is no clear justification in treating TCNs more harshly by limiting the scope of eligible relationships to immediate family members of UK-based sponsors**. Therefore, we think the rational **choice is between continuing to exclude TCNs from the scheme** (except where they have a Ukrainian family

member who qualifies) **or including TCNs with extended family members in the UK**".

(Emphasis in the original).

29. The risks and impacts were described as follows:

> **"Including TCNs with extended family members in the UK within the scope of UFS could significantly increase the total numbers eligible, which would have an impact on public funds and services.** All successful applicants are granted full access to benefits and housing support and we are already under pressure from other departments such as the Department for Levelling Up, Housing and Communities (DLUHC) and local authorities given the unfunded pressures the volumes already in the scheme are creating. Any expansion to the scheme would likely require cross government agreement which would not be guaranteed.
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> **There is a risk that opening up the Scheme to TCNs might generate potentially abusive applications from people who were not resident in Ukraine.** Given this, and the relatively light touch approach to evidential requirements for Ukrainians under the Scheme, **you have indicated you may be minded to operate a different approach to evidential flexibility to TCN applications**. We have very little rationale or evidence base for doing so at this stage. Caseworkers would still be able to request further evidence where there are concerns (including of residence in Ukraine prior to the 1 January 2022 cut off). Caseworkers would be more likely to do this where a person is unable to show any links to Ukraine, such as a Ukraine Passport. **As such we do not believe we would derive significant benefit from a differential approach**.
>
> **If we were to operate two different policies on evidential flexibility, it is likely to constitute direct discrimination** on the basis of nationality (in favour of Ukrainian nationals) and would need to be authorised. Any authorisation can be challenged on public law grounds, and we would need to ensure there was an adequate evidence base to support the authorisation. As the current policy already allows further checks to be completed, we do not consider there would be a strong rationale for taking a different approach.
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> **We would recommend operating a consistent evidential flexibility policy across the scheme** which would mean either offering the same light touch approach to TCNs (with the consequent risk of applicants abusing the light touch approach being granted) or introducing a more stringent approach to counter that risk (with the knock on impact on genuine Ukrainian applicants being asked to produce more documentary evidence than has previously been the case, and potentially more refusals on the basis of an absence of evidence).
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> **Given the potential adverse impacts on already-stretched public services and potential for abusive applications, our recommendation remains to not include TCNs in the UFS (except where they are the family members of Ukrainians who qualify).** This is in line with the Rules as currently in

operation, with discretion available to caseworkers to grant outside the Rules in exceptional circumstances."

30. In his witness statement, Mr Ramsbotham also explained that there was and is a legitimate public interest in ensuring that those granted temporary admission to the United Kingdom could be required to return to Ukraine once it was safe and their right to remain expires. It was unclear whether non-Ukrainian nationals would be permitted to return to Ukraine, or could be subject to removal from Ukraine if returned. The stated Ukrainian Government policy was for there to be a temporary extension of their visas, but this was not guaranteed and would be time-limited. Non-Ukrainian nationals could therefore be placed in the undesirable position of being unable to return to the Ukraine and also unable to meet the criteria to remain in the United Kingdom.

31. Mr Ramsbotham also described the difficulties in obtaining evidence about residence. He stated that the Secretary of State could not confirm residency of an individual in Ukraine. There were difficulties with the publicly available Ukrainian checking service and a new process from the Ukrainian authorities might not be forthcoming given their other priorities. A light touch approach had been applied to evidencing residency immediately before 1 January 2022 and this made sense for the vast majority of Ukrainians. For TCNs, however, the risk of false residence claims would be greater. This would necessitate additional casework scrutiny and credibility assessments. This would not be proportionate when considering the aims of the Ukraine Schemes, and given that there are alternative schemes for those fleeing from Afghanistan, and the ability for TCNs unable to return to seek asylum in safe third countries accessible from Ukraine.

Ground 1 – discrimination

32. The Applicant's case is that the refusal of the visa under the UFS is discriminatory and in breach of Article 14 of the Convention read with Article 8[3]. Applying the approach set out in In re McLaughlin [2018] UKSC 48; [2018] 1 WLR 4250 at §15, the Applicant contends that (i) the circumstances fall within the 'ambit' of Article 8 of the Convention as it concerns a visa scheme set up by the Respondent that allows those fleeing war to join family in the United Kingdom; (ii) the Applicant is in an analogous situation to a Ukrainian national who falls within the UFS; (iii) the difference of treatment with the Ukrainian national is on grounds of nationality; and (iv) there is no objective justification for the difference of treatment. We take each of these contentions in turn.

[3] The Applicant's claim under Article 14 of the Convention was focussed on the UFS, and not the HUSS. The same ultimate conclusion would have been reached by this tribunal even if the claim had been directed at the HUSS.

(i) *Do the circumstances fall within the ambit of Article 8*

33. In order to fall within the ambit of a Convention right for the purposes of a claim under Article 14 it is not necessary for the measure in question to engage a substantive Convention right. It is sufficient if "the subject matter of the disadvantage constitutes one of the modalities of the exercise of the right guaranteed" or the measures are "linked to the exercise of a right guaranteed" under the Convention: see e.g. Petrovic v Austria (2001) 33 EHRR 14 at §28.

34. In Petrovic, the Strasbourg Court held that the refusal to grant the applicant a parental leave allowance did not constitute a failure to respect family life, as Article 8 did not impose any positive obligation on States to provide this kind of financial assistance. Nevertheless, it was held that the allowance was intended to promote family life and necessarily affects the way family life is organised. By granting parental leave allowance, it was held that the State demonstrated its respect for family life, and so the payment of the allowance came within the scope or ambit of Article 8 for the purposes of an Article 14 challenge.

35. Similarly here. To qualify for the UFS, an applicant must have a family connection with a person settled in the United Kingdom whether directly (as a relative of the person settled in the United Kingdom) or indirectly (as a relative of the person who has the direct family connection). The UFS is not open to anyone who simply has a connection with a person settled in the United Kingdom. The aim of the UFS is to keep families, defined quite broadly, together following their departure from Ukraine as a result of the Russian invasion. In our judgment, the UFS is therefore intended to promote family life. In the language of the Strasbourg Court, the UFS is "one of the modalities of the exercise" of Article 8 of the Convention.

36. Accordingly, the circumstances fall within the ambit of Article 8 for the purposes of an Article 14 claim. It is not necessary, therefore, for us to consider for these purposes whether the Applicant did enjoy family life with his brother who was settled in the United Kingdom so as to engage Article 8.

(ii) *Is the Applicant in an analogous situation to a person treated differently*

37. Article 14 safeguards individuals, placed in analogous situations, from discrimination. The comparator groups do not need to be identical, but there needs to be a "relevantly similar" situation between them for this requirement to be satisfied: see e.g. Hode and Abdi v United Kingdom (2013) 56 E.H.R.R. 27 at §45, 50. The "analogous situation" requirement must be judged "in the context of the measure in question and its purpose, in order to ask whether

there is such an obvious difference between the two persons that they are not in an analogous situation": *Re McLaughlin* at §26.

38. As Baroness Hale explained in AL (Serbia) v Secretary of State for the Home Department [2008] UKHL 42; [2008] 1 WLR 1434 at §25: "in only a handful of cases has the court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position… unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification".

39. We agree with the Applicant that he is in an analogous, or relevantly similar, situation to a Ukrainian national who qualifies for the UFS because he was ordinarily resident in Ukraine immediately before 1 January 2022, and is a family member of a person settled in the United Kingdom. If the Applicant was a Ukrainian national, he would have qualified for the UFS. There are undoubtedly differences between the Applicant and a Ukrainian national who qualifies – such as whether he will be able to return to Ukraine after the conflict has concluded and remain there – but these are differences that are more relevant to the question of justification (to which we will come), rather than to whether they are in relevantly similar situations. Both the Applicant and the Ukrainian national who qualifies were impacted by the Russian invasion and wished to flee to the United Kingdom where they had a family member with settled status.

(iii) *Is the difference in treatment on the ground of one of the characteristics listed in Article 14 or "other status".*

40. There is no dispute between the parties that there is a difference in treatment between the Applicant and his comparators on grounds listed in Article 14: race or nationality. The discrimination is direct: if the Applicant had had Ukrainian nationality he would have qualified under the UFS, given that he was resident in Ukraine immediately before 1 January 2022 and has a family member with settled status in the United Kingdom.

(iv) Is there an objective justification for the difference in treatment?

41. In considering whether the difference in treatment between the Applicant and a Ukrainian national who qualified for the UFS is objectively justified, we are required to consider the questions set out by Lord Reed in Bank Mellat v H M Treasury (No 2) [2013] UKSC 39; [2014] AC 700 at §74. That is:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4)

> whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will
> contribute to its achievement, the former outweighs the latter."

42. In doing so, we have to consider what margin of appreciation (or degree of deference) should be afforded the Respondent. Ms Knorr, for the Applicant, contended that although a wide margin is usually allowed to the State when it comes to immigration policy, "compelling" or "very weighty" reasons are required before a Court could decide that a difference in treatment based on nationality was compatible with the Convention.

43. The Strasbourg Court has held that "a wide margin is usually allowed to the state under the Convention when it comes to matters of immigration. In particular, a state is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country": see Pajić v Croatia (2018) 67 E.H.R.R. 12 at §58. On the other hand, the Strasbourg Court has repeatedly stated that "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention": see e.g. Ponomaryov v Bulgaria (2014) 59 E.H.R.R. at §52 (education fees).

44. In R (SC) v Work and Pensions Secretary [2021] UKSC 26; [2022] AC 223, at §115, Lord Reed stated that "the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from "the circumstances, the subject matter and its background". Furthermore at §159, Lord Reed observed that it was:

> " important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. As was recognised in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification".

45. It might be thought that cases involving immigration policy ought to be treated in the same way as those involving social and economic policy given that they involve matters that are quintessentially governmental, and will necessarily impact on social and economic matters. Accordingly, it might be thought that cogent justification is required for differential treatment on grounds of race or nationality in the immigration context. Nevertheless, our

attention was drawn to one case from Strasbourg in the immigration context – Biao v Denmark (2017) 64 E.H.R.R. 1 – where the Grand Chamber indicated that "compelling or very weighty reasons" were required to justify differential treatment on the grounds of nationality.

46. Biao was concerned with a Danish nationality law which allowed a Danish national and a foreign national to qualify for family reunification in Denmark if the former had been a Danish national for 28 years. This was found to create a difference in treatment between Danish-born nationals and those who acquired Danish nationality later in life. This amounted to *indirect* discrimination on the basis of race or ethnic origin, as the 28-year rule had "the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish": see §113. The primary focus of the Grand Chamber, therefore, was on discrimination on grounds of ethnic origin, rather than nationality.

47. At §114, the Grand Chamber stated that:

> "The burden of proof must shift to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin . . . **Having regard to the fact** that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society and **a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons** . . . , it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 of the Convention taken in conjunction with Article 8".

(Emphasis added). Although the reference to nationality-based discrimination was not central to the reasoning in the case – it was essentially *obiter dicta* – it does reflect the view that, even in the immigration context, very weighty or compelling reasons are required where nationality-based discrimination is concerned.

48. Against this background, therefore, we consider it appropriate to apply the stricter standard of review and examine whether the Respondent has compelling or very weighty reasons to justify the difference in treatment in the present case.

49. The Secretary of State advanced a number of ways in which the differential treatment was justified.

(a) The Ukraine Schemes were set up at speed, and designed to process applications with minimal checks. The Secretary of State considered that different, and potentially more onerous, checks would have to be put in place if the scheme were to cover non-national residents of Ukraine generally.

(b) The Ukraine Schemes are unique in light of the specific situation arising in the context of the Ukraine war. They were and are legitimately designed to deal with the specific situation rather than amounting to a general route to obtain leave to enter the United Kingdom.

(c) The majority of TCNs in Ukraine have the ability to return to their countries of citizenship, and so had a safe option not necessarily available to Ukrainian citizens.

(d) In respect of the category of person who cannot safely return to their home country, in the context of the Ukraine Schemes it is impractical to make individual decisions as to whether applicants can safely return to their home countries – effectively asylum or protection decisions - given the desire for speed and simplicity in the system. Even if the Applicant can show that he could not return to Afghanistan, the Secretary of State could not practically undertake such an exercise in every case of a TCN previously resident in Ukraine. This would include nationals of Russia who were living in Ukraine. It would be unfair to allow the Applicant's application merely because he has brought this litigation.

(e) The result of having to consider non-national residents of Ukraine on the grounds that they cannot safely return to their home countries would be, in effect, to allow asylum applications to be made from abroad. The Secretary of State has taken a policy decision not to permit this. To allow such applications under the Ukraine Schemes would be to undermine this legitimate public policy and the Secretary of State believes this would give rise to a risk of abuse, which in turn generates a need for authoritative checks on residence status to avoid abuse.

(f) A legitimate public interest remains in ensuring non-qualifying applications are not granted due to the speed and limited nature of checks being undertaken. There were concerns as to the potential adverse impact on public services of high volumes of such applications, and the risk of abuse.

(g) There was and is a legitimate public interest in ensuring that those granted temporary admission to the United Kingdom pursuant to the Ukraine Schemes could be required to return to Ukraine once it is safe and their leave to remain expires. It is uncertain if and for how long after the end of the war non-Ukrainian nationals granted either temporary or permanent residence rights will be permitted to return to Ukraine before their rights of residence

lapse, still less whether they could be subject to enforced removal there when the situation arises in future. Under Ukrainian law, grants of residence may also be revoked by Ukraine where a person threatens "national security, public order, health, rights and lawful interests of Ukrainian citizens and other individuals residing in Ukraine". If this occurred, the Secretary of State may be prevented from removing individuals. The same risk would not apply to Ukrainian citizens.

(h) There was and is a legitimate public interest in limiting the administrative burden on the Secretary of State caused by the Ukraine Schemes.

(i) There are significant administrative hurdles in checking the documentation and residence status of non-Ukrainian nationals, a process which requires the cooperation of the Ukrainian authorities. The need for those authorities to deal with other matters, and including their own citizens fleeing Ukraine, is obvious. These practical issues have not been resolved and any solution would not, in any event, be in the hands of the Secretary of State. Unless and until there is engagement and agreement reached as to systemic checks, widening the scheme to cover non-Ukrainian nationals generally is impractical. To proceed without checks as to residence status would open the door to a substantial risk of fraudulent applications.

(j) As a result, the scheme had to draw a line between qualifying and non-qualifying individuals that could practically and consistently be administered. The Courts have long recognised the desirability and lawfulness of a predictable and workable system: see Huang v Secretary of State for the Home Department [2007] 2 AC 167 at §6.

50. In the instant case, Ms Knorr contends that the Applicant's claim is not a challenge to the policy of the UFS itself; rather, it is a challenge to the application of the policy to the Applicant. It seems to us that, as a matter of our analysis, this is a distinction without any real difference. The UFS contains bright lines as to who qualifies and who does not; the Applicant contends that the bright lines discriminate against him as an Afghan (or non-Ukrainian) national and cannot be justified. That argument would be available to the hundreds of other Afghan (or non-Ukrainian) nationals who were resident in Ukraine before 1 January 2022 and had a family member living in the United Kingdom. It is necessary, therefore, for us to consider the justification of the bright lines generally, and balancing that with the impact on the Applicant of failing to qualify. We also bear in mind that the impact on the Applicant is likely to be reflective of the kind of impact on many if not most others who also fail to qualify.

51. It is clear that the Secretary of State had to set up the Ukrainian schemes at considerable pace. The objective of providing a safe haven for persons fleeing

from the Russian invasion of Ukraine was obviously a compelling one. For social and economic reasons, the Secretary of State could not offer that safe haven to all persons fleeing from Ukraine. It was necessary, therefore, for the Secretary of State to impose some restrictions on, or limitations to, those who could be offered temporary sanctuary in the United Kingdom. This made complete sense in the context where, as the Secretary of State was aware, the countries within the European Union were offering temporary protection to all of those fleeing from Ukraine. In other words, no one would be denied a safe place to move to.

52. In setting the restrictions or limitations, the Secretary of State focussed on Ukrainian nationals and their family members who had been living in the Ukraine on 1 January 2022, shortly before the invasion, where the Ukrainian national had a family member settled in the United Kingdom. This was an entirely reasonable focus for the Secretary of State. In supporting Ukrainian nationals, the Secretary of State was providing both moral and practical support to Ukraine, a matter of geopolitical importance for the Government.

53. Extending the scheme to family members of those Ukrainian nationals would mean that families could stay together, improving the Ukrainian nationals' sense of well-being and stability following their arrival in the United Kingdom. They would not worry about the whereabouts and conditions of their family members, and could support one another in their new place of residence. This was an entirely sensible approach. Given the pace at which the Ukraine schemes were, and had to be, set up and the administrative resources that the Secretary of State considered were appropriate to allocate to the qualification requirements, a generous and flexible approach was taken to assessing whether the residence requirement in Ukraine was met. This was also dictated somewhat by the absence of support on the ground in Ukraine to confirm individuals' status, unsurprisingly given the other demands on the administration in Ukraine at the time of and after the Russian invasion.

54. Broadening the scheme, without changing the evidential requirements for qualification clearly ran a serious risk of abuse. The Secretary of State was entitled to be concerned that large numbers of non-Ukrainian nationals for whom other entry routes were not available would claim to have been resident in Ukraine on 1 January 2022 so as to qualify. To mitigate against this risk, the Secretary of State would have had to apply more stringent evidential requirements to all such applicants. The Secretary of State was entitled to consider that this would require the deployment of greater administrative resources than he reasonably had available to him, in circumstances where the assistance from the Ukrainian authorities could not be guaranteed given the state of record-keeping in Ukraine. Moreover, if the Secretary of State did not apply the same stringent evidential rules to Ukrainian nationals (and their family members) who were applying under the scheme, he would run the risk

that that difference in treatment was challengeable under Article 14 of the Convention and might not easily be justified.

55. With respect to TCNs, the Secretary of State was entitled to take into account that some of them may not have the right to return to Ukraine once the conflict was over, and would seek to extend their stay in the United Kingdom. Avoiding this possible outcome was of genuine concern. For those TCNs who could not or might not be able to return their country of origin safely, the Secretary of State would have to make a determination in individual cases, and this would involve an additional allocation of administrative resources. It might also be tantamount to considering a claim for asylum, and the Secretary of State was entitled to take steps to avoid this outcome. For Afghan nationals, the Secretary of State was also entitled to decide that there was a bespoke regime already in place for consideration of their claim for entry to the United Kingdom and the limits of that regime should not be altered to accommodate those who were, or who claimed they were, fleeing from Ukraine and had been resident there on 1 January 2022.

56. An administratively workable scheme which adopts "bright lines" can amount to objective justification. That objective justification is not defeated merely because there are individuals whose circumstances (such as those of the Applicant) would not be excessively difficult to examine and make a determination on. There is considerable value in having the "bright lines" themselves as they enable the Secretary of State to allocate the appropriate level of resources, and send a wider message to those whose circumstances are not so easy to determine: their claims can be addressed quickly and efficiently, without too much burden on governmental resources. The harshness of the " bright lines" can be tempered for truly exceptional circumstances and, of course, other lawful routes for family reunification may be available, including for Afghan nationals.

57. The "bright lines" arguments are not diminished by the fact that the need for speed in putting the measures together and making decisions at the outset was no longer present as time elapsed. The same justification would apply: there would continue to be the risk of abuse, and the consequent requirement to allocate resources to determine the validity of claims; and there would continue to be the concern that the scheme would be tantamount to considering a claim for asylum, and may be a means to get around the bespoke Afghan scheme.

58. In our judgment, the aims for the Ukraine scheme are clearly legitimate ones. The measures adopted by the Secretary of State are rationally connected to meet those aims. A measure that was less intrusive to the Applicant could not have been used without unacceptably compromising the achievement of the objective: it would have required eliminating or moving the "bright line" that

had been established for the various reasons articulated above. Whilst Ms Knorr argues that the Minister for Safe and Legal Migration rejected many of the justifications (see the correspondence above at [27]), this does not appear to have been his final and considered view. Otherwise the scheme would not have been introduced in the way that it was, which strongly suggests that the advice of officials was ultimately accepted. The fact that the relevant Minister has expressed criticism or reservations about a particular argument does not mean that it cannot amount to a compelling or very weighty reason when examined by the Court.

59. When aggregated together, we consider that the various arguments for justifying the measures and the placement of the "bright lines" amount to compelling or very weighty reasons for designing the scheme in the way in which it was set up. In our judgment, these reasons clearly outweigh the disadvantage to the Applicant in not qualifying for the scheme, or not being treated as a truly exceptional case. Whilst the Applicant does have a genuine reason for wishing to be in the United Kingdom, as we explain below the family relationship with his brother is not so strong that his exclusion from the scheme is too great a hardship to him. Further, it is clear that the Applicant has temporary protection and a degree of stability in a safe place: Germany, where he has some family connection.

Ground 2 – Article 8

60. In summary, the Applicant's case is that there is family life between him and the Sponsor such as to engage Article 8(1) of the Convention and that the refusal amounts to a disproportionate interference with the same. Particular reliance is placed with regards to the relationship on the pre-existing ties between the brothers, their traumatic history, health needs (the Applicant suffering from poor mental health and would benefit from the direct support of the Sponsor), care and support, with both emotional and financial support. In terms of the balancing exercise required, the Applicant's case is that the public interest is reduced given the aim of supporting those fleeing from the war in Ukraine and supporting those at risk due to their work with British forces in Afghanistan, extending to their family members. In the alternative, the Applicant's case is that the Sponsor shares his private life with the Applicant and there is the potential for further development of both family and private life in the United Kingdom.

61. In short, the Respondent's position is that Article 8(1) of the Convention is simply not engaged on the facts of this case and even if it were, any interference would be proportionate. In particular, the Applicant can continue his relationship with the Sponsor from where he is now, where they can freely communicate and visit with relative ease, any financial support can continue and any medical treatment required is available in Germany. In

addition, the Respondent also submits that there is an alternative remedy available to the Applicant, to make a human rights application for entry clearance.

62. At the outset, we do not consider that the Applicant's reliance on private life for the purposes of Article 8 adds anything of substance to his family life claim and the submission failed to address two specific points. First, the Applicant himself is not within the territory of the United Kingdom and is not therefore within the jurisdiction for Article 8 on private life grounds to apply to him at all (his family life can only be considered because of the Sponsor's residence within the territory). Secondly, there is arguably no engagement with and no interference with the Sponsor's right to respect for private life in the United Kingdom as a result of the Respondent's decision under challenge. Even if the family life (in practical rather than Article 8(1) terms) is considered as part of the Sponsor's private life, it is not enjoyed in the United Kingdom and it has subsisted for a number of years with the Applicant being in a different country and being maintained through modern means of communication; which can continue in the same way. We therefore only focus in what follows on the family life aspects of this claim.

63. It is not in dispute that in cases such as this, the Upper Tribunal may consider the Applicant's Article 8 claim for itself and we focus on doing so in this decision in accordance with the five stage test set out in Razgar v Secretary of State for the Home Department [2004] UKHL 27. The first issue is whether family life engages Article 8(1).

64. The legal position when considering whether Article 8(1) is engaged, is summarised by the Court of Appeal in Rai v Entry Clearance Officer [2017] EWCA Civ 320, from paragraphs 17 onwards. In essence, for family life to be established to engage Article 8(1), there needs to be support between adult family members which is real, committed or effective and looking at the circumstances of the individuals involved.

65. We start by setting out the evidence before us as to the relationship between the Applicant and the Sponsor, from their own written statements and from what is contained in Dr Galappathie's report on this point. We also note that there is evidence of *Whatsapp* messages between the brothers which we refer to later on.

66. The Applicant states in his first written statement dated 8 February 2023, that whilst in Ukraine he was supported by his family financially (particularly the Sponsor and another brother from the family car business) and kept in touch with them using *Whatsapp* and *Facebook Messenger* as well as visiting in July 2017 and July 2018. On this second visit, the Sponsor helped to mediate for

the Applicant to arrange a marriage[4] and this was the last date on which the brothers met in person. The Applicant has remained in regular contact with the Sponsor throughout his time in Ukraine and now Germany. They speak usually three times a week and message each other. The Sponsor continues to provide the Applicant with financial support in Germany, sending the money first to someone he knows in Afghanistan who runs a money exchange, form there it is sent to an individual in Germany and then is passed via a friend in Germany to the Applicant. The Applicant also remains in contact with other family members, but describes being close to the Sponsor who he is able to share things with that he can not share with the rest of his family.

67. In his second written statement dated 29 March 2023, the Applicant reiterated that he has always had a close relationship with the Sponsor who supports him practically, financially and emotionally. The trauma of fleeing Ukraine and family suffering is difficult for the Applicant to deal with alone and makes him want to be with the Sponsor. The Applicant would have been helped by being with family, especially the Sponsor to talk and support each other through the traumatic events and thinks that being with family would help him recover from a poor mental state as it is easier to talk about what has happened when physically together and he would cope better with them.

68. The Applicant states that although he has been living with someone he calls his cousin[5], their relationship is not the same as he has with the Sponsor – they were not close and had not seen each other in many years. It was a temporary arrangement to share his cousin's one bedroom flat, to which the Applicant contributed to the rent. The Applicant receives some money from the German Government, some from part-time work and some from the Sponsor, for example he sent 150 euros at the end of February 2023.

69. The Sponsor consoles the Applicant when he is struggling and reassures him to be patient and that everything will be ok. The Applicant describes this support as important and he just wants to be with the Sponsor and hopefully the rest of their family, and to move on with their lives.

70. In his third written statement, dated 11 March 2024, the Applicant provides an update as to his current circumstances in Germany. The Applicant has obtained new employment as a picker from mid-January 2024 and no longer receives financial support from the German Government. The new employment was not close to where the Applicant was living with his cousin, who had in any event asked him to find alternative accommodation as his

[4] The Applicant subsequently underwent what is described as the first part of the marriage after he had returned to Ukraine, but the couple never saw each other in person again and have since divorced.
[5] Formally, his paternal cousin's son.

flatmate was getting married and his wife would be joining him. The Applicant initially stayed in a hotel for work, following which he found an apartment to rent in Essen, where he has been living since 1 March 2024 with others who he does not know. The Applicant's employment is causing him physical health problems because of a bad back, but he had no choice but to take this job otherwise he would be homeless.

71. The Applicant describes struggling to cope on a day to day basis, feeling anxious because of his experiences and worried all the time about his family who are now in Pakistan, one of whom died very recently due to ill-health.

72. The Applicant had an appointment with the German immigration authorities on 19 March 2024 to renew his visa, but had at the date of this statement not yet attended or received a new visa and has been unable to work since 1 March 2024 until this is renewed.

73. In his first written statement dated 3 February 2023, the Sponsor sets out his background and that of his family. He describes being particularly close to the Applicant, growing up and doing everything together until he went to Ukraine in 2015. After that, they keep in touch daily and the Sponsor gave him money monthly while the Applicant was at university. There were times when the Sponsor was on special operations with the armed forces where he was prevented from communicating with anyone, including family. The brothers saw each other in Afghanistan in 2017 and 2018 and have kept in touch since the Sponsor has been in the United Kingdom.

74. The Sponsor sets out the difficulties he and his family have had with the Taliban and the risks faced by them in Afghanistan; including the death of his father in 2019. He states that the tragedies have brought the family ever closer with greater dependency on each other for survival. The Sponsor sent money to his family in Afghanistan whenever possible, although there were practical difficulties in doing so and it did not always reach them. The Sponsor states that he remains close to the Applicant, talking to each other by phone three times a week and keeping in touch with messages and emails.

75. In his second written statement dated 30 March 2023, the Sponsor reiterates how everything that has happened has brought the whole family even closer and that it is important for him to be with the Applicant. The plan remained that if the Applicant came to the United Kingdom, the Sponsor would find somewhere to rent for both of them to live together and, pending that, accommodation is available still with the HUSS sponsor. The Sponsor is employed in the United Kingdom and learning English here.

76. The Applicant's family paid $12,000 for his initial visa to go to Ukraine and continued to give him financial support while he was there. There is also a

record of *Whatsapp* messages, although this is said to be only a sample and doesn't include family group chats or record of calls or messages from *Facebook Messenger*.

77. In Dr Galappathie's report dated 14 December 2023, there is some reference to the Applicant's relationship with the Sponsor. It is described as 'close' and the 'closest to him in the family' in various parts, and as a very important relationship. In addition, Dr Galappathie states:

> "In my opinion, their relationship has strengthened since [the Applicant] was forced to flee Ukraine. It is worth noting that [the Applicant] outlined that his experience of having to flee Ukraine during the war was very difficult and traumatic to deal with this all on his own and it made him desperately want to be with his brother. Additionally, he reports that if he had been with [the Sponsor] during this time, they could have supported each other. [The Sponsor] consoles him when he is struggling and reassures him, since he was alone and struggling when he left Ukraine. His support is important to [the Applicant] as he outlined that everything that happened is getting to him but having [the Sponsor] and the hope of joining him is helping him."

78. Overall, whilst we accept that the Applicant and his brother have a relatively close relationship with some elements of support, we do not find that the evidence before us establishes that there is real, committed or effective support between them to show more than normal ties between adult siblings who have lived apart in different countries for the last eight and a half years. As such, for the more detailed reasons set out below, the Applicant has not established family life for the purposes of engaging Article 8(1) of the Convention.

79. The written statements from both the Applicant and the Sponsor contain a number of statements about their relationship being close growing up together as children and remaining in regular contact since 2015 between different countries. It is said that their relationship changed and strengthened since the Russian invasion in Ukraine in February 2022 and that the Sponsor provides practical, emotional and financial support; but there is very little detail or evidence of the same. There is, for example, only one specific example of financial support in February 2023 and no supporting evidence of any specific or regular support. The financial support referred to whilst the Applicant was studying in Ukraine up to around 2020 was said to be from his family generally, including, but not limited to the Sponsor.

80. Whilst we accept that there is regular communication between the brothers (as there also appears to be with other family members), there is very little detail or evidence as to the nature of it. There is only limited disclosure of translated *Whatsapp* messages (the originals of which have not been submitted) between July 2019 and February 2023. These show frequent

contact on particular days, overall regular contact but also some lengthy gaps of up to six weeks without any messages at all. The messages themselves are largely short and of a normal conversational nature and contain very little in the way of examples of any particular support from the Sponsor. There is, for example, only one reference that we could identify to financial support and some advice given about possible applications for immigration purposes. There are no significant examples of emotional or other practical support and the pattern of communication over nearly a four year period seems to be fairly consistent, with no significant change in frequency or substance after the Russian invasion of Ukraine (nor for that matter after the Taliban took control in Kabul or particular family events there relating to that).

81. Dr Galappathie's report adds nothing of substance to the evidence from the Applicant and the Sponsor, in essence referring only to how the Applicant has described the relationship (consistently with his own written statement) during the assessment. There is again no detail about this or any particular examples of the support and reassurance referred to. In particular, it is not said how the relationship between the Applicant and the Sponsor strengthened after the Russian invasion.

82. We do not find that the shared traumatic history of the Applicant and the Sponsor adds any significant weight to their nature of their relationship and whether it engages Article 8(1). The history of trauma referred to is primarily focused on events relating to other family members in Afghanistan, which we accept would affect both the Applicant and the Sponsor, but were not events that either were present for or that they have both directly been involved in together. The additional trauma of the Russian invasion and needing to flee Ukraine is specific only to the Applicant.

83. Overall, the evidence before us of the relationship between the Applicant and the Sponsor is lacking in detail. We asked Ms Knorr in what way the relationship between the brothers had strengthened since the Russian invasion, but no practical examples could be given; only a reference to the assertion of the same in Dr Galappathie's report. It would be reasonable to expect, for example, evidence of an increased frequency or duration of contact; the Sponsor taking on a different role with increased support or the like. There is however nothing of that nature before us. At its highest, this is a close family who keep in regular contact, with occasional financial support and occasional advice on immigration matters.

84. Although we do not find that Article 8(1) of the Convention is engaged in the Applicant's case; for completeness we deal briefly with the remaining four stages of the test in Razgar as we would not, in any event, find that the Respondent's decision would be a disproportionate interference with the Applicant or Sponsor's right to respect for family life in breach of Article 8.

85. The Applicant and the Sponsor would be able to maintain and continue their relationship as they do now, using modern means of communication to keep in touch and no barriers have been identified to the Sponsor visiting the Applicant in person in Germany. In substance, the only potential interference is therefore that the Applicant and Sponsor would not have the opportunity to strengthen and further develop private or family life if reunited in the United Kingdom. This is at its highest only a very moderate interference with the right to respect for family life and is not comparable on the facts to cases such as R (Singh) v Entry Clearance Officer [2004] EWCA Civ 1075; [2005] QB 608 which concerned the right to develop family life in the context of an adoption where there was very little in the way of an existing relationship.

86. Any interference would be in accordance with the law as the Applicant does not meet any of the requirements set out in the Immigration Rules for a grant of entry clearance to the United Kingdom and would be in pursuit of the one of the legitimate aims through the maintenance of immigration control.

87. The final stage requires a proportionality balancing exercise of, on the one hand, the Applicant and Sponsor's family life and on the other, the public interest. On the Applicant and Sponsor's side, are the factors set out above in relation to the nature and substance of their relationship and we also take into account what is said by Dr Galappathie in his report about the Applicant's mental health and his opinion that this could be improved by the Applicant reuniting with the Sponsor in the United Kingdom. Although similar in content, a number of extracts are set out below:

> "In my opinion, he will also need to have stability, including stable accommodation and not fear being removed to Afghanistan, in order to meaningfully engage in the therapy that he requires. In my opinion, family support and the stability of living with his brother would also have a positive impact on his ability to engage with treatment. In my opinion, being allowed to join his brother in the UK would be a powerful intervention that would help enable his mental health to recover and also help enable effective treatment to take place. He will also benefit from being able to take part in education and paid employment, to improve his sense or purpose and wellbeing, when stable enough and this will help with his ongoing recovery. Research has identified that having suitable accommodation, and spending time creatively through education or work can often help alleviate depression and anxiety."
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> "In my opinion, the impact of the refusal is likely to have had a significant adverse impact on his mental health and led to his mental health significantly worsening given that he outlined feeling devastated when he received the first refusal. In my opinion, if he is not reunited with his brother and remains in an unsuitable environment for supporting recovery, by way of sharing a one-bedroom flat, specifically one room with someone he does not know very well,

is likely to lead to his mental health worsening, and his risk of self-harm and suicide will increase."

"In my opinion, [the Applicant's] separation from his brother, who lives in the UK, is worsening his mental health. In my opinion, knowing that he is in Germany struggling mentally and to make ends meet, whilst his brother, who he has a close relationship with, is in the UK and would like [the Applicant] to join him, but being unable to join his brother, due to the refusal of the application he has made, is worsening his already very fragile mental health. … it would be of benefit to him and his mental health, if he is able to join his brother in the UK so he can be emotionally and practically supported by him and feel safe and secure, with his family member, namely his brother, who is the closest to him in the family. …"

"In my opinion … ['the Applicant] has a very close and important relationship with his brother … in the UK, which is why he would like to be able to be reunite with him. [The Applicant] has suffered a history of trauma, both in Afghanistan and in Ukraine, and in my opinion, the support he would receive from being able to live with his brother in the UK, would help him feel safe and secure, and therefore, allow him to meaningfully engage with the treatment that he requires so that he can start to recover from his mental health problems. … he is unlikely to benefit from the treatment he needs and therefore, recover meaningfully, if he continues to be separated from his brother in the UK, due to their closeness and the importance of their relationship. …"

"… [the Applicant] will benefit from being able to have daily face to face conversations with him and to be able to touch and hold him, this will help him to feel emotionally and physically close to him and allow him to feel he has close family members to support him, which will be a powerful therapeutic factor that will help him to recover from his mental health problems."

88. We do however have a number of reservations as to the weight to be attached to Dr Galappathie's opinion in this regard. Whilst Dr Galappathie acknowledges earlier in the report that the Applicant had not sought any assistance from the health authorities in Germany for his mental health, he stated that this did not undermine the diagnosis given that it is reasonable that the Applicant would not access treatment whilst in an insecure position and that such treatment would not be effective whilst he remains separated from his brother. There are two difficulties with those reasons.

89. First, in relation to whether the Applicant is in a secure position, the report is written on the assumption that he is not, without addressing the undisputed facts (as set out by the Applicant himself) that he has legal status in Germany (which is in the process of being renewed); he had (until quite recently) received some financial support from the German authorities; he had employment and relatively long-term accommodation with a family member (for nearly two years). Whilst it can reasonably be said that the Applicant did not know his cousin as well as the Sponsor and had not seem him for some

years before he arrived in Germany, there is no assessment at all as to whether and if so how that relationship changed or strengthened during the time they lived together. It would be reasonable to expect that during this time, their relationship strengthened in all of the circumstances, but it is not considered at all what, if any, support he did or could give the Applicant. It is difficult to conclude that the Applicant was not and is not currently in a relatively stable position in Germany.

90. Secondly, there is no analysis at all of what treatment or support is available to the Applicant in Germany, nor any reasons given as to why such treatment would not be effective whilst the Applicant remains separated from his brother. This is a conclusion that is repeated numerous times throughout the report with no explanation for it. Whilst we do not doubt that the Applicant and Sponsor wish to be together and more effective support could be given in person, we do not accept the statement without more that no treatment would be effective without that. There is simply no basis given for that conclusion, particularly in circumstances where the Applicant has not made any attempt to seek mental health treatment in Germany, even though he has accessed medical support for other conditions.

91. In these circumstances, whilst we accept that the Applicant and Sponsor are both likely to receive some benefit from being reunited in the United Kingdom, particularly with regards to the Applicant's mental health, we can only attach little weight to the conclusions of Dr Galappathie about the medical need for such a reunion for the reasons set out above.

92. In relation to the public interest, it is somewhat trite to recite the general public interest in the maintenance of immigration control and we attach appropriate weight to this. On behalf of the Applicant, Ms Knorr also submitted that the public interest should be reduced by two specific factors, first, the recognised public interest in providing support for those fleeing the war in Ukraine and secondly, the recognised public interest in providing support to those now at risk because of their work with the British armed forces in Afghanistan, extending to their family members. The first of these is significantly covered above in relation to the first ground of challenge, in that there was a lawful choice to devise a scheme to help Ukrainian nationals and their family members. We also take into account that this is a not a situation where the Applicant was or is at risk in Ukraine: he has been granted a form of protection in Germany, which is expected to be renewed, where he has access to accommodation, employment, health care and other support. We do not therefore accept that there should be any significant reduction to the weight of the public interest for this first reason.

93. As to the second point, the Sponsor has been granted indefinite leave to remain in the United Kingdom in recognition of his contribution to the British

armed forces and the risk to him as a result if he returned to Afghanistan. There is a separate application in process under the ARAP scheme in relation to his family members and therefore a more appropriate route for this point to be considered. In any event, we take into account that given the Applicant has lawful status in Germany, he is not currently at risk from the Taliban nor is there anything to suggest he is at any risk of removal to Afghanistan. The general statements by the Respondent and others in Government recognising the need to support those who worked closely with the British armed forces because of the risk they now face for that work does not therefore directly apply to the Applicant who is not currently at any such risk. For these reasons we do not accept that there should be any reduction in the weight to be given to the public interest on this second point.

94. Overall, even if the Applicant and Sponsor had family life which engaged Article 8(1) of the Convention (which as set out above, it does not), we do not find, considering the relative strength of their relationship and possible benefits of being reunited in the United Kingdom, that this outweighs the public interest in this particular case. The somewhat modest interference with the right to respect for family life (if engaged at all) is not a disproportionate interference contrary to Article 8 of the Convention.

Ground 3 – failure to exercise discretion

95. In summary, the Applicant's case under ground three is that the matters already raised in the first two grounds of challenge, even if not successful, are relevant to the exercise of discretion in this case and have not been properly taken into account by the Respondent. In response, the Respondent relies on his position in relation to the first two grounds of challenge and submitted that for the same reasons, this final ground of challenge should fail. We did not hear any detailed oral argument on this final ground from either side.

96. We do not consider that this final ground of challenge adds anything of substance to the previous two grounds and must fail for substantively the same reasons. Whilst Ms Knorr submitted that the claim could still succeed on common law grounds even without any finding of unlawful discrimination or breach of Article 8, there were no detailed submissions on specific grounds of failure to take particular matters into account (beyond a reference back to the matters contained in earlier grounds) or on rationality grounds. Although this is a case in which, on the facts, an exercise of discretion in favour of granting the Applicant entry clearance outside of the Immigration Rules could well have been made taking into account all of the circumstances, we do not find any public law errors in the refusal to do so. The decision letters contain sufficient reference to all relevant material with an explanation as to why they are not cumulatively sufficient for the exercise of discretion. That is a conclusion on the basis of information before the

Respondent that he was rationally entitled to reach, particularly in circumstances where there is no unlawful discrimination and no engagement with, let alone breach of, any rights protected by the Convention.

Conclusion

97. For all of these reasons, the application for Judicial Review is dismissed on all grounds.

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