



Neutral Citation Number: [2022] EWCA Civ 1092

Case No: CA-2022-001264

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MRS JUSTICE LANG
[2022] EWHC 1402 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between :

(1) S	<u>Claimants/</u>
(2) AZ	<u>Respondents</u>
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Defendants/</u>
(2) SECRETARY OF STATE FOR DEFENCE	<u>Appellants</u>

Lisa Giovannetti QC and Hafsah Masood (instructed by **the Treasury Solicitor**) for the
Appellants
Sonali Naik QC, Irena Sabic and Emma Fitzsimons (instructed by **Wilsons Solicitors LLP**)
for the **1st Respondent**
Irena Sabic, David Sellwood and Maha Sardar (instructed by **Wilsons Solicitors LLP**) for
the **2nd Respondent**

Hearing date: 28 July 2022

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This appeal arises in two claims for judicial review each brought by a former Afghan judge who is seeking leave to enter the UK. At the time that the proceedings were brought both were in Afghanistan, and it was common ground that they were at risk of persecution by the Taliban: accordingly their names were anonymised, and they are referred to as “S” and “AZ”. S has recently left Afghanistan and is now in Pakistan, but that does not affect the issues which we have to decide.
2. In both cases the Claimants claimed to be entitled to leave to enter in accordance with a joint policy of the Secretary of State for the Home Department and the Secretary of State for Defence known as the “Afghan Relocations and Assistance Policy” (“ARAP”); or in the alternative by the grant by the Home Secretary of “Leave Outside the Rules” (“LOTR”). Their claims were heard together by Lang J on 17 and 18 May this year. Her judgment was handed down on 9 June 2022. In summary:
 - (1) As regards the claim under ARAP, she held that a lawful decision had been made that neither Claimant fell within the terms of the policy.
 - (2) As regards the LOTR claim, the Home Secretary had taken the position that the Claimants were obliged to make their applications using a visa application form (“VAF”) made available on the Government website, and since they had not done so she had declined to make any decision. Lang J held that both had made valid applications and that the refusal to consider them was accordingly unlawful. In consequence the Secretary of State was obliged to proceed to a substantive decision.
3. On 28 June both Secretaries of State applied for permission to appeal against Lang J’s decision on the LOTR claim. Strictly, only the Home Secretary was affected by that claim, and I doubt if the Defence Secretary should have been named as an Appellant. Although nothing turns on the point, in this judgment I will refer simply to “the Secretary of State”.
4. On 8 July Andrews LJ granted the Secretary of State permission to appeal against Lang J’s order as regards the LOTR claim. She made it clear in her reasons that she had serious doubts whether the appeal had a real prospect of success, but she believed that there were compelling reasons to grant permission because nine other former Afghan judges have brought proceedings for judicial review raising similar issues, and a decision of this Court might assist in the disposal of their claims. She directed expedition. She declined to order a stay, with the result that the Secretary of State was obliged to proceed to a substantive decision.
5. That is the appeal before us. The Secretary of State has been represented by Ms Lisa Giovannetti QC leading Ms Hafsah Masood; Ms Sonali Naik QC, Ms Irena Sabic and Ms Emma Fitzsimons have appeared for S; and Ms Sabic, Mr David Sellwood and Ms Maha Sadar have appeared for AZ. As regards the issues before us the interests of S and AZ are identical and we were only addressed by Ms Naik, whose submissions Ms Sabic adopted. Because of the urgency of the matter we are delivering judgment the day following oral argument. That means that it has been necessary to be particularly focused and to confine ourselves to the issues that are dispositive of the appeal.

6. I have to say that the appeal was very ill-prepared, for which the primary responsibility must lie with the Secretary of State as Appellant. Many documents of central importance were omitted from the original bundles and had to be asked for by the Court in the course of its pre-reading, and others were only provided during the hearing, which made it difficult for the Court to get a good understanding of the various policies and procedures involved. Ms Giovannetti offered appropriate apologies and said that both she and Ms Masood had been ill and had been unable fully to supervise the preparation. The difficulties were in the event much mitigated by her clear and focused explanations of the points that remained obscure.
7. It is important to emphasise that the issues which we have to decide are very limited. There is no cross-appeal against the Judge's decision on the ARAP claim, and as regards the LOTR claim the only issue concerns the procedure by which an application for LOTR should have been made. In fact the Secretary of State has now made decisions, dated 22 July, in the cases of both Claimants, on what is described as an "in principle" basis, refusing LOTR, and we were told that the Claimants have sent pre-action protocol letters challenging their lawfulness; but those challenges are not before us.
8. Ms Naik submitted that the fact that the Secretary of State had made the decisions of 22 July meant that the present appeal, which was concerned with whether a proper application had been made in the first place, had become academic. I do not accept that. If we were to overturn the Judge's decision the effect would be that no proper application had indeed been made, and the Secretary of State would be entitled to withdraw her "in principle" decisions, which were only made because of the Judge's order.
9. For the purpose of the issues on this appeal, I need not set out any of the factual background about the events in Afghanistan which led to their position in which the Claimants find themselves. Nor need I set out their and their families' individual circumstances, though it is impossible not to feel deep sympathy for their predicament. For those interested, details can be found in the full and lucid judgment below ([2022] EWHC 1402 (Admin)).

THE RELEVANT POLICIES AND PROCEDURES

10. Subject to some immaterial exceptions, non-UK nationals wishing to come to the UK require leave to enter: see section 3 of the Immigration Act 1971. The Secretary of State's practice governing the grant of leave to enter must be set out in the Immigration Rules – see *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208. In the case of a "visa national" (which includes nationals of Afghanistan) the grant of leave to enter under the Rules is by way of entry clearance granted overseas, which takes the form of a visa – see paragraphs 24-28 of the Rules.
11. Applications for a visa must typically be made online. The gov.uk website has a page entitled "Applying for a visa to come to the UK". It identifies the most typical visa "routes", referred to by the Judge as "the online visa routes": these include, for example, visitor visas, student visas, various kinds of work visa and family visas. Under each there are hyperlinks which take a potential applicant to a page where they can find the necessary online application form: I will call these "the online VAFs". The online VAFs have an obvious family resemblance as regards lay-out, basic personal

information required and various boilerplate provisions, but they of course differ, according to the route chosen, in the particular questions which the applicant is required to answer. Each has an expandable free-text box where the applicant can enter “additional information”.

12. Subject to the power to waive referred to below, applicants for leave to enter are also required to “enrol their biometrics” – that is, to have their fingerprints and a photograph taken and supplied to the Home Office for registration. The relevant regulations are the Immigration (Biometric Registration) Regulations 2008. Enrolment takes place at authorised “Visa Application Centres” (“VACs”). There are VACs in most but not all overseas countries. Once an online application has been submitted the applicant is given a reference number and asked to complete further tasks. One of those is to identify the country in which they wish to enrol their biometrics; once they do so the system redirects them to the VAC provider in that country. The applicant will then have to attend that Centre to provide the biometrics. It is the Secretary of State’s policy not to treat an application as complete, or to consider it, until biometrics have been provided, but it is common ground that she has power under the Regulations to depart from that policy, either by waiving the obligation to enrol biometrics altogether or to defer it to a later stage.
13. The Secretary of State retains a discretion to grant leave to enter in circumstances not provided for in the Rules, i.e. LOTR – *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32, [2012] 1 WLR 2192. The exercise of that power is the subject of formal Home Office guidance. Version 1 of “Leave outside the Immigration Rules” (“the Guidance”) was issued on 27 February 2018 and remained in force at the date of the decisions in the Claimants’ cases. At para. 74 of her judgment the Judge sets out passages from the Guidance expounding the principles on which LOTR is granted, which emphasise its exceptional character and that it will typically only be granted “on compelling compassionate grounds”. Since on this appeal we are not concerned with the substance of the Claimants’ applications I need not reproduce them. However, I need to set out what the Guidance says about the procedure for applying for LOTR from abroad:

“Applicants overseas must apply *on the application form for the route which most closely matches their circumstances* [emphasis supplied] and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route. Any dependants of the main applicant seeking a grant of LOTR at the same time, must be included on the form and pay the relevant fees and charges.”

The phrase “the application form” in the first line of that passage is hyperlinked to the “Applying for a visa to come to the UK” page on the gov.uk website from which, as explained at para. 11 above, the applicant can be taken to a VAF for each of the standard routes there identified.

14. The requirement that applicants for LOTR must apply “on the application form for the route which most closely matches their circumstances” is at the heart of the issues on this appeal, and I will return to it below. But it is convenient to note at this stage that Ms Giovannetti explained that the essential purpose of the requirement that the

applicant should use one of the online VAFs was simply so that the application could be dealt with under the Home Office's automated system for dealing with applications, with an assigned reference number and access (among other things) to the procedure for the provision of biometrics as described above. That being so, it was in truth a matter of indifference which online route the applicant selected as most closely matching their circumstances. By definition many of the boxes in the form would be inappropriate to the basis on which they were seeking leave, which they would be expected to explain in the "additional information" box. She told us on instructions that in practice applications would not be rejected on the basis only that a form more closely matching their circumstances could have been chosen.

15. I need next to say something about the ARAP policy referred to in para. 2 above. As I have said, the Judge has held that the Claimants' applications under ARAP were rightly refused, but the fact that they made those applications remains material to the issue before us. The policy is concerned with assistance of various kinds to Afghan citizens who were employed by the UK Government (typically by the Ministry of Defence ("the MoD")) in Afghanistan prior to the Taliban take-over or, exceptionally, who were not employed by it but worked alongside it and are peculiarly vulnerable as a result (so-called "category 4"). One of the forms of assistance offered, in appropriate cases, is "relocation" to the UK (which necessarily involves the grant of leave to enter): I need not set out the criteria governing eligibility, but they are essentially concerned with the applicant's degree of vulnerability. The terms of the policy governing relocation are given effect by paragraphs 276BA1-276BC1 of the Immigration Rules.
16. The evidence is that responsibility for decision-making about relocation under ARAP was split between the MoD and the Home Office. The MoD is responsible for the initial assessment of eligibility for relocation, since they are best placed, liaising where necessary with other Government agencies operating in Afghanistan, to confirm that the applicant had indeed been employed by the UK Government and to assess their eligibility for relocation. If the applicant satisfies that initial stage, responsibility passes to the Home Office to ensure provision of biometrics and to satisfy itself that there are no grounds for refusal under Part 9 of the Immigration Rules (which in practice means carrying out criminal record and security checks), and, when that is done, to issue the visa.
17. That dual responsibility is reflected in the procedures as follows:
 - (1) Applicants for relocation under ARAP are required to fill in an online form headed "New Application for Relocation to the United Kingdom under ARAP": I will refer to this as "the ARAP application form". The ARAP application form is completely different in character and appearance from a Home Office visa application form. It does no more than require the applicant to give certain basic personal information and to specify what job they had done, between what dates, for which Government "Department" and at what location. There is no box for "additional information".
 - (2) The form itself does not bear the title of any particular Government department, but the recipient is in fact the MoD, as would be apparent to applicants from the published Guidance, *Afghan Locally Employed Staff: Relocation Schemes*, (and in fact the careful reader would note that the small print about data protection on the front sheet refers to "the MOD Privacy Notice"). The front sheet informs

applicants that the information about their employment will be checked and that an “eligibility assessment” will be made.

- (3) The MoD, referring as necessary to other agencies, then carries out the necessary checks to establish that the information given by the applicant about their employment is correct, and, if it is, makes the eligibility assessment.
- (4) If the applicant is found eligible for relocation a specific ARAP visa application form is generated: I will call it the “ARAP VAF”. The evidence before the Judge was that the ARAP VAF was filled out by MoD staff and forwarded to the Home Office, though we were told that more recently the practice has been to send the applicant a secure link from which they can access the form and fill it out themselves for submission to the Home Office, which will trigger the procedure for enrolling biometrics, as in the case of the online VAFs. The form itself (which we were shown though it was not before the Judge) requires only very basic personal information, together with a date of expected arrival. That is of course consistent with the applicant’s substantive eligibility for relocation having already been established, so that all that remains is Part 9 checks and biometrics. The ARAP VAF is not available online or accessible to applicants elsewhere. (It is not in that regard unique: the position is the same for persons identified for resettlement under country-specific schemes such as that for Syrian nationals.)

18. I should add that version 2 of the LOTR Guidance, issued on 9 March 2022 (which is after the date of the decisions with which we are concerned), contains the following:

“Afghanistan Relocations and Assistance Policy (ARAP)

Applicants (whether overseas or in the UK) cannot use the Afghanistan Relocations and Assistance Policy online application form to apply for leave outside the Immigration Rules. This form is only for relevant Afghan citizens who meet the requirements of the ARAP policy, as a principal applicant or a dependent family member of a relevant Afghan citizen who is eligible under the policy. Any application for LOTR should be made via a valid application on the application form for whichever other route most closely matches the applicant’s circumstances.”

That provision was added, as will appear, in response to attempts by Afghan applicants for LOTR, including the Claimants in this case, to rely on the submission of an ARAP application form (not, NB, an ARAP VAF) as an application form “closely matching their circumstances” of the kind specified in version 1 of the Guidance (see para. 13 above).

THE PARTIES’ POSITIONS AND THE IMPUGNED DECISIONS

19. Both Claimants through their solicitors engaged in extensive correspondence with the Government Legal Department (“GLD”) from the autumn of 2021 (shortly after the Taliban take-over in Afghanistan) seeking leave to enter on, as already noted, two bases (there were originally attempts to claim on a third basis but that was not pursued). First, they contended that they were entitled to relocation to the UK under the ARAP scheme, for which both say that they submitted ARAP forms (in S’s case the Secretary of State

says that there is no record of it having been received, but for reasons that will appear it is unnecessary for us to resolve that question). Second, they contended that even if they did not qualify under ARAP they were entitled to LOTR. I need not set out the basis of that claim in any detail. In short, they say that they ought to be treated in the same way as a number of other Afghan judges who were granted LOTR in the context of the emergency evacuation operation from Kabul at the end of August 2021 (so-called “Operation Pitting LOTR”).

20. It is unnecessary to trace in detail the way in which the parties’ positions developed in that correspondence, which continued after the commencement of judicial review proceedings (which was in December 2021 in S’s case and January 2022 in AZ’s), and in the respective Grounds of Claim and Grounds of Defence. As regards LOTR, it was the Secretary of State’s position throughout that no proper application for LOTR had been made and that accordingly she was not in a position to make any decision. It was the Claimants’ eventual position that the ARAP form, supplemented by the representations made in the correspondence, constituted an application on the form most closely matching their circumstances within the meaning of the Guidance. (The Secretary of State makes the point that that was not their initial position and that there is no reference to LOTR in the ARAP forms submitted or the correspondence originally referring to it.) Their response to the Secretary of State’s position that they should use one of the online VAFs was that those forms were wholly inapt to their circumstances and that completing any of them would involve them in falsehoods which might prejudice the application or a future application or indeed render them liable to prosecution. The Secretary of State said that those concerns were unrealistic. Applicants could enter “n/a” in boxes that were not applicable to their cases and it would be completely understood that they were using an inappropriate form only because the Guidance required them to do so.
21. The correspondence also covered a point which had emerged in the context of a claim by another Afghan judge, referred to as JZ. He, unlike the Claimants, did try to submit an online VAF but he encountered a difficulty when presented with the obligation to identify a VAC at which he would provide biometrics. His solicitors summarised the problem as follows:

“(1) When completing the application form online it requests the country in which the applicant is able to enrol his/her biometrics. The two options provided when ‘Afghanistan’ is selected are as follows:

a. I have checked available biometric enrolment locations and can travel to a location in my selected country. If no location is available in that country, then I confirm that I can travel to a location in the redirected country.

b. I am unable to travel to a location in my selected country or, as there is no location available, to the redirected country.

(2) The second option above applied to our client as he is in hiding and there are no Visa Application Centres open in Afghanistan. When this option is selected, the applicant is redirected back to the page where he/she is asked to enter the country in which they are

able to enrol their biometrics. Our client is unable to submit a form in the manner which you suggest.

(3) Notwithstanding the above, if our client were to click the link to ‘*available biometric enrolment locations*’ as indicated in option ‘a’ above he is taken to a website page for VFS Global (<https://visa.vfsglobal.com/gov/en/gbr>). On this page there are a list of countries, of which Afghanistan is one. Under the ‘*apply through designated country column*’ it suggests that the applicant ‘*Apply at your nearest accessible Visa Application Centre*’.”

He was prepared to take the risk of trying to leave Afghanistan (as he would of course have had to do if granted leave to enter) and to attend a VAC in Pakistan, but he was not prepared to do so if his application might then be refused. He thus asked the Secretary of State to use her “deferral” discretion to consider his application before he had supplied biometrics. The GLD acknowledged that this was a genuine problem but suggested a “workaround” under which applicants would select “the country where they would normally expect to enrol their biometrics” and then contact the Home Office to explain that they could not in fact do so. He was assured that this untruth on the form would not be used by the Home Office as adverse evidence in any decision making process, but he was not prepared to take this course. After JZ had been granted permission to apply for judicial review the Secretary of State relented and agreed to treat JZ as if his evidenced efforts to submit the online VAF had been successful. (Pursuant to a later order of Lieven J she considered his application “in principle” prior to the submission of biometrics.) The same problem was raised in the Claimants’ cases and they likewise declined to use the workaround.

22. The problem raised by JZ has now been resolved by giving applicants an online option to ask for the provision of biometrics to be waived or deferred. But that post-dates the decisions in these cases.
23. The decisions challenged, characterised in the Judge’s eventual order as decisions “refusing to accept [the Claimant’s] application for Leave Outside the Rules ... as valid”, are contained in S’s case in a letter from GLD dated 27 October 2021 and in AZ’s in letters from GLD dated 17 November 2021 and 14 January 2022.
24. The Judge found the Secretary of State’s refusal to accept the Claimants’ LOTR applications to be unlawful on two bases, which I will refer to as “the ARAP application basis” and “the biometrics basis”. I take them in turn.

(A) THE ARAP APPLICATION BASIS

25. This basis for the Judge’s decision essentially accepted the Claimants’ position that their submission of ARAP application forms constituted the use of a “form most closely matching their circumstances” in accordance with the Guidance. I should say at the start that I do not believe that the ARAP application form was such a form. In my view it is clear that the reference in the Guidance is to one of the online VAFs to which hyperlinks are (at one remove) provided: see para. 13 above. The ARAP form is not one of those forms: indeed it is not a VAF at all – see para. 17 (1) above. On this basis, as Ms Giovannetti submitted, the paragraph in version 2 of the Guidance simply makes more explicit what was already the effect of version 1.

26. That is in my view formally a complete answer to the Claimants' case on this point, but I should say that I do not regard it as a purely formal matter. The entire ARAP relocation procedure is *sui generis* and is quite inapt for the determination of the issues raised by a LOTR application. The assessment performed by MoD staff following receipt of an ARAP form is directed solely to the applicant's eligibility under ARAP itself. They could not determine the issues which are the basis of the LOTR application. Thus the use of the ARAP procedure as a gateway to the issue of an ARAP VAF would achieve nothing except complication and confusion. Once the form was submitted the Secretary of State would still have to determine the substance of the application (which the ARAP VAF does not address at all, because in a true ARAP case the eligibility decision has already been made).
27. The Judge's reason for reaching the contrary conclusion is at para. 133 of her judgment, where she says:

“ARAP is in the IR [Immigration Rules], so it cannot sensibly be said that it is not an immigration policy. Whilst it may be inconvenient for the MoD officials to have to refer LOTR applications on to the Home Office for consideration, I consider it is irrational and disproportionate for the Defendants to prioritise their own administrative convenience in this way when it is acknowledged that the Claimants are at risk of serious harm at the hands of the Taliban.”

With respect I do not think that meets the basic objection which I identify at para. 25 above: the Claimants had simply not submitted an application form at all. Although on this point I am disagreeing with the Judge I should say that this issue was only one of a very large number which she decided in an impressive judgment and to most of which there has been no challenge. We have been assisted by focused submissions on this limited point, and also by seeing the ARAP VAF: although that it is referred to in the evidence before the Judge, sight of the actual form is invaluable in understanding how the system in fact worked.

28. On that basis the Claimants' reliance on their ARAP applications falls at the first hurdle. But I should say something about paras. 131-132 of the judgment. These read:

“131. The online visa routes do not remotely match the Claimants' circumstances. If they made false entries on such forms, they would be exposed to the risk of permanent refusal of entry on mandatory grounds and even criminal prosecution. Any attempt to enter the UK on false pretences in order to apply for asylum would be illegal. In my judgment, it is irrational to put law-abiding legal professionals in a position where they have to falsify their applications, for the sake of their own and their family's safety.

132. The option suggested by the GLD, namely, that they enter 'not applicable' in answer to the questions on the form, is misleading by omission. It also carries the clear and grave risk that their LOTR applications will be considered and dismissed without any meaningful reference to the criteria which the SSHD has applied in other

comparable cases, in the exceptional circumstances pertaining in Afghanistan. This is procedurally unfair.”

29. As appears from the opening sentence of para. 131, the overall point that the Judge is making in that passage is that “the online visa routes” – i.e. those for which VAFs are specified – are wholly inappropriate to the Claimant’s circumstances. That is no answer if, as I would hold, the ARAP application form is not a VAF at all. However, it would be capable of founding a rather different challenge to the Secretary of State’s policy, namely that it is irrational that the only means of applying for LOTR is by using a form which has nothing to do with the actual basis of application. That is hinted at by the Judge’s observation, at para. 134 of her judgment, that the explicit prohibition of the use of the ARAP form in version 2 of the Guidance would be “at risk of a future legal challenge for the reasons I have set out above”: in other words, if she had not been able to find that the use of the ARAP form was permitted by version 1 she might have had to find the system irrational because the only permitted route for applying for LOTR was by the use of forms which exposed applicants to the risks she had identified in paras. 131-132.
30. As to that, I am bound to say that I find it hard to believe that there is any risk of applicants being prejudiced in their applications, still less of their being rendered liable to prosecution, in circumstances where they are only doing what the Guidance tells them to do and where the Secretary of State has, in these and other proceedings, formally confirmed what the GLD has said on her behalf. However, it remains on the face of it very odd that applicants are required to use forms which are admittedly inappropriate, and it is not hard to see how applicants, particularly those without access to sophisticated advice, might be concerned that their application would be jeopardised by choosing a route which the Secretary of State believed matched their circumstances less closely than some other route and be puzzled how to answer questions that had no application to their circumstances. If, as Ms Giovannetti told us, the only reason for requiring the use of an inappropriate form was to have a vehicle by which applicants could be assigned a reference number and plugged in to the system for obtaining biometrics, why could that not be more straightforwardly achieved by providing a separate form for LOTR applications?
31. I have considered carefully whether we should in this judgment consider whether the decisions taken in the Claimants’ cases were irrational on that more general basis. In the end I have concluded that we should not. It is debatable whether in the pleadings the claims were ever advanced on that basis, but even if they were it is not, as we have seen, the basis on which the Judge decided the case. The question of why there is no separate LOTR form is not addressed in the evidence and the urgency of the hearing meant that we did not hear developed submissions on it. As appears below we will be upholding the Judge’s decision on her other basis so that the Claimants will not be prejudiced by not having the possibility of establishing this ground.

(B) THE BIOMETRICS BASIS

32. As regards the failure to provide biometrics I will set out the relevant paragraphs of Lang J’s judgment in full:

“135. The Claimants were also unable to proceed with their applications for LOTR in October and November 2021 because of the

general rule that an application is not complete, and will not be considered, until biometrics are provided at a Visa Application Centre. However, the British Embassy in Kabul closed in August 2021, and since then there has not been a Visa Application Centre in Afghanistan. In my view, the Claimants and their dependants (including AZ's six young children and elderly mother, and S's paralysed husband) had a strong case for a deferral of the requirement to provide biometrics until such time as they could safely reach a Visa Application Centre in a third country, without being detected by the Taliban. Under regulation 5 of the Immigration (Biometric Registration) Regulations 2008, the SSHD has power to waive or defer biometrics testing. However, the application form in force at the time required applicants to identify the Visa Application Centre at which they intended to provide their biometrics, and made no provision to apply for a waiver or deferral. In my view, this was irrational and procedurally unfair.

136. The GLD advised the Claimants to resolve this problem by making a false entry on the form, by naming the Visa Application Centre at which they intended to provide biometrics, when they knew they could not do so. They were advised that they should then 'contact the Home Office and inform it of any difficulties they face enrolling their biometrics'. The GLD advised that 'using the form in this way ... will not be used as adverse evidence in any decision-making process'. In my judgment, it was irrational for the GLD to expect the Claimants to take the risk of making a false entry on the form, given the penalties for making false statements in immigration applications, on the basis of such a limited and unenforceable assurance contained in a solicitor's letter. It was far from clear that Home Office officials would permit a subsequent amendment to the application to correct the false statement and apply for waiver/deferral instead, without any authorised procedure for doing so.

137. In my view, the rational and fair course of action was for the SSHD to amend the online form so as to include the option of applying for a waiver/deferral of biometrics testing. The SSHD has now done this, but only after the decisions in the Claimants' cases were made."

33. I would broadly endorse that reasoning, though I would put the central point slightly differently. The Secretary of State declined to entertain the Claimants' applications, the substance of which was clear from their written representations, on the basis that they should have used one of the online VAFs. However, the position was that an application made by that route would not in fact be considered because the applicant could not conscientiously complete the biometrics application. That being so, it would plainly be irrational of the Secretary of State, subject only to the question of the workaround, not to depart from her normal policy and consider an application which was not made in that way.
34. As to the workaround, that involved the Claimant making an entry on the form which was not true. Ms Giovannetti submitted that the assurances given by the GLD that the Claimants would not be prejudiced by taking that course should have been sufficient to

remove any objection to its adoption. I see some force in that: I may, as appears above, be rather more sanguine than the Judge about the risk of the Claimants being prejudiced by taking a course positively recommended by the GLD. But in my view the Judge was entitled to take the view that she did. The fact remains that the Claimants were being invited to say something on the form that was plainly wrong – and to do so in order to resolve a problem which was entirely of the Secretary of State’s making. I can see why an applicant might be less than confident that they would suffer no ill consequences from following the workround, whatever assurances were made. It is in the nature of institutional decision-making that different officials, possibly in different countries, may not when making a particular decision be aware of what has been said by colleagues in different contexts and on a different occasion.

CONCLUSION

35. I would dismiss the appeal, albeit that I would hold the Secretary of State’s refusal to consider the Claimants’ applications to be irrational on only one of the bases found by her.

Lord Justice Lewis:

36. I agree.

Lady Justice Elisabeth Laing:

37. I also agree.