

Neutral Citation Number: [2022] EWHC 1413 (Admin)

Case No: CO/3367/2020

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

Priory Court,
33 Bull Street,
Birmingham, B4 6DS

Date: Monday, 16th May 2022

Before:

THE HONOURABLE MR JUSTICE KERR

Between:

THE QUEEN ON THE APPLICATION OF MS

Claimant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Defendant

MR CHRIS BUTTLER QC and MS MIRANDA BUTLER, instructed by Immigration
Advice Service, appeared for the **Claimant**
MS CARINE PATRY QC and MR JACK ANDERSON, instructed by Government Legal
Department, appeared for the **Defendant**

APPROVED JUDGMENT

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MR JUSTICE KERR:

Introduction

1. The claimant is Kurdish, a national of Syria and a lawyer. He was born in 1979. He left Syria in 2014, in grave danger. He and his family are refugees in this country. Broadly speaking, he challenges what he says is the failure of the defendant ("the Secretary of State") to provide sufficient free biometric enrolment appointments for refugees, in particular in his case.
2. A biometric enrolment appointment is an appointment at which a person's biometric information is taken by an authorised representative of the Secretary of State. Biometric information, under the relevant legislation, can be of various kinds; at the moment, it is fingerprints and a digital photograph of the person's face.
3. The claimant says the failure confronted him with an invidious dilemma between paying for appointments he could not afford, or his refugee status being invalidated and the consequent peril of removal back to Syria and, pending removal, of being unable to work, rent accommodation, have a bank account or drive a car.
4. The failure to provide sufficient free biometric appointments is, the claimant submits, contrary to the Secretary of State own policy that refugees should be able to attain settlement without payment. The Secretary of State was defeating her own policy because, the claimant says, biometric enrolment, an essential requirement of any application for settlement, in practice costs money because you cannot (or could not at the relevant time) get a free appointment.
5. At the start of the hearing before me, the claimant abandoned a further argument that the Secretary of State's failure confounds the claimant's legitimate expectation that he would be able to attain settlement without the payment of a fee. It was said there was an unequivocal representation that settlement for refugees would be free of charge.
6. The claimant obtained permission to argue those two grounds from Steyn J in late March 2021. He made a renewed application to amend the grounds to add two further grounds which, however, were abandoned at the start of the hearing before me. They were:
 - i) failure to implement a computer based system that gives priority to refugees for available free biometric enrolment appointments; and
 - ii) failure to provide adequate information to applicants to ensure they are aware of arrangements for booking free appointments other than online.
7. The claimant therefore now relies upon a single ground, failure to abide by the Secretary of State's policy.
8. The remedies originally and ambitiously sought were, first, a mandatory order for "reimbursement" of £440 paid by the claimant to secure appointments for him, his wife and their two children; second, a "declaration that the defendant has acted unlawfully by failing to provide refugees seeking to make settlement applications and/or enrol their biometrics with a free appointment"; third, a "mandatory order the defendant forthwith ensure that

adequate free biometric appointments are made available to allow refugees to complete their applications for settlement without charge"; and fourth, damages.

9. However, the remedy now sought is more confined: the claimant seeks reimbursement of the £440 and a more modest form of declaration, without a mandatory order, confining the declaration of illegality sought to the specific case of the claimant.
10. The Secretary of State contends, in brief outline that no illegality is shown here:
 - i) There is no fee for an application for indefinite leave to remain by a refugee.
 - ii) While provision of biometric enrolment appointments was adversely affected by the Covid pandemic, sufficient free appointments have been offered.
 - iii) There is no requirement that biometric enrolment must take place by a set date unless a reminder is issued: a person's leave continues pending a decision on the application and the Secretary of State suspended rejection of applications due to late enrolment during the pandemic.

Facts

11. The claimant claimed asylum in this country on 2nd December 2014. While his application was pending, the Secretary of State published, in March 2015, a code of practice ("the Code of Practice") called *UK Borders Act 2007: Code of Practice about the sanctions for non-compliance with the biometric registration regulations*.
12. Both parties made submissions about the Code of Practice. It includes a detailed process for issuing warning letters and imposing sanctions, which can ultimately lead to the sanction of treating an application for leave to remain as invalid.
13. The Code of Practice does not refer to any circumstances in which the Secretary of State is compelled by law to treat an application for leave to remain as invalid. It includes a statement that a sanction for failure to comply with a requirement of the Immigration (Biometric Registration) Regulations 2008 ("the Biometric Regulations" or "the Regulations") would not be imposed where that would breach a person's human rights or the UK's obligations under the Refugee Convention (paragraph 31).
14. On 26th August 2015, the claimant was granted asylum as a refugee with five years leave to remain. The letter bearing that good news also stated that he must make "an application for further leave before your leave ends" and "you can apply for further leave one month before your leave expires".
15. The claimant's family were granted family reunion leave and arrived in the UK in December 2015. At the end of the five year period, he and his dependants would need to apply for indefinite leave to remain, to stay on the path to settlement, i.e. permanent residence here and ultimately UK citizenship.
16. In November 2018 a then immigration minister, Caroline Nokes MP, published a government statement announcing, among other things, that modernised service centres were opening and would be available for most applicants for leave to remain or settle in this country.

17. That, said Ms Nokes, would enable documents and biometric information to be submitted at a single appointment. It would mean applicants would not have the worry of parting with precious identity documents and other important documents while awaiting decisions about their applications. The statement went on to say:

"Free appointments will be available for everyone, however, customers will also have the option to purchase added value services such as same day appointments and On Demand services [hyperlink]."

18. On 25 March 2020, two days into the first national lockdown at the start of the Coronavirus pandemic, all biometric enrolment appointments were suspended. The same day, the Secretary of State issued internal guidance, not in the public domain, called *OPI 940: Temporary instructions on non-biometric enrolment reminders and rejections* ("the March 2020 guidance").
19. This was a Covid related guidance document. It stated, as an instruction to case workers, that no application should be rejected or biometric reminder letters sent for non-enrolment until further notice.
20. General government guidance on the gov.uk website entitled *Indefinite leave to remain (refugee, humanitarian protection or Discretionary Leave)* stated (then and since) under the heading "Fees" as follows:

"There's no fee for applying for settlement as a refugee or a person who's been given humanitarian protection".

And in the next paragraph under the same heading:

"If you have Discretionary Leave it costs £2,404 for you and each other person you include in your application. You'll each need to have your biometric information (fingerprints and a photo) taken – there's no fee for this."

21. This is the statement of the Secretary of State's policy which, the claimant says, has been breached. The evidence from the claimant's seven witnesses who are active in assisting applicants for leave to remain or settle here, including refugees and their dependants, is that generally in 2020 and 2021 it was well nigh impossible to book a free appointment for biometric enrolment online.
22. You had to be very fortunate or quick off the mark to get one and most of their clients could not. Consequently, they say, they had to advise their clients with regret that the thing to do was, if possible, to pay for an appointment, as the claimant has done. But not everyone has access to the funds to do so.
23. On 1st June 2020, the contractor operating the service on behalf of the Secretary of State, Sopra Steria Limited ("SSL") began a phased reopening of the UKVCAS service points across the UK. However this was a slow process and to begin with there was very limited appointment availability, meaning that there was a backlog of about 200,000 people needing to progress their applications before normal working practices could resume. Of these, about

- 70,000 (refugees and non-refugees) needed to attend a personal appointment as they could not reuse previously enrolled biometrics, by means of an app.
24. Ms Hannah Farmer is (since September 2020) the Lead, Supplier Relationships and Services for the Secretary of State's executive agency, the UK Visa and Citizenship Application Services ("UKVCAS"). As she explained in her first witness statement, UKVCAS decided to invite those in need of an appointment in tranches, based on the date of their application, so that those who had waited longest would be seen first.
 25. New appointments were made available in "chunks", as Ms Farmer explains. There was a mix of free and chargeable appointments and communications were sent to applicants noting that "free appointments were being booked up very quickly". The tranche system was explained in a later internal UKVCAS process document (dating from September 2020) called *OPI 987: Restart of in-country biometric enrolment validation*. It superseded the March 2020 guidance ("OPI 987").
 26. On 28th July 2020, the claimant made an application for indefinite leave to remain for himself, his wife and their two young children. No fee was charged. The type of application was stated on the UKVCAS online application service to be "Set (P)". "Set" stands for settlement and "P" for protection. Set-P is the term used by the Secretary of State to describe the category of refugees and their dependants who seek to settle in this country. About 5 per cent of biometric enrolment appointments are in the Set-P category.
 27. When the claimant (or his immigration adviser and solicitor, Ms Heather Malunga) submitted the application online, it generated a response confirming receipt and advising that further "mandatory actions" needed to be completed. One was to book and attend an appointment to provide biometric information. In fact, a separate appointment would be needed for each of the four family members, so the claimant needed to arrange four appointments, preferably on the same day at the same place. I will refer to these collectively as "an appointment".
 28. The response stated that this must be done by 29th September 2020. After that date, "We will send you a reminder after this date if you have not attended an appointment". Although the claimant did not know it, he was in tranche 8 (under OPI 987) because his application had been made in the month of July 2020. Unbeknown to the claimant, tranche 8 applicants were timetabled to receive an invitation to book an appointment on 4th August 2020 and a first reminder on 22nd August 2020 if they had not by then booked an appointment.
 29. The first reminder letter (see OPI 987, paragraphs 6.3-6.5) would warn that the applicant must enrol their biometrics within 45 working days. A second, final reminder or warning letter would be issued thereafter advising the applicant to enrol biometrics within 10 working days. If that deadline were not met and the applicant did not contact UK Visas and Immigration ("UKVI") to explain why, then "the application can be rejected" (paragraph 6.5).
 30. In the early hours of 5th August 2020 (a day later than envisaged in OPI 987) a generated email from UKVCAS was sent to Ms Malunga but addressed to the claimant expressing delight that "You can now book an appointment ... You can now access our booking system and book a date and time that works for you from a mix of free and chargeable appointments". The email also added:

"If you are worried that your visa will expire before you can get an appointment, go to UKVI's Immigration Guidance at GOV.UK [hyperlinked] for advice and help."

31. The same day, Ms Malunga attempted to book a free appointment on the UKVCAS website, but was unable to find one. She could find only chargeable ones. At around the start of August 2020, there were approximately 500 Set-P applicants seeking biometric appointments each week across the UK. As the Set-Ps comprise about 5 per cent of the total cohort of applicants, there are likely to have been very roughly 10,000 applicants a week overall across the UK.
32. Statistics gathered by the Secretary of State in answer to enquiries from the claimant's lawyers indicate that there were some 2,605 *free* appointments available across the UK in the period from 5th - 25th August 2020, of which the claimant needed four. These appointments were not released all at once, but in batches of uneven number. For example, there were only 56 on 5th August but a further 512 on 6th August.
33. Overall, in the calendar year 2020, 15,187 Set-Ps obtained a free appointment (or 56.6 per cent of the Set-P cohort), while 11,636 (or 43.4 per cent of the cohort) obtained a chargeable appointment. I infer that the latter figure must include the four appointments paid for by the claimant.
34. The claimant's leave to remain as a refugee was due to expire on 25th August 2020. Ms Malunga advised him that she had tried and failed to book a free appointment and that the only available appointments would cost £440 (for all four family members). The claimant explained that he did not have the money to pay that sum and Ms Malunga agreed to continue to search for free appointments.
35. Ms Malunga logged in regularly during the period from 5th August to 2nd September 2020, but was unable to find any free appointments. It is not clear how frequently she logged in, but she has produced screenshots showing only chargeable appointments in Birmingham and Manchester during that period. There was some evidence that it could be possible to attend a "non-core" site or one further away than the nearest to a person's residence. In the claimant's case the nearest core site was Manchester, as he lives in Liverpool, but Ms Malunga also found appointments, albeit chargeable, in Birmingham.
36. The claimant and Ms Malunga did not click on the link to the government website for "advice and help", as referred to in the email of 5th August 2020. Had they done so, Ms Farmer explains that help would, indeed, have been at hand: "This has included asking for free appointments to be arranged, or arranging for an appointment to take place quickly if necessary, for urgent or compassionate cases".
37. Such cases, Ms Farmer explained, had arisen in 2020 where applicants had contacted the "Coronavirus Immigration Helpline". Some applicants had had to travel at short notice due to illness of a family member; in one case an applicant with a terminal illness needed to complete the process to benefit that person's dependants before he or she died.
38. I do not think the claimant's case would necessarily have been treated as particularly urgent at that stage; as at 5th August 2020 he had not yet even received a first reminder letter, let alone a second letter warning that his application for leave to remain might be treated as invalid. The Secretary of State's general policy was that, in line with section 3C of the

Immigration Act 1971, existing leave and associated conditions continue until an application is determined.

39. The next day, 6th August 2020, Ms Malunga sent a pre-action protocol letter by email to the "ukvipap" email address at the Home Office, i.e. to the Secretary of State (with a response deadline of 20th August). She complained of the unavailability of free appointments. On the claimant's behalf, she demanded, in the spirit of avoiding litigation, written confirmation that refugees would no longer be charged for appointments and that "a free appointment has now been made available for the claimant".

40. The claimant did not attempt, apart from by Ms Malunga's unsuccessful online searches and by the pre-action protocol letter, to obtain a free appointment; nor did he ask for the deadline of 29th September 2020 for attending a biometric enrolment appointment to be extended.

41. On 17th August 2020, the Secretary of State responded to the pre-action protocol letter, saying:

"I have been advised that the additional measures UKVCAS have put in place to ensure the safety and wellbeing of our customers and staff, mean they are not currently able to offer the same volume of appointments across our service points, as we did before COVID-19.

UKVCAS understand it is disappointing for customers to not been able to locate free of charge appointment [sic] at their desired location, unfortunately, UKVCAS are currently experiencing very high demand for free appointments upon their release.

UKVCAS are working to increase the number of UKVCAS service points and the volume of appointments available so customers have a wider range of choice of appointments in their desired locations and price ranges.

We trust you understand the exceptional circumstances in which we are currently operating and appreciate your co-operation at this time."

42. The response letter thus did not offer a free appointment; nor did it mention extending the deadline of 29th September 2020; nor did it include any soothing reassurance that the claimant should not be concerned because his leave would be treated as continuing at least until expiry of a deadline set in the second warning letter.

43. These points would, in my judgment, have been more likely to have emerged from a call to a helpline, if the claimant were able to get through to an adviser, than in a response to a quasi-litigious legal letter. It is not clear when the response letter reached Ms Malunga. It appears to have been sent by post rather than email. On 19th August 2020, Ms Malunga told the claimant she had not received any response.

44. During the afternoon of 22nd August 2020, in accordance with OPI 987, UKVCAS sent a first reminder email to Ms Malunga addressed to the claimant, noting that he had not yet booked an appointment and stating in bold type that "We strongly recommend that you make a booking as soon as possible." Available appointment dates had been "extended ... to the 20th September 2020" and "You can now book a date and time that works for you from a mix of free and chargeable appointments. Please be aware that free appointments will be booked up very quickly."

45. Ms Farmer's researches show that, while no new appointments were released that day or the next, on 24th August no less than 779 free appointments were made available, though that was on a UK wide basis and for all applicants, not just Set-P applicants. Naturally, they would be snapped up quickly on a first come first served basis.
46. On 25th August 2020, the claimant's five year fixed period of leave to remain expired. That day, he obtained and paid £440 for a "same day" biometric appointment for himself and his three family members. He was in serious debt and at risk of eviction for non-payment of rent. He paid by credit card, putting him yet further in debt.
47. On 27th August 2020, the Secretary of State published a further Covid-inspired policy document called *Covid-19: Biometric enrolment, reuse and evidencing status*. It set out, among other things, "handling requirements for enrolling ... biometrics or issuing a temporary status letter instead due to reduced capacity for enrolling ..." It does not appear to have been put in the public domain at the time.
48. The guidance "tells caseworkers the approach to handling application case types made on or before 1st August 2020". That would include the claimant. It included the point that where applicants "have a reasonable excuse for being unable to enrol their biometrics, they can remain on 3C leave until they can be expected to enrol their biometrics and their application can be decided".
49. The reference to "3C leave" is to leave under section 3C of the Immigration Act 1971 while you wait for a Home Office decision. The guidance document continued: "3C leave prevents them from becoming an overstayer and means people can continue to work, study or stay under the same conditions until their application is finally decided and during any subsequent appeal".
50. The present claim was then brought on 15th September 2020. Ms Farmer explains that, by mid-September 2020, the appointments system was still delivering only 25 to 30 per cent of the appointments that had been available in March 2020, but was sufficiently close to normal operation for applicants to be able to register for an appointment at the time of making their application, without waiting to be invited, under the tranche system.
51. OPI 987 formally became operative from 17th September 2020, but confirmed and reflected practice already in place. Further full shutdowns occurred in later lockdowns or due to staff testing positive for Covid, for example in Manchester in November 2020. From September 2020, SSL was subjected to a key performance indicator ("KPI") requiring at least 56 per cent of appointments for biometric enrolment at core sites to be free.
52. By May 2021, 82.43 per cent of all appointments were free. However, as at November 2021, as the Secretary of State stated in answer to a request for information and disclosure, between 25 and 39 per cent of Set-P applicants for biometric enrolment during 2021 had paid for their appointments.

Claimant's Submissions

53. I summarise below the parties' submissions only in briefest outline. For the claimant Mr Chris Buttler QC and Ms Miranda Butler in written argument, and Mr Buttler in oral argument, made the following main points:

- i) The Secretary of State has misread the Biometric Regulations. Although this point is not pleaded, it is necessary for the court to determine it as part of the court's "route to verdict". The court should also make a finding that the Code of Practice is out of tune with the law because it does not refer to automatic invalidity of an application for indefinite leave to remain under the Biometric Regulations.
- ii) Contrary to the Secretary of State's reading of the Biometric Regulations, an application for indefinite leave to remain is automatically invalid on expiry of the deadline for biometric enrolment, unless that deadline has already been extended by an authorised person, before not after it expires.
- iii) This is because a refugee applying for settlement on expiry of a five year fixed period of leave to remain does so by applying for indefinite leave to remain, under regulation 3(2)(b) of the Biometric Regulations. The claimant was not applying for refugee status under 3(2)(e); he already had refugee status and did not need to apply for it again. His refugee status had not been revoked and nothing had changed; Syria was still unsafe.
- iv) Therefore, Mr Buttler submitted, the consequences of failure to comply with a requirement (under regulation 8) to attend a biometric appointment by a "specified" date attracted (by regulation 23(1)) the Draconian consequences of regulation 23(3)(b) ("must treat the person's application for leave to ... remain ... as invalid..."); and not the milder discretion to treat it as invalid under regulation 23(4).
- v) A date "specified" under regulation 8 cannot be altered and a later specified date set once the initial specified date has expired. Retroactive extensions of time are not possible because the consequences of failure to meet the initial deadline crystallise once that deadline expires; consequences that cannot then be undone.
- vi) The consequences of invalidity are disastrous for the person concerned and their family. It is a crime to be in the UK without leave to remain (Immigration Act 1971, section 24). Invalidity means the person faces severe restrictions on the right to work in this country; to rent accommodation; to have a bank account; or to hold a driving licence (*R (Balajigari) v. Secretary of State for the Home Department* [2019] 1 WLR 4647, per Underhill LJ at paragraph 8).
- vii) Unless the claimant had paid for the appointment on 5th August 2020, he would have been unable to meet the deadline of 29th September 2020 for obtaining biometric enrolment. The deadline of 29th September was a hard deadline, i.e. a date specified under regulation 8 which could only be postponed before 29th September, not later.
- viii) The claimant was only able to meet that deadline by paying for the appointment. That was contrary to the policy that applications for leave to remain (particularly for refugees) would be free of charge. The claimant's application was not free of charge. The Secretary of State should be held to her own policy.
- ix) Refugees do not get priority over other applicants for free appointments. The system is "route agnostic"; it does not, on the evidence, include treating refugee applicants for free biometric appointments as a special category. The small number of free appointments can therefore be taken by non-refugees. There were insufficient free

appointments at the time when the claimant needed them in August and September 2020.

- x) The court should grant a declaration that the Secretary of State's arrangements for the enrolment of biometric information were unlawful in the claimant's case and should order the Secretary of State to repay to the claimant the £440 paid by him as the fee for his biometric enrolment appointment as money paid pursuant to what Mr Buttler called an error of public law.

54. Such were, in abbreviated form, the main submissions of the claimant. They were developed in writing and orally at considerably greater length than my summary here, by reference to legislation and case law.

Defendant's Submissions

55. For the Secretary of State, Ms Carine Patry QC and Mr Jack Anderson in written argument, and Ms Patry in written and oral argument, made the following main points:

- i) The relief now sought, a declaration that the arrangements in the claimant's case were unlawful, is a long way from the nature of the challenge at the time when the claimant brought it in September 2020. The sole remaining ground of challenge is breach of the Secretary of State's policy and it is no longer suggested that any breach of the policy is still subsisting.
- ii) The claim for a declaration that the arrangements were unlawful in the claimant's case is founded on an unpleaded alleged misinterpretation of the Biometric Regulations. The claimant should not be allowed to change his case in this way, long after the publication of the relevant policy document and long after the Secretary of State's reading of the Regulations was made clear in the summary grounds of defence. Thus, even if the claimant's interpretation of the Regulations were correct, the claim as pleaded would still fall to be dismissed.
- iii) There was no breach of the policy in August 2020. The claimant was not charged a fee for applying for leave to remain in July 2020. The appointments available, even when the effects of the pandemic were at their worst, were a mix of free and chargeable appointments which promoted consumer choice and accorded with the Secretary of State's policy and the statement of Ms Caroline Nokes MP.
- iv) There were fewer appointments than normal in the summer of 2020, but sufficient free appointments at the time, despite the difficulties caused by the pandemic. The claimant failed to take the necessary steps to obtain a free appointment. He could have obtained one if he had sought help from UKVCAS instead of just pursuing a path leading to litigation. He decided to pay for an appointment without further enquiry or any request for assistance, over a month before 29th September 2020.
- v) In any case, neither the claimant nor any other refugee has been prejudiced by the shortage of appointments caused by the pandemic. The deadline of 29th September was an indicative date only, not a deadline "specified" under regulation 8 of the Biometric Regulations. The claimant was specifically told on 5th August 2020 he

would receive a reminder letter (as indeed he did on 22nd August) before any question of prejudice to his refugee status could arise.

- vi) If it is appropriate to address the meaning of the Biometric Regulations at all, the Secretary of State's interpretation of them is correct, while the claimant's is unduly rigid and wrong. Failure to meet a deadline for attending a biometric enrolment appointment does not automatically invalidate a refugee's application for indefinite leave to remain, putting them on the wrong side of the criminal law and sharply curtailing their rights to work, rent accommodation, open a bank account or drive a car, as the claimant suggests.
- vii) This is because, as the Secretary of State says, the claimant was not applying for indefinite leave to remain at all under regulation 3(2)(b). He was applying, rather, to be recognised as a refugee or person in need of humanitarian protection under regulation 3(2)(e). The Refugee Convention and reflective rules and guidance in this country, including the Immigration Rules, recognise that refugee status can be lost, i.e. revoked or not renewed, if the basis for granting it has gone since temporary leave to remain was granted. It is fair to refugees to treat their application as attracting the discretionary sanction, not the harsh mandatory sanction of invalidity.
- viii) Moreover, even a hard "specified" date imposed under regulation 8 can be extended, not just before its expiry (as the claimant accepts) but also retroactively after it has expired. There is no reason to construe the Regulations narrowly and rigidly so as to exclude a retroactive extension of the "specified" deadline. Such a construction is fair to refugees and accords with the Secretary of State's policy.
- ix) The claim for restitution of the £440 paid is not properly pleaded or particularised. The Secretary of State has had no opportunity to file evidence on this issue. It should not be entertained. It was pleaded as a claim for a mandatory order which is a public law remedy, while restitution is a common law/private law cause of action. The Secretary of State was not unjustly enriched. No wrong or mistake is made out in any case. There is no cause of action in restitution for repayment of a sum paid pursuant to an error of public law.

56. Such were, in summary, the submissions of Ms Patry and Mr Anderson for the Secretary of State. Like the claimant's submissions, they were presented in much more detailed form than my summary above, including reference to various authorities.

Reasoning and Conclusions

57. I consider first the Secretary of State's policy. A minister should follow her own policy unless there are good reasons for departing from it. A statement of government policy is not a statute. Its interpretation is a matter for the court, not the Secretary of State: per Lord Wilson JSC in *Mandalia v. Secretary of State for the Home Department* [2015] 1 WLR 4546 at paragraphs 29-31. The meaning to be given to a policy statement is what a reasonable and literate person's understanding of the document would be: see e.g. Hooper LJ's judgment in *R (Raissi) v. Secretary of State for the Home Department* [2008] QB 836 at paragraph 108.

58. The first part of the relevant passage is clear: there is to be no fee for applying for settlement as a refugee or a person who has been given international protection. That is then contrasted

with the position of an applicant for discretionary leave to remain, who must pay £2,404 for the privilege of applying. There is then, in the paragraph dealing with discretionary leave, not the previous one dealing with refugees, a statement that biometric information must be given and that "there's no fee for this".

59. It is curious that the biometric information requirement is not, in the text of the policy statement, clearly tied to refugee applicants. But it is clear that the requirement applies to refugees and non-refugees alike. It must follow that the "no fee" assurance, equally, must apply to refugees and non-refugees alike. That also tallies with Ms Nokes MP's statement in 2018 that "free appointments will be available for everyone".
60. Next, if refugees were charged nothing for the application itself but a hefty fee for the subsequent compulsory biometric enrolment process, that would tell the reasonable and literate reader of the policy statement that the "no fee" assurance was illusory and fictitious; Ms Nokes MP had addressed the point directly, saying that "free appointments will be available for everyone".
61. I conclude without difficulty that the policy includes provision of free biometric enrolment appointments for refugees and non-refugees. But the reasonable and literate reader of the policy would not understand that to mean that every appointment on offer must be free. I do not find any breach of the policy in making available chargeable appointments alongside free ones for those wishing to and able to pay.
62. I consider the policy to mean that there must be a reasonable sufficiency of free appointments to meet the commitment to free appointments and to make that commitment more than nominal. How plentiful the supply of free appointments must be to meet the requirement of a reasonable sufficiency must be a question of fact and degree, the answer to which must lie in an assessment of the evidence of availability of free appointments.
63. Next, I consider whether the policy was breached in the case of the claimant. Since he no longer seeks a declaration that the arrangements were unlawful generally - only in his case - it is no longer necessary to consider whether the arrangements were unlawful generally; but some regard must be had to the availability of free appointments generally to judge whether the policy was breached in the claimant's case.
64. The backdrop is, I bear in mind, the dearth of appointments generally at the time when the phased reopening of service points across the UK began in June 2020. I also bear in mind the Secretary of State's statistical evidence of the manner and timing of appointments becoming available from August 2020 onwards. There was, the claimant does not dispute, a mix of chargeable and free appointments.
65. He does not assert that there were no free appointments but says there were not enough. I accept the unchallenged evidence of the claimant's witnesses to the effect that free appointments were very difficult to find at that time; and I note that, consistently with that evidence, the first reminder email of 22nd August 2020 from the UKVCAS included the warning: "Please be aware that free appointments will be booked up very quickly".
66. Is the claimant justified in saying free appointments at the time were so scarce that I should find there were none available to him and his family? I turn to consider the circumstances in which he obtained his chargeable appointment. I start with the computer generated

response to his application submitted on 28th July 2020, stating that biometric enrolment must take place by 29th September.

67. I will return to the provisions of the Biometric Regulations a little later in this judgment, but it is necessary to say here a word about a date being "specified" under regulation 8. I think it is clear that whether a date is "specified" as a mandatory deadline is a question of fact. To "specify" a date is to communicate to the recipient (i) the date and (ii) the message that the appointment must take place before that date.
68. To ascertain whether a date is specified under regulation 8, therefore, you look at what was communicated. Here, the claimant was told that he "must book and attend an appointment" and "by 29th September". But he was not told that the appointment must at all costs take place by that date. He was told that he would be sent "a reminder letter after this date" if he had not attended an appointment by then. The reference to a reminder letter means that 29th September was not "specified" under regulation 8 in that communication.
69. The reminder letter was to arrive "after this date", i.e. after 29th September. In fact, it arrived on 22nd August, over a month before it was scheduled to arrive. The claimant did not on 28th July know that it would arrive early. On 28th July he should have been proceeding on the footing that he had, ultimately, until some as yet unspecified date after 29th September, to book and attend a biometric enrolment appointment. However, he was conscious of the expiry date of his five year fixed leave to remain, which was looming and due to arrive as soon as 25th August 2020.
70. I infer that he did not trust the implied assurance that he would not be prejudiced if he were to await the reminder letter; he feared that he would be caught out by expiry of his leave to remain. However, he had the benefit of assistance from Ms Malunga who would have ready access to the published Code of Practice and knowledge of the protection of "3C leave" while an application for settlement remains pending after expiry of leave to remain.
71. When, on 5th August, the claimant received the invitation to book an appointment, there were only 20 days left till expiry of the family's leave to remain; but nearly eight weeks till the deadline of 29th September, after which a reminder letter could be expected. The claimant's concern was of the kind envisaged in the message that accompanied the invitation to book an appointment: "If you are worried that your visa will expire before you can get an appointment, go to UKVI's Immigration Guidance at GOV.UK [hyperlinked] for advice and help".
72. Once Ms Malunga's efforts to book a free appointment on 5th August had failed, it was time for the claimant to click on the hyperlink and attempt to obtain assistance from UKVCAS of a more personal kind, to book a free appointment for him and his family. There was no need to panic. Even taking his situation at its worst, he had 20 days to resolve the matter.
73. For those reasons, I accept the Secretary of State's submission that he "jumped the gun" by deciding instead to send a pre-action protocol letter as early as 6th August 2020. It is a pity that the Secretary of State's response to that letter did not remind the claimant of available assistance to obtain a free appointment. The pre-action protocol procedure, designed to avoid litigation, appears ironically to have encouraged litigation. But that does not mean the claimant could not have obtained a free appointment in sufficient time if he had tried harder.

74. I find that he could have done. Had he sought assistance by less aggressive means, he would have come to appreciate that he had until some unspecified date *after* 29th September 2020 to attend an appointment. He chose the more risk averse course of paying for an appointment and pursuing, not at his own expense, litigation. In my judgment, it was that calculus that informed his decision to borrow the money to pay for the appointment. I do not find that he was forced to pay for it by a breach of the Secretary of State's policy.
75. The claimant has therefore not made out a breach of the policy of providing free appointments in the claimant's own case. That is sufficient to dispose of the claim. I do not, strictly, need to decide whether there was, overall, a sufficiency of free appointments such as to comply with the policy commitment to provide free appointments for all applicants, i.e. for that commitment to be real rather than illusory vis-à-vis the general cohort of applicants and Set-P applicants in particular.
76. I would observe, though it is not necessary for my decision, that, despite efforts to resume normal service, the Secretary of State was obviously struggling to comply generally with the free appointments policy during the period from March to December 2020 when the availability of appointments was severely affected by lockdowns and other Covid related restrictions.
77. I do not know what the ratio of available free appointments to paid appointments was during the whole of that period. But I do know that nearly half the Set-P applicants (43.4 per cent) during the calendar year 2020 in fact paid for their appointments. Common sense tells us that many are, like the claimant, likely to have been in difficult financial circumstances. I do not infer that the 43.4 per cent who paid did so out of pure consumer choice.
78. It is strictly unnecessary to consider the submissions made on the proper construction of the Biometric Regulations and whether the Secretary of State misread them. Although the arguments on this issue were erudite, learned and well made, they were perhaps not as full as they would have been if the issue had been pleaded from the outset. Even after an application to amend the grounds had been made, refused, renewed and finally abandoned, the point still remains strangely unpleaded.
79. There have been at least four incarnations of the Biometric Regulations. In the case of some regulations, more than four. I was taken to the first (up to 28th February 2012) and the last (from 1st July 2021 to the present). I was not taken to the version in force at the time in 2020 when the claimant was grappling with the appointment system, though I am sure I would have been if any amendment in force at the time had been material.
80. In those circumstances, I do not need to, and do not, decide definitively the rights and wrongs of the arguments on construction of the Biometric Regulations. I will not set out all the provisions. I have summarised the submissions only briefly above. However, I do propose to deal briefly with the main points made by counsel, in deference to their valuable submissions and in the hope that my observations may be of some use.
81. First, the change from "may" to "must" in regulation 23 took effect as early as 29th February 2012. As enacted, regulation 23(1) provided that, where a person required to apply for biometric enrolment fails to comply with a requirement of the Regulations, the Secretary of State "may" take various actions, including to "disregard" the application for leave to remain. The only obligation on the Secretary of State was, under regulation 23(1)(b), to consider a financial penalty (under section 9 of the parent legislation, the UK Borders Act 2007).

82. From 29th February 2012, that discretion became "subject to paragraphs (3) and (4)", the new words added to the start of regulation 23(1). Sub-regulation (3) then provided (among other things) that the Secretary of State "must treat the person's application for leave to remain as invalid" if the application falls within either (a) or (b) of regulation 3(2).
83. There have been six versions of regulation 3. The one in force from 29th February 2012 - when "must" replaced "may" for certain purposes - was version 4. Regulation 3(2)(a), from 29th February 2012, referred to an application for limited leave to remain for a period exceeding, in total, six months. Sub-paragraph (b) referred to an application "for indefinite leave to remain".
84. I will not delve further into the legislative history or the details of the various amendments. I was not taken to any *travaux préparatoires*, but it appears from the nature of the amendments that in early 2012 the government wished to toughen up the regime for certain applicants for leave to enter or remain, beefing up the sanction for failure to meet a requirement of the Biometric Regulations to make it one of mandatory invalidity.
85. There have been various further amendments since, but the same sanction of mandatory invalidity has continued to apply in the case of applicants in the 3(2)(a) and 3(2)(b) categories. Those categories at the time of the claimant's case were as then defined in version 5 of regulation 3 (18th March 2015 to 30th December 2015) as applicants "for limited leave to enter or remain" ((a)) and "for indefinite leave to enter or remain" ((b)). That language is unchanged in the present version of regulation 3, version 6.
86. It is common ground that an application must fall into one, and only one, of the categories of application listed in regulation 3(2) at (a)-(h) in the current version. I agree; otherwise, the Secretary of State's sanction might be mandatory and discretionary at the same time, which would not make sense. Regulation 3(2)(e) refers to an application "to be recognised as a refugee or a person in need of humanitarian protection". That category of application does not attract the mandatory sanction but only a discretion to treat the application as invalid in cases of failure to comply with a requirement of the Regulations.
87. The Secretary of State submitted that the claimant's application was a regulation 3(2)(e) application to be recognised as a refugee. The claimant submitted that his application was a regulation 3(2)(b) application for indefinite leave to remain. The claimant's submission is plainly correct. I cannot accept the Secretary of State's submission. It does not fit with the true character of the claimant's application, in that it is not permissible to bend the language of the Regulations so as to make it fair to refugees. The change in February 2012 was not enacted to benefit applicants.
88. To see what a person is applying for, the primary documents you have to look at are the application itself and any relevant surrounding documents. Here, the Home Office's letter of 26th August 2015 stated that the claimant "must make an application for further leave before your leave ends". It did not state that he would have to reapply for refugee status. The application made on 28th July 2020 then described the "type of visa/application" as "Set (P)".
89. Thus, it was an application for settlement, i.e. indefinite leave to remain, made by a refugee. It was not an application for refugee status. The claimant and his family did not need to apply for refugee status. They already had it. They had not lost it since August 2015. There had been no intervening decision to revoke their refugee status. It does not assist the

Secretary of State to point out that, under the Refugee Convention and mirroring rules and guidance in this country, the claimant's refugee status could have been revoked (or not renewed). The fact is that it was not revoked and did not need to be renewed because it remained in place.

90. As to when a deadline date is "specified" under regulation 8, I have already described this as a question of fact and degree. Once a date is specified, I incline against the argument that it can be retroactively extended after it has expired. That would be an odd reading; the Secretary of State's obligation to treat the application as invalid, presumably unperformed, would be first breached and then nullified and the breach absolved. The applicant would be in a state of limbo in the interim. That does not make much sense.
91. I think the analysis of the Regulations undertaken by Upper Tribunal Judge Norton-Taylor in *R (SGW) v. Secretary of State for the Home Department* [2022] UKUT 15 (IAC) is correct. The decision of the Court of Appeal in *R (Jayamaran) v. Secretary of State for the Home Department* [2018] EWCA Civ 2545, is not in point; it was a decision made with reference to the Immigration Rules, not the Biometric Regulations as such: see the judgment of Jackson LJ at paragraphs 2 to 3.
92. I see no escape in the language of the provisions from the harsh proposition that the mandatory sanction of invalidity applies where a specified regulation 8 deadline is missed and the application is for limited, or indefinite, leave to enter or remain. However, the sanction of invalidity is not self-activating. Regulation 23 does not state that the invalidity is automatic. It states that the Secretary of State "must" impose the sanction of treating the application as invalid.
93. That leaves the possibility that the Secretary of State might decide nonetheless to stay her hand and refrain from performing that apparent obligation. That, indeed, appears to be what is happening at present. The Code of Practice does not mention mandatory invalidity and therefore appears to misstate the effect of regulation 23. Rather, it recognises that a sanction for failure to comply with a requirement of the Biometric Regulations would not be imposed where that would breach a person's human rights or the UK's obligations under the Refugee Convention (see paragraph 31 of the Code of Practice).
94. While an aggrieved anti-immigration campaigner might complain about that beneficent approach to mandatory invalidity, it seems to be very sensible. The Secretary of State is a public authority under section 6 of the Human Rights Act 1998 and might feel impelled to read down "must" to "may" in certain cases where a breach of Convention rights would otherwise ensue, for example where a refugee could be exposed to removal or to pre-removal difficulties such as inability to work, rent accommodation, drive a car or maintain a bank account.
95. For completeness, I add the following brief observations about the claim for restitution of the sum of £440 paid by the claimant for the appointments for him and his family. If I had found a breach of the Secretary of State's policy in his case, I would not have been prepared to entertain that claim, for the reasons given by the Secretary of State in her submissions. It was not properly articulated, was pleaded only in the form of a public law remedy, there was inadequate opportunity to answer it and its merits are at best doubtful.
96. In conclusion, for the reasons I have given, the claim must fail and is dismissed. I am grateful to counsel for their full, helpful and attractively presented arguments.

This judgment has been approved by Kerr J.