



Neutral Citation Number: [2023] EWHC 1052 (Admin)

Case No: CO/3626/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2023

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

Between :

THE KING
on the Application of

Claimant

SURJIT KAUR
Acting by her litigation friend Steven Boparai

- and -

(1) ADJUDICATOR'S OFFICE
(2) SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendants

Chris Buttler KC and James Robottom (instructed by Duncan Lewis) for the Claimant
David Manknell (instructed by Government Legal Department) for the First Defendant
Edward Brown KC (instructed by Government Legal Department) for the Second
Defendant

Hearing date: 7 February 2023
Draft judgment circulated to the parties: 24 April 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 05 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Henshaw:

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(A) INTRODUCTION

1. The Claimant applies for judicial review of certain aspects of a decision, made by the Second Defendant (“*SSHD*”) and upheld by an adjudicator (“*the Adjudicator*”), to offer her £40,000 in compensation under the Windrush Compensation Scheme (“*WCS*”). Permission was granted by Cotter J on 16 September 2022.
2. The Claimant claims that the decision was unlawful to the extent that it:
 - i) made no award to the Claimant under the categories of the WCS rules relating to: (a) loss of access to employment, (b) loss of access to benefits or (c) the discretionary category of loss; and
 - ii) placed the Claimant at level 3 in relation to the WCS rules on “*Impact on Life*”.
3. I have concluded, for the reasons set out below, that the decision was lawful and that the claim must therefore be dismissed.

(B) BACKGROUND FACTS

(1) Outline of the Claimant's claims and decisions made

4. The 'Windrush generation' were citizens of the British Commonwealth who arrived in the UK between 1948 (the year in which HMT Empire Windrush docked at Tilbury) and 1973 (the year in which the Immigration Act 1971 came into force and restricted Commonwealth immigration). Many of the Windrush generation faced difficulties in the UK because "[a]lthough [the Immigration Act] 1971 entitled people from the Commonwealth who arrived before 1973 to the 'right of abode' or 'deemed leave' to remain in the UK, it hadn't automatically given them documents to prove it. Nor had the Home Office consistently kept records confirming their status. So, without making a further application and paying a fee, they had no way to show the UK was their rightful home" (Windrush Lessons Learned Review). See also *R (Mahabir) v Secretary of State for the Home Department* [2021] 1 WLR 5301 §§ 37-42, noting that many Windrush immigrants encountered difficulties re-entering the country after departing for any period, and those who remained increasingly found themselves subject to a hostile immigration regime which encouraged them to leave by restricting their access to key services and making it more difficult for them to secure accommodation or hold down employment. The Home Secretary at the time the WCS was introduced said there had been "a failure by successive governments to ensure that these individuals have the documentation they need" (Amber Rudd MP, 23 April 2018, a statement which was cited in *R (Howard) v Secretary of State for the Home Department* [2021] 1 WLR 4651 at §§ 6 and 34). Lack of proof of status could affect individuals' ability to obtain work, claim benefits or access services. The Secretary of State established the WCS to compensate members of the Windrush generation for such losses.
5. The Claimant arrived in the UK from India in 1963 at the age of 22 and has been resident in the UK since then. She is now 82 years old. Sadly, she lacks litigation capacity because of cognitive impairment. Cotter J appointed her son, Mr Steven Boparai, to act as her litigation friend on 16 September 2022.
6. The Claimant's entitlement to Indefinite Leave to Enter ("ILE") was endorsed in her Indian passport on 23 February 1997. An endorsement of ILE was at all material times sufficient to demonstrate lawful immigration status in the UK. The Claimant initially made, but no longer pursues, a claim for the period after February 1997. Mr Boparai's evidence is that neither he nor the Claimant had any knowledge of the ILE endorsement until it was referred to in the review decision mentioned below, and that the Claimant did not recall having it in her passport from the time in question. However, the Claimant now accepts that the stamp meant that from 23 February 1997 she was not prevented from obtaining work, claiming benefits or accessing services as a result of being unable to prove her immigration status.
7. On 29 April 2019, the Claimant made an application for compensation pursuant to the WCS. She made the application on a detailed form (which Mr Boparai helped her complete as she is unable to read or write English). In addition, she and Mr Boparai provided further information, at the Home Office's request, in a six-page letter dated 29 December 2019. The Claimant claimed, and claims, that she faced the problem that the WCS is designed to compensate: she lacked proof of her right to live and work in the UK and was unable to work or claim welfare benefits. Mr Boparai has

also filed a witness statement in the present judicial review claim, setting out details in support of the Claimant's claims and indicating that the Claimant and her six children lived in abject poverty as a result of these problems.

8. The SSHD determined that the Claimant was a member of the Windrush generation and eligible for compensation under the WCS, subject to proof of loss. By a decision dated 7 July 2020 ("*the 2020 Decision*"), the SSHD rejected the Claimants' claims for loss of access to employment, loss of access to benefits, denial of access to housing services and banking services, and loss of access to a driving licence. The Claimant was offered an award of £3,000 under the Impact on Life category of the WCS, as to which the 2020 Decision letter said:

"You have told us you have been unable to find work your entire life. You were also unable to claim benefits. This caused severe hardship and you had to sell your home after your husband sadly passed away, in order to support your family. You feel that you have not had adequate support from the UK Government and lived your life as an outcast.

Although we have not been provided with or found any information to confirm you were unable to access employment or benefits due to issues with your status, we acknowledge that not having a British passport and being unable to demonstrate your lawful status in the UK, will have caused you difficulties over the years. We also acknowledge the consequence of being unable to demonstrate your lawful status."

9. The 2020 Decision was upheld on a Tier 1 Review, i.e. a review by a senior reviewer employed by the SSHD, who was not involved in making the original decision and whose task was to consider whether the SSHD in the initial decision had correctly applied the WCS rules and guidance in assessing the Claimant's claim.
10. On 8 January 2021, the 2020 Decision was withdrawn following changes to the WCS rules introduced in December 2020, the relevant aspects of which I summarise later.
11. A new decision ("*the Caseworker Decision*") was made on 24 February 2021 and notified to the Claimant on 8 March 2021. The Caseworker Decision increased the Impact on Life award from £3,000 to £40,000, that higher award being permitted as a result of the December 2020 amendments to the WCS rules. However, so far as material to the present claim, the Claimant was refused compensation under the following heads of the Scheme:
- i) loss of access to employment (Annex D to the Scheme): this part of the decision is challenged by Grounds 1 and 2 of the present claim;
 - ii) loss of access to benefits (Annex E to the Scheme): this part of the decision is challenged by Grounds 3 and 4 of the present claim; and
 - iii) a discretionary award (Annex I to the Scheme): this part of the decision is challenged by Ground 5 of the present claim.

In addition, the Claimant challenges under Ground 6 the refusal to award a higher tariff level for impact on life (Annex H to the Scheme).

12. The Caseworker Decision was upheld on a Tier 1 Review (“*the Review Decision*”), the outcome of which was notified to the Claimant by a letter of 13 April 2021.

(2) The Adjudication stage

13. Under the WCS rules, if an individual is dissatisfied with the outcomes reached by the SSHD and has exhausted the Home Office’s tiered complaints process, he or she may refer the case to the Adjudicator for review.
14. On 28 April 2021 the Claimant sought a review from the Adjudicator, whose Office has been made the First Defendant to the present claim. On 23 July 2021 the Adjudicator made her decision, and did not recommend that the SSHD reconsider her decision in respect of the Claimant’s claim.
15. Counsel for the Adjudicator’s Office helpfully explained its functions and position in written and oral submissions. The Adjudicator is an independent and impartial adjudicator of complaints. The Adjudicator’s Office falls within the same legal entity as the Commissioners of Her Majesty’s Revenue and Customs (“*HMRC*”), and the staff in the Adjudicator’s Office are employees of HMRC.
16. However, the Adjudicator is an office holder, not an employee nor an officer of HMRC, but a person external to HMRC with the independent personal authority to review complaints.
17. The Adjudicator is also independent from the Home Office, and a Service Level Agreement (“*SLA*”) between the Home Office and the Adjudicator’s Office sets out how the Adjudicator’s Office review services are to be provided, including the scope of the reviews carried out by the Adjudicator’s Office. Paragraph 6.2 of the SLA states that the Adjudicator’s Office is independent or ‘at arm’s length’ from HMRC and the Home Office, and that its decisions are not subject to influence or interference.
18. Paragraph 4.4 of the SLA states that the Adjudicator will conduct an independent review of decisions made under the WCS, and that individuals can also request a review of a complaint about how the Home Office has handled their claim for compensation under the Scheme. By § 4.5 of the SLA:

“The Adjudicator will:

- Bring an independent perspective and assurance to individual case reviews;
- Conduct the review to a quality standard in line with industry good practice;
- Consider whether the Home Office has provided a fair and consistent application of the Windrush Compensation Scheme Rules, standards, guidance and codes of practice, alongside the factual evidence of the review and

- Share insight to improve the Windrush Compensation Scheme service.”

19. Pursuant to § 4.10, the Adjudicator can look at applications for review or complaints about mistakes, unreasonable delays, poor or misleading advice, processes, whether relevant guidance has been followed, inappropriate staff behaviour, and the use of discretion. The Adjudicator cannot consider complaints about eligibility under the WCS, i.e. whether a claimant falls within the scope of the WCS at all (§ 4.11).

20. As to the Adjudicator’s powers on review, §§ 4.20 and 4.21 provide:

“4.20 The Adjudicator may recommend that the Home Office reviews the amount of an award where it has found evidence that:

- The Home Office has not followed processes (rules and guidance) appropriately;
- The Home Office has used its judgement inappropriately and unreasonably in applying the rules and/or guidance in force.

4.21 The Adjudicator will not be entitled to substitute their judgement for a reasonable judgement reached by the Home Office.

4.22 The Adjudicator will issue the final report (in each individual case), conclusion and recommendations to the Home Office Deputy Director, Windrush Compensation Scheme Operations. The Adjudicator recommendation will

- Uphold or partially uphold the claimant’s application for a review or complaint; or
- Not uphold the claimant’s application for review or complaint.”

The Adjudicator can also recommend redress (§ 4.23).

21. The Home Office is not obliged to accept the recommendation of the Adjudicator, although if it does not do so, it must provide written reasons for its decision, and those reasons must be approved by the Home Office Director, UK Visas and Immigration responsible for the operation of the WCS (§ 4.26).

22. The Claimant submits that although she has formally challenged the decision of the Adjudicator alongside the decisions of the SSHD, the claim is in substance a challenge to the decisions of the SSHD. That is because the Adjudicator reviewed only the lawfulness of the Home Office’s decisions, as reflected in §4.21 of the SLA quoted above. The Claimant says the position is the same as where an appellate court has before it the decision of a first instance tribunal (which made findings of fact) and the decision of an appellate tribunal (which reviewed the first instance tribunal’s decision for an error of law): the appellate court’s task is to assess whether there was an error of law in the first instance tribunal’s decision. By analogy, on appeal to the

Court of Appeal in the employment context, “*the question, strictly speaking is whether the ET [Employment Tribunal] made an error of law, not whether the EAT [Employment Appeal Tribunal] did so. ...If the ET committed no error of law, then the EAT cannot interfere. Conversely, if the ET's judgment does contain an error of law it does not matter whether the EAT's analysis of that error of the claim as a whole was exactly accurate*” (*Robinson v Department for Work and Pensions* [2020] IRLR 884 § 34, per Bean LJ).

23. Counsel for the Adjudicator submits that the analogy is not entirely apt. It is possible for there to be an error of law by the SSHD that is not an error of law by the Adjudicator, given the limitations on the Adjudicator’s powers. These include the limitation about eligibility provided for in § 4.11 of the SLA; in addition, the Adjudicator would not have power to determine whether a part of the WCS rules or guidance were itself lawful.
24. The SSHD too considers that the analogy with appellate tribunals is not entirely apt, but is content to proceed in the present case on the basis that the operative decisions are the Caseworker Decision and Review Decision made by the SSHD. She takes the view that the Adjudicator’s decision corroborates the rationality of her decision, but is not itself the relevant target for review.
25. The Adjudicator has taken a neutral position in the present case and not sought to make submissions on the substantive issues between the Claimant and the SSHD. In oral submissions, counsel for the Adjudicator made the points that no remedy was sought against the Adjudicator; that remaining neutral assisted the Adjudicator in being seen to be impartial; and that whether the Claimant were right or wrong about the legality of the SSHD’s decision, the contents of the Adjudicator’s decision would not affect the outcome. Counsel also invited the court to consider giving some form of indication as to whether it was necessary for the Adjudicator to be made a party to claims of this kind, bearing in mind the additional costs likely to be involved.
26. One matter that was not canvassed in argument is whether the Adjudicator has power to make a recommendation (which the SSHD may then follow) whose effect might be to *reduce* the amount of an award, or whether the terms of the SLA § 4.22 would preclude that. Should such circumstances be possible and arise, then it might be necessary or appropriate for the Adjudicator to be joined. However, in the normal run of cases, where the Adjudicator has merely upheld the SSHD’s challenged decision (as in the present case), it appears to me unnecessary to join the Adjudicator as a party.

(3) Evidence about the objectives of the WCS

27. Lisa Birtles-Maule, of the SSHD’s Policy Team with responsibility for the WCS, explained the SSHD’s general approach as follows in her witness statement:

“14. The standard of proof for the WCS is the balance of probabilities for all categories of compensation. Decision makers are guided to take a holistic view when it comes to assessing the evidence available in a claim. It is understood that providing documentary evidence to support every aspect of a claim for compensation can be challenging for claimants.

Decision makers are guided that they should not ask for further evidence where it will not make a difference to the final outcome.

15. To prevent incorrect payments, decision makers must be satisfied that the information provided by the claimant is accurate. Where the threshold for awarding compensation has not been met, decision makers will request further corroborating information. This may be direct from third parties or from the claimant. If further information cannot be obtained sufficient to reach the threshold, compensation will not be awarded for that element of the claim. The decision maker will use all direct evidence, and circumstantial evidence in making the final decision. For example, a claim for loss of access to employment may be accepted without any direct evidence if the person has a strong track record of employment followed by a period without employment during a period when their status was unresolved. Whereas a person claiming with no employment history at all, may not.

16. The WCS is a flexible ex gratia scheme. It is designed to ensure that compensation is paid promptly, whilst, at the same time, ensuring that public money is not paid out incorrectly. It is clear from the rules of the WCS that applications will need to provide evidence in support. The reason for this is to safeguard the public purse. Decision makers are trained in the approach that they should adopt to the WCS rules and evidence submitted by applicants. This helps ensure consistency in approach.”

28. The Claimant put forward a witness statement from Mr Martin Forde KC, who is the independent person appointed by the SSHD to design the Scheme and oversee its function. He stated *inter alia* that:
- i) he was the Independent Adviser to the WCS between 10 May 2018 and June 2021, and had been asked to comment on the formulation of the Scheme and, in particular, whether the drafters of the Scheme had regard to certain factual matters when formulating the Scheme;
 - ii) his role was to oversee the development of the Scheme Rules and to give independent advice to the Home Office regarding the design of the Scheme; he was directly involved in the consultation process and then directly involved in the drafting of the Scheme. He attended meetings where he advised on the categories of loss to be included in the Scheme and on the scope of those categories; he received various drafts of the Scheme, on which he commented and gave advice before the Scheme was finalised; the Home Office accepted his advice and the final version of the Scheme accords with his vision of the categories of loss and their scope;
 - iii) the Scheme is meant to cover all identifiable financial losses arising from the inability to demonstrate lawful immigration status, and the impact on life

category is meant to cover a wider range of detrimental impacts. To ensure that individuals did not fall through the cracks of the other annexes, the ‘discretionary award’ annex was included, which was intended to cover any demonstrable losses that for whatever reason did not fit in to the other categories;

- iv) he made it clear from the beginning that Home Office staff would often have to take the word of eligible applicants on trust;
 - v) the Scheme was intended to cover all losses arising from an inability to demonstrate lawful immigration status and was therefore absolutely meant to cover losses caused by oral applications or enquiries for work or benefits that were rejected and, when he signed off on the Scheme, he was satisfied that it did so. It would be contrary to the basic purpose of the Scheme to deny compensation to someone in Ms Kaur’s position on the basis that they had not insisted on completing an application form which they had been told was futile; and
 - vi) the Scheme was designed to take a broad and generous approach to evidence and credibility. It reflected his advice to the Home Office that “*you got into this mess because you were too burdensome with documentation*” and should take a broad and flexible approach to the evidence of loss. The Home Office accepted his advice, and the Scheme therefore covered situations that were not documented.
29. The SSHD objected to the admission of this evidence on the basis that it appeared to be offered as quasi expert evidence for which there is no permission; further, Mr Forde KC’s statement was essentially commentary and opinion, and its admission would be contrary to the principles summarised in *R (Gardner) v Secretary of State for Health and Social Care* [2021 EWHC 2946 (Admin)] at §§ 3-17.
30. The parties accepted that I should read this evidence *de bene esse* and decide on its admissibility as part of the present judgment.
31. In support of its admission, the Claimant submits that she does not adduce it as expert evidence, and accepts that the interpretation of the WCS is a matter for the court. However, she says it is relevant (a) to show the purpose and scope of the scheme, and whom it was intended to compensate (cf *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836 §§ 4 and 123-124, a case concerning another *ex gratia* compensation scheme), and (b) as evidence of the materials and considerations that were before the decision-maker when the WCS was formulated. By way of analogy, an enactment is to be read in its context in the widest sense, including the mischief that it was intended to remedy, as discerned from other provisions of the statute, its preamble, the existing state of the law, and other legitimate means (*Attorney-General v Prince of Hanover* [1957] 1 WLR 436, 460-461 per Viscount Simonds, cited in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed., section 11.2). The Claimant makes the point that it is commonplace in judicial review applications concerned with human rights issues for the court to receive evidence from a civil servant as to the Minister’s thought process. The Claimant must equally be entitled to adduce Mr Forde KC’s evidence as to the Scheme’s objectives.

32. It is thus common ground that Mr Forde KC's evidence is not admissible as going directly to the interpretation of the Scheme. The question is whether it is admissible as factual evidence about the Scheme's objectives and the matters taken into account when it was formulated. Although with some hesitation, I consider that the evidence is admissible insofar as it may shed light on the general purposes of the Scheme, on the basis that Mr Forde KC was one of the persons closely involved in its formulation. However, it has to be borne in mind that Mr Forde KC was not himself the decision-maker. Although he states that the Home Office accepted his view, in my view that is a matter (with respect) to be assessed by reference to the wording of the Scheme assessed in its context as a whole. It cannot simply be assumed that an objective which Mr Forde KC had in mind, or expressed, constitutes the objective of the actual decision-maker, in other words of the Scheme.

(C) GROUNDS OF APPEAL

33. The grounds of claim, to the extent now pursued, raise the following issues as formulated by the Claimant:
- i) Issue 1 (Ground 1): did the caseworker ask the right question when determining whether the Claimant had lost access to employment?
 - ii) Issue 2 (Ground 2): if "yes" to question 1, was the caseworker's conclusion that there was insufficient evidence that the Claimant's lack of status had caused loss of access to employment a rational one supported by adequate reasons?
 - iii) Issue 3 (Ground 3): is an oral refusal to permit an individual to apply for benefits a "*refusal of an application*" within the meaning of Annex E to the Scheme?
 - iv) Issue 4 (Ground 5): if "no" to Issue 3, was the loss of access to benefits "*not of a kind provided for by Annex E*", so as to fall within Annex I?
 - v) Issue 5 (Ground 4): if "no" to Issues 3 and 4, did the exclusion of the Claimant from Annex E on the ground that her application for benefits was refused orally (compared to an individual whose application was refused in writing) breach her rights under Article 14 ECHR?
 - vi) Issue 6 (Ground 6): did the caseworker give adequate reasons for concluding that the impact on the Claimant's life under Annex H was of level 3 rather than level 4 severity?

34. I consider the issues in that order in sections (E) to (I) below.

(D) INTERPRETATION OF EX GRATIA COMPENSATION SCHEMES

35. The Claimant made the following general points about the construction of *ex gratia* compensation schemes, which were not controversial between the parties and which I accept.
- i) It is for the court to determine the objective meaning of the scheme for itself.

- ii) The scheme should be interpreted as it “*would be read by a reasonable claimant or support worker or advisor*” (*R (JB) v Secretary of State for the Home Department* [2022] EWCA Civ 1392, § 68 per Bean LJ), a “*reasonable and literate person*” or an “*ordinary and reasonable reader*” (*R (Raissi) v Secretary of State for the Home Department* [2008] QB 836 § 125, per Hooper LJ).
 - iii) That approach to construction is consistent with the public law rights to which published policies give rise. The beneficiaries of a policy have a public law right to be treated in accordance with the policy (*Mandalia v Secretary of State* [2015] 1 WLR 4546 §§ 29-30 per Lord Wilson). To avail herself of that right, an individual needs to be able to understand what the policy says. Unless a policy is interpreted according to the understanding of the “*reasonable claimant*”, the individual affected by the policy cannot avail herself of the right to be treated in accordance with the policy.
 - iv) In interpreting a policy, a reasonable claimant will read the scheme in light of its overall purpose. The court should therefore ask: “*What does the scheme mean? What was its purpose and scope? Who was the minister intending to compensate?*” (*Raissi* § 124). The scheme should be interpreted without making artificial distinctions and having regard to the substance of the situation (*Raissi* §§ 125 and 127).
36. The SSHD makes the point that the WCS self-evidently is a tool of social and economic policy, involving the *ex gratia* distribution of public monies in redress for historic injustice; and that in those circumstances, the Government should be given a particularly wide margin, both as to the rules adopted and as to the decisions made applying those rules (see e.g. *R (CN) v Secretary of State for Health and Social Care* [2022] 4 WLR 73 § 8). I note that the statement at § 8 of *CN* related to the creation of the scheme there, the issue in the case being whether the exclusion of a category of persons was unlawfully discriminatory. I am not sure that the same approach should necessarily be taken to the interpretation and application of the WCS. Caseworkers making decisions under the scheme are not themselves making judgments as to matter of social or economic policy.
37. On the other hand, it is elementary that the court’s role is to examine the legality of the challenged decision, rather than its merits. I also see force in the point, reflected to a degree in the evidence of Ms Birtles-Maule quoted above, that decision-makers under the WCS will necessarily need to take a broad and holistic view as to whether or not to accept claims that may (given the span of years involved) be supported by greater or lesser amounts of documentary evidence; and, where little or no documents are provided, to exercise their judgment in the light of the inherent probabilities and their experience of their WCS case work as a whole. That does not mean that an absence of documentary or third party evidence will necessarily be ignored. The inherent probabilities may include, for example, how likely it is that (even after the passage of a long time) a claimant who claims unsuccessfully to have applied for a large number of jobs will be unable to produce any letters or other documentary evidence at all of those applications or their outcome. (The Claimant’s and Mr Boparai’s letter of 29 December 2019 listed 22 businesses whom they said the Claimant had approached for employment.) These are primarily matters for the

judgment of the decision maker in the light of their experience of handling cases of this kind.

(E) GROUNDS 1 AND 2: EMPLOYMENT

(1) The decisions and the questions addressed

38. The Claimant's evidence in support of her application under the WCS was that she had approached a considerable number of named local companies for work, that Mr Boparai was often present as her interpreter, but that "*we were told [by the prospective employers] that unfortunately she could not be considered for employment because she was unable to prove her lawful immigration status due to her Indian Passport*" and she was "*simply told she could not be considered for employment when we presented her Indian passport and her immigration status was questioned which was subsequently rejected as unacceptable*". The Claimant and Mr Boparai provided a list of the companies/bodies whom she said she had approached. Their letter of 29 December 2019 said:

"My mother does not have any written correspondence from prospective employers as:

1. She was for the majority of instances never provided with a letter to confirm refusal
2. On the few occasions she recalls receiving written refusal she does not have the correspondence.

Further to providing evidence of letters or applications made by my mother, it is wholly unreasonable to expect an individual to have kept letters that date back several decades. Any individual that is constantly refused work by means of verbal or written correspondence would not wish to keep the correspondence. ..."

39. As the WCS was then formulated, the Claimant did not qualify under the relevant part of the rules, "*Annex D: Loss of access to employment*". Prior to December 2020, the relevant part of Annex D permitted an award to be made only if:
- i) the claimant was in employment or had accepted an offer of employment, and the employment was terminated or the offer withdrawn because he or she was unable to demonstrate their lawful status in the UK (§ D11(a)(i)), or
 - ii) the claimant "*was not in employment but had been in regular employment in the previous two years*" and was unable to access employment because he or she was unable to demonstrate lawful status in the UK (§ D11(a)(ii)).
40. The Claimant did not fall into either category because the evidence was that she had never been able to obtain employment in the UK. Accordingly, the 2020 Decision made no award for loss of access to employment, and that was upheld on review on 17 November 2020. A level 3 award was made for "*impact on life*", which at the time was worth £3,000.

41. In December 2020, the WCS was amended in several ways, which included:
- i) increases in the value of awards for “*impact on life*” under Annex H, with Level 3 awards under the annex increasing from £3,000 to £40,000; and
 - ii) the introduction into Annex D of a new category of eligibility for a ‘General’ award for claimants who had not been in regular employment for a specified period but could demonstrate they were actively seeking employment and were unable to progress applications for employment because of their inability to demonstrate their lawful status in the United Kingdom (new paragraph D9(a)(iv) and (b)).

In addition, the former 12-month limit on General awards was removed. However, it remained possible for the Home Office to reduce or decline to make an award if it considered that a claimant had failed to take reasonable steps to resolve their lawful status, had otherwise failed to take reasonable steps to mitigate losses or impacts, or had taken unreasonable steps that had resulted in increased losses (§ 4.4 of the rules).

42. The revised Annex D, relating to loss of access to employment, contained the following paragraphs about entitlement to an “*Actual earnings award*” or a “*General award*”:

“Actual earnings award

D2 An actual earnings award for loss of access to employment may be made to a primary claimant or an estate if the following conditions are met.

(a) The primary claimant or (in the case of an estate) the deceased:

- (i) was in employment which was terminated and can demonstrate what their earnings had been; or
- (ii) was not in employment but had accepted an offer of employment which was rescinded and can demonstrate what their earnings would have been; or
- (iii) was unable to access employment but had been in regular employment in the two years prior to the date specified in D3(c) and can demonstrate their earnings over that period; or
- (iv) was required to defer the progression of an application for employment which they were subsequently able to secure and can demonstrate their earnings in that employment.

(b) The reason for the termination of employment, rescinding of an offer of employment, or for the primary claimant or the deceased’s inability to access employment or progress an application for employment was the inability of the primary

claimant or the deceased to demonstrate their lawful status in the United Kingdom.”

“General award

D9. A general award for loss of access to employment may be made to a primary claimant or an estate if the following conditions are met.

(a) The primary claimant or (in the case of an estate) the deceased:

(i) was in employment which was terminated, but is unable to demonstrate what their earnings had been; or

(ii) was not in employment and had accepted an offer of employment which was rescinded, but is unable to demonstrate what their earnings would have been; or

(iii) was unable to access employment and had been in regular employment in the two years prior to the date specified in D10(c) but is unable to demonstrate their earnings over that period; or

(iv) had not been in regular employment in the two years prior to the date specified in D10(d) but can demonstrate they were actively seeking employment and were unable to progress applications for employment.

(b) The reason for the termination of employment, rescinding of an offer of employment, or for the primary claimant or the deceased’s inability to access employment or progress applications for employment was the inability of the primary claimant or the deceased to demonstrate their lawful status in the United Kingdom.

D10. For the purposes of paragraph D9, the period of loss begins:

(a) where D9(a)(i) applies, from the date of termination;

(b) where D9(a)(ii) applies, from the date on which the offer of employment was rescinded;

(c) where D9(a)(iii) applies, the date from which the primary claimant or the deceased first could not access employment;

(d) where D9(a)(iv) applies, the date from which the primary claimant or the deceased were first unable to progress an application for employment.

D11. The period of loss ends on the earlier of:

- (a) three months from the date on which the primary claimant or the deceased received a document from the Home Office proving their lawful status in the United Kingdom;
- (b) the date on which the primary claimant or the deceased commenced employment;
- (c) where an estate of a primary claimant applies for an award under this Annex, the date on which the deceased died; or
- (d) where a primary claimant is not resident in the United Kingdom, the date on which they ceased to be resident in the United Kingdom.”

The route set out in § D9(a)(iv) was newly introduced in December 2020.

- 43. On 8 January 2021, the Secretary of State wrote to the Claimant stating that the changes to the Scheme “*increase the value of offers made under the Impact on Life category*” and “*This means that the amount of money we have offered to you in your full and final offer will increase. We therefore have withdrawn the T1 Review decision and we will make a new offer*”.
- 44. The Caseworker Decision was taken on 24 February 2021. The internal minute of the decision records includes this:
 - “Awards under Loss of Access to Employment are made when it is satisfied on the balance of probabilities an individual was dismissed, or had job offers withdrawn because of difficulties demonstrating their lawful status. Unfortunately, there is no information to show Mrs Kaur was dismissed or had offers of employment withdrawn due to her inability to demonstrate lawful status. Mrs Kaur therefore fails to meet the requirements set out at D2 and D9 of the Windrush Compensation Scheme Rules”.
- 45. I agree with the Claimant that, certainly on its face, this reasoning indicated that the caseworker had addressed the gateways set out in § D9(a)(i) and (ii) (and D2(a)(i) and (ii)), but not – in particular – the new gateway in § D9(a)(iv). That gateway arose for consideration because the Claimant’s evidence was that she had actively sought employment but been unable to progress her applications because she was unable to prove her lawful status.
- 46. The Caseworker communicated her decision to the Claimant by letter dated 8 March 2021, which said in relation to the claim for loss of access to employment:
 - “Awards under Loss of Access to Employment are made when it is satisfied on the balance of probabilities an individual was

dismissed, or had job offers withdrawn because of difficulties demonstrating their lawful status.

Whilst you have told us that you were unable to secure employment, we have not been provided with any information to show that you had employment terminated or an offer of employment withdrawn due to an inability to demonstrate your lawful status in the UK. We are also aware that you previously had an endorsement in your passport which confirmed you had Leave to Enter the UK for an Indefinite period. You therefore do not have an inability to demonstrate lawful status.

As we have not been provided with nor found any information to show that you lost access to employment due to an inability to demonstrate your lawful status, we are, unfortunately, unable to offer an award under the Loss of Access to Employment category of the Scheme.”

Although the final paragraph above is expressed in general terms, the preceding reasoning indicates in my view that the caseworker had not considered the new § D9(a)(iv) gateway.

47. The Claimant sought review on 16 March 2021, and the Review Decision was subsequently made. I mention at this point that the documents include two review decision minutes, headed “*Windrush Compensation Scheme 1st Tier Review v1*” and “*Windrush Compensation Scheme 1st Tier Review v2*”. The Claimant’s written and oral submissions proceeded (at least initially) on the basis that the first of these was the relevant minute. However, it is clear from the contents of the minutes that it is the second “V2” one that relates to the Review Decision, and that the first minute relates to the Tier 1 review of the 2020 Decision.
48. The internal minute of the relevant Review Decision summarised the contents of Mr Boparai’s letter, sent on behalf of the Claimant, seeking review. It noted that he had reiterated that the Claimant had provided names of companies and dates when work was applied for with reasons for refusal. Review was sought for the period from 1963 to 1997, rather than the 43-year period originally claimed for. Further:

“Mr Bopari notes that himself and his siblings regularly accompanied their mother in her efforts to seek employment and would help complete application forms on her behalf as there was no support available for her. Mr Bopari recalls that his mother was always refused work when she produced her Indian passport as Identification and was told that her passport did not prove her right to work in the UK.

Mr Bopari advises that the Job Centre informed Mrs Kaur she was unable to demonstrate her lawful status with her Indian passport.

Mr Bopari notes that from previous decision notices, the Home Office the quotes the same reasoning time and time again, of

being unable to find any information to support loss of access of employment or termination of a job offer due to difficulties demonstrating lawful status.

Mr Bopari clarifies his mother does not hold any further information dating back several decades. Mr Bopari advises his mother was simply refused work verbally and not provided with any written correspondence.”

49. The minute notes that no further supporting information was provided. Reference is made to Home Office database notes accepting, on the balance of probabilities, that the Claimant arrived in England in 1962 to join her husband, and was present and settled in the UK on 1 January 1973. Reference is made to copies of pages the Claimant had provided from various passports issued in 1975, 1996, 2006 and 2015. The notes indicated that passports had also been issued in 1969 and 1986. The 1996 passport contained an ILE endorsement dated 23 February 1997 and also indicated that the Claimant had previously travelled on the passport issued in 1986. The reviewer was satisfied that on 23 February 1997 the Claimant was able to satisfy the Immigration Officer that she held lawful status for the ILE endorsement to be placed in this passport. Further:

“Right to work checks were only introduced following the Asylum and Immigration Act 1996 and Immigration, Asylum and Nationality Act 2006, which is decades after Mrs Kaur refers to difficulties. It is again noted that Mrs Kaur held evidence of settled and lawful status from 23/02/1997 through the Indefinite Leave to Enter endorsement in her passport.”

50. The minute then noted that § D2 did not apply as there was no indication of prospective earnings, so consideration was given to a General award under § D9. The reviewer set out briefly the reasons why §§ D9(a)(i), (ii) and (iii) were not met, which in the case of § D9(a)(ii) (offer of employment rescinded) included the point that “... *Mr Bopari clarifies that Mrs Kaur is not able to provide information to show she had been offered employment which was rescinded due to difficulties demonstrating lawful status. He explains this happened decades ago and the refusals were delivered verbally*”.

51. The reviewer then turned to the new gateway, as follows:

“**D9(a)(iv)** not met.

Whilst Mr Bopari explains himself and his siblings are prepared to provide Affidavits if his mother decides to request an independent claim for compensation in HM Courts or participate in a Class Action, there is insufficient information to show Mrs Kaur was actively seeking employment yet had to defer the progression of a job offer due to difficulties demonstrating lawful status.

As mentioned above, within passport N168861 (valid between 07/03/1996 – 12/10/2006) it is noted Mrs Kaur previous

travelled on B138267 issued in Birmingham on 14/02/1986. For the ILE endorsement to have been issued in this passport on 23/02/1997, Mrs Kaur was able to satisfy the Immigration Officer of her lawful status in the UK.

Mr Bopari has confirmed on 16/03/2021 there is no further information available in relation to being denied access to employment because of difficulties demonstrating lawful status. Tier 1 review is cannot therefore conclude the supporting information requirements outlined in the Scheme's guidance page 54 have been met.

Furthermore, in light of the above ILE stamp, Tier 1 Review is unable to conclude Mrs Kaur's employment difficulties were more likely than not affected between 1963 – 1997, because of difficulties demonstrating lawful status.

Tier 1 review is therefore satisfied that no award is applicable under this category and maintains the decision not to offer an award.”

52. The reference to the supporting information requirements on page 54 was to the section headed “*Evidence*” in the Caseworker Guidance, version 6, dated 16 December 2020. That part of the guidance included the following section relevant specifically to the new gateway:

“Where the claimant had not been in regular employment in the previous two years but was actively seeking employment and was unable to progress job applications due to status issues they must provide evidence of this.

Relevant evidence will include, but is not limited to:

- official correspondence from prospective employers requesting proof of status to enable a job application to be progressed
- official correspondence from prospective employers discontinuing the claimant's job application solely because of the claimant's inability to show lawful status

You should see evidence that the claimant made more than one attempt to obtain employment.”

53. The Claimant submits that the contents of the Review Decision minute indicate that the reviewer was addressing the wrong question: § D9(a)(iv) does not require an applicant to show that they “*had to defer the progression of a job offer ...*”, as the minute put it. The wording in the minute appears more appropriate for a consideration of § D2(a)(iv), which requires an applicant to show that they were “*required to defer the progression of an application for employment which they were subsequently able to secure and [to] demonstrate their earnings in that employment*”.

54. I do not accept that submission. The relevant gateway, § D9(a)(iv)/(b) required an applicant to demonstrate that they “*were actively seeking employment and were unable to progress applications for employment*”, as well as the reason for their inability to “*progress applications for employment*”. The reviewer made clear in the minute that they were not considering § D2 at all because there was no indication of prospective earnings. It is therefore very unlikely that they were, in the section headed “*D9(a)(iv) not met*”, in fact addressing the § D2(a)(iv) requirements to show deferral of the progression of an application for employment which they were subsequently able to secure, and to show their earnings in that employment. Equally, none of gateways D9(a)(i) to (iii) referred to deferring a job offer, and the reviewer had already addressed the lack of evidence of any job offer being rescinded in the context of § D9(a)(ii) (see § 50. above). The most natural reading, in my view, is that the reviewer was, as the section heading indicated, addressing § D9(a)(iv) and used the expression “*defer the progression of a job offer*” as a way of expressing the concept of being “*unable to progress applications for employment*”. Moreover, the phrase two paragraphs later in the minute “*being denied access to employment*” supported the view that the reviewer was not confining him/herself to enquiring whether any a job offer had ever actually been obtained.
55. The Review Decision was communicated to the Claimant by a letter dated 13 April 2021, which so far as relevant said:

“We previously concluded that you were not entitled to an award under the Loss of Access to Employment category of the Windrush Compensation Scheme.

Within the request for review, your representative, Mr Stephen Bopari, requests that the decision made under this category is reviewed from 1963 until 23 February 1997 when passport XXX was endorsed with Indefinite Leave to Enter (ILE).

Mr Bopari recalls that himself and his siblings regularly accompanied you in your efforts to seek employment and would help to complete application forms on your behalf as there was no support available for you.

Mr Bopari explains that it is employment difficulties, which represents a direct and the most significant impact to your retirement pension.

It is noted from Home Office records that passport XXX also referenced passport YYY which was issued in Birmingham on 14/02/1986 and had been used for travel.

For the ILE endorsement to have been placed in your passport, the Immigration Officer would have been satisfied you could demonstrate your lawful settled status at on 23 February 1997.

Based on the information available to us, we are unable to conclude your employment was affected by an inability to demonstrate lawful status prior to 1997. Therefore, the criteria

for an award has not been met and we are unable to offer an award under this category.”

56. The Claimant submits that this letter contained no reference to the new § D9(a)(iv) gateway, still less any recognition that the caseworker had omitted to address the new category of eligibility in the Caseworker Decision. I agree that the letter does not refer to the error in the Caseworker’s Decision, but do not consider that it needed to. The reviewer’s minute, quoted earlier, which I have concluded was addressing § D9(a)(iv), in its penultimate phrase used the expression “*Mrs Kaur’s employment difficulties*”. I consider that the phrase “*unable to conclude your employment was affected*” similarly refers to effect on “*employment*” as a compendious way of expressing the various types of situation covered by § D9, including inability to progress applications for employment that was being actively sought within § D9(a)(iv).
57. The Claimant refers to the duty of a defendant to judicial review proceedings “*to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings*” (*R (Das) v Secretary of State for the Home Department* [2014] 1 WLR 3538 § 80, citing *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] Env LR 761 § 86). The Claimant relies, in that context, on the section of Ms Lisa Birtles-Maule’s witness statement in which she says the following about the decisions in the present case:

“[17] Awards under Loss of Access to Employment are made when the decision maker is satisfied on the balance of probabilities that an individual was dismissed, or had job offers withdrawn because of difficulties demonstrating their lawful status. Whilst Ms Kaur told us that she was unable to secure employment, the decision maker was not provided with sufficient evidence to show that she had employment terminated or an offer of employment withdrawn due to an inability to demonstrate her lawful status in the UK. Ms Kaur had an endorsement in her passport which confirmed her Leave to Enter in the UK for an Indefinite period. She therefore did have the ability to demonstrate her lawful status. It is not the purpose of the WCS to provide payments for every detriment that might have been suffered in the past. Ms Kaur’s information and supporting evidence did not suggest that the difficulties that she experienced were the result of the sort of failure that the WCS was designed to address. The WCS does not, for example, compensate about matters which were caused by private employers or individuals.”

58. I agree with the Claimant that the first two sentences of this passage refer only to the gateways in subparagraphs (a)(i) and (ii) of §§ D2 and D9, and make no reference to § D9(a)(iv). However, the focus of this evidence, as I read it, is on the lack of evidence that the problems the Claimant claimed to have encountered resulted from her immigration status, a theme to which Ms Birtles-Maule returned later in her statement:

“[24] ... Although it is possible that employment difficulties could have occurred after May 2014 when Right to Work legislation was amended, it was noted by the decision maker that Ms Kaur has never worked in the UK. She had issues obtaining employment both before and after she could demonstrate her status by way of the ILE endorsement in her passport (in 1997). That suggested that her status was not the reason why she was having problems securing a job. ...”

Insofar as the second sentence of § 17 of Ms Birtles-Maule’s witness statement assumes that the issue for the decision-makers was confined to the reasons why the Claimant had lost a job or had a job offer withdrawn, it is in my view inaccurate. For the reasons already given, it is clear that the reviewer in the decision minute addressed each of the gateways in D9(a)(i), (ii), (iii) and (iv) separately and distinctly, and it cannot realistically be suggested that he/she was in fact addressing the D9(a)(i) or (ii) issues again when he/she turned to consider § D9(a)(iv).

59. The Claimant also suggests that the last sentence of quoted § 17 above (“*The WCS does not, for example, compensate about matters which were caused by private employers or individuals*”) is incorrect if applied to D9(a)(iv). However, I read that sentence as referring to decisions by employers and others independent of immigration status – i.e. to other reasons why the Claimant may have encountered difficulty in any attempts to find a job – and thus as being correct.

(2) Reasons

60. The Claimant notes that the reasons set out in the decision letter must explain why the decision maker reached his or her conclusion on the “*principal important controversial issues*” (*South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 § 36, per Lord Brown). Reasons can be briefly stated, the degree of particularity required depending on the nature of the issues (*ibid.*). Reasons must be sufficient to enable an individual to assess whether the decision makers made any error of law (*R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] 4 WLR 168 § 122(iii) per Hickinbottom LJ).
61. The Supreme Court in *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 noted that public authorities are under no general common law duty to give reasons for their decisions, but that it is well established that fairness may in some circumstances require it, even in a statutory context where no express duty is imposed. The court cited *inter alia* *R v SSHD ex p. Doody* [1994] 1 AC 531, where reasons were necessary in order to reveal whether the minimum term imposed on a prisoner by the Home Secretary differed from the penal element recommended by the judges, in which case the reasoning was bound to include (explicitly or implicitly) a reason why the Home Secretary had taken a different view. The Supreme Court found, on the case before it, that the defendant planning committee’s failure to address certain fundamental points raised a substantial doubt about whether it had properly understood the key issues or reached a rational conclusion on relevant grounds (§ 68).
62. The Claimant submits that in the present case a key part of her application was her claim for loss of access to employment (indeed, it was by far the highest value part of

the claim). The decision makers needed to identify what § D9(a)(iv) required and assess whether the Claimant's evidence on that issue met that requirement. If they thought it did not, they needed to explain why not.

63. As part of this, the Claimant submits, there needed to be an explanation as to why, if it were the case, her evidence had not been accepted. As a matter of law, uncorroborated personal testimony is capable of proving a fact on the balance of probabilities; see, e.g., *Phipson on Evidence* (20th ed.) § 14-01. A report of the WCS Oversight Board in May 2022 made the following comments about evidence:

“Decision making

Burden of proof

12. It has been recognised from of outset of the Scheme that applicants tend to be ‘document poor’. Availability of contemporaneous documentary evidence of circumstances that arose some decades ago, is the exception rather than the norm. In addition, both the factual circumstances of loss and causality linked to inability to demonstrate lawful status must be established on balance of probabilities. In those circumstances it must have been envisaged that applicants would be heavily reliant on oral or other testimonial evidence.

13. In some cases we have noted a tendency to reject anything but documentary/contemporaneous evidence. Personal testimony is evidence and needs to be assessed as such. An applicant is entitled to an explanation of how their evidence has been considered to help them to understand and possibly to accept the decision.

14. We have noted possible discomfort or reluctance in articulating decisions when rejecting an applicant's evidence. Caseworkers make reference to there being no evidence, when there is evidence but it is not sufficiently compelling to meet the balance of probabilities. Reference to lack of corroborative evidence that might be expected, or the inherent unlikelihood of an allegation would make it easier to explain the assessment of applicant testimony without implying disbelief.

15. There have also been cases where the Home Office have been selective with the information they share with the claimant and may be trying to avoid a negative response from the claimant. This can make the Home Office look defensive in their correspondence. Transparency and clarity of the explanation to the claimant, whether the decision is in their favour or not, would provide better customer service and help them why the decision has been made.

16. The burden of proof lies with the claimant. In relation to any claim which is within the remit of the WCS, we encourage

the Home Office to:

- indicate clearly whether there is *any* evidence (oral or documentary) to substantiate a particular point
- if there is *no* evidence to make that clear
- if there is *some* evidence to set out what it is and state clearly whether the Home Office accepts it on the balance of probabilities and
- if the HO does not accept that a particular point has been established on the balance of probabilities it should *explain* clearly why not.”

(emphasis in original)

64. The Claimant submits that the reasons communicated to her by the letters of 8 March and 13 April 2021 indicate that the new § D9(a)(iv) gateway was not considered at all. Alternatively, they at least gave rise to “*genuine doubt*” about that *CPRE Kent* § 42). In any event, the reasons given did not explain why the decision-makers considered the Claimant’s direct evidence about what employers had told her – that that she could not be considered for employment because of her immigration status – was insufficient to establish her entitlement.
65. In the present case, the essence of the reason given in the 13 April 2021 letter for the decision as regards employment – one of several heads of claim addressed in the letter – was that the information provided was insufficient to enable the reviewer to conclude that the Claimant’s employment had been affected by inability to demonstrate lawful status prior to 1997. In addition, the point was made that the Claimant had been able to travel to and from the UK prior to 1997, and to satisfy the immigration officer that an ILE stamp should be endorsed in her passport in February 1997. It should be borne in mind that caseworkers and reviewers in cases of this kind will often have to form a general view, in cases often involving little documentation, based on a mixture of factors including the extent to which any documentation is available, the inherent probabilities, the decision-maker’s experience of the nature and quality of evidence put forward in other cases, and the light that that sheds on the reliability of the evidence put forward in the case in hand. It is not to be expected that the decision-maker will necessarily be able to conclude that he/she simply disbelieves the claimant’s evidence, or to identify reasons for doing so, in the way that a judge would following a trial: in practice, it seems more likely that the decision will result from an overall judgment as to the whether the materials put forward allow the decision-maker to conclude that the criterion has been met, on the balance of probabilities. As the House of Lords stated in *South Bucks DC* at § 36D, reasons can be briefly stated, the degree of particularity required depending on the nature of the issues falling for decision. Viewed in the light of the considerations I summarise above, I consider that the letter of 13 April 2021 did state why the decision-maker had found this claim not to have been established.
66. Further, I do not agree that the 13 April 2021 letter gave rise to genuine doubt about whether the reviewer had considered § D9(a)(iv) at all. The summary it gave of the

evidence presented made clear that the issue was whether attempts to obtain a job (as opposed to dismissal from a job or rescission of a job offer) had been hampered by inability to prove immigration status, and concluded that the information provided did not establish this.

67. In any event, even if inadequate reasons were given, it would be necessary to consider whether the Claimant could satisfy the court that she has genuinely been substantially prejudiced by that failure (*South Bucks DC* at § 36F-G). The Claimant submits that she lost the chance of an effective 2nd tier review by the Adjudicator, and has incurred additional costs. Even if, as appears from the Adjudicator's decision ("*We saw, from their papers, that the Home Office concluded ...*"), the Adjudicator had access to the internal minutes of the Caseworker Decision and the Review Decision, it appears those minutes were not provided to the Claimant until after the present claim was brought. On the other hand, it is unclear what particular points the Claimant could and would have made, had the 13 April 2021 letter given fuller reasoning. There is no indication there is any further evidence that the Claimant could have been able to put forward. Insofar as the Claimant might have wished to object to the point made about her being able to travel prior to 1997 and persuade an immigration officer of her right to enter (or to any inference that might have been drawn about what, if any, light that shed on her ability to obtain employment) the information set out in the letter enabled the Claimant to do so.
68. In the circumstances, I am not persuaded that the reasons given in the 13 April 2021 letter were inadequate in law, or, in any event, that the Claimant was substantially prejudiced as a result.

(3) Rationality

69. The Claimant also submits that the SSHD's conclusion lacked a rational basis.
70. The Claimant makes the point, first, that the reference in the minute of the Review Decision to right to work checks being introduced only in 2006 was unfounded. Although certain criminal offences were introduced in 2006, it had still been unlawful previously to work in the UK without leave to remain or other permission (see section 1(2) of the Immigration Act 1971). The whole point of the WCS was that inability to prove status led to disadvantage, and if the employment provisions of the scheme were intended to bite only from 2006, then the scheme would have said so.
71. I agree that the decision-maker could not properly have rejected a claim on the basis that no employment disadvantage could have occurred before 2006. Nonetheless, the fact that right to work checks were not required before 2006, and (it may reasonably be inferred) were less likely to be widespread before then, is a factor that could properly be taken into account when assessing the Claimant's evidence as a whole.
72. The Claimant also refers to certain statements made in the SSHD's Detailed Grounds of Defence. Paragraph 21 said:

"The WCS decision maker considered the evidence provided by the Claimant, which comprises representations from herself and family members. The decision maker was entitled to conclude that this evidence was not sufficient to discharge the

evidential burden under the WCS as required by the WCS rules. This is because it was not established, on the balance of probabilities, that the ‘reason why’ the claimant was unable to access employment was because of an inability to demonstrate lawful status. On the contrary, the Claimant was unable to obtain employment both before and after she was able to demonstrate her lawful status. That indicates that any inability to demonstrate lawful status prior to 23 February 1997 was not the reason why she could not obtain employment.”

73. The Claimant submits that (a) there is no indication that the latter point formed any part of the decision-makers’ reasoning (thus it should be treated with caution: see, e.g., *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin) § 78), and (b) even if it did form part of the reasoning, it would not justify the conclusion reached. A decision maker could rationally have concluded that it could not be assumed that refusals of employment before 1997 were caused by the lack of proof of lawful status. However, the Claimant’s case did not rest on an assumption: it was her and her son’s direct evidence that she was told in terms by prospective employers that she could not be considered for employment because she could not prove her lawful status.

74. Further, the Claimant submits, the decision-makers did not question the accuracy of that evidence. The Claimant refers, directly or indirectly, to the following statements in the SSHD’s Detailed Grounds (and similar statements in the SSHD’s Summary Grounds):

“21. The WCS decision maker considered the evidence provided by the Claimant, which comprises representations from herself and family members. The decision maker was entitled to conclude that this evidence was not sufficient to discharge the evidential burden under the WCS as required by the WCS rules. This is because it was not established, on the balance of probabilities, that the “reason why” the claimant was unable to access employment was because of an inability to demonstrate lawful status. On the contrary, the Claimant was unable to obtain employment both before and after she was able to demonstrate her lawful status. That indicates that any inability to demonstrate lawful status prior to 23 February 1997 was not the reason why she could not obtain employment.

“37. The SSHD has confirmed in the pre-action response that Paragraph D9(a)(iv) was considered. It was further expressly considered by the First Defendant in its reviews. As explained above, the reason why the Claimant was unsuccessful under Paragraph D9(a)(iv) was not (as claimed in SFG§61), that the decision-maker failed to give any or any adequate weight to her evidence. Rather, it was that even accepting her evidence, she had not established that any inability to prove lawful status was the reason why she was unable to access employment (i.e. causation). ... The decision-maker did not need to decide whether they ‘accepted’ the evidence. The point was that it

made no difference. It follows that the Reply is wrong to assert (at §5) that the Claimant's case on 'causation' is uncontested – it was rejected by the decision-maker. ...

“38. SFG §§64-65 suggests that the decision makers “failed to take a holistic view of the claim and adequately take into account the Claimant's evidence”. There is no basis for this assertion. The Claimant's evidence was considered but did not prove entitlement. The WCS was not intended to give compensation, for loss of access to employment, to those who could not and would not have been in employment even if and when they had evidence of lawful status.

“42. Moreover, as stated in the SSHD's pre-action response, even assuming that the representations from the Claimant and her family members proved that she was unable to progress applications for employment, they do not prove that the reason for this was inability to demonstrate lawful status. On the contrary, those representations indicate that the Claimant was unable to access employment or progress applications both before and after her passport was endorsed with an ILE stamp. That indicates, alongside the evidence in general, that the reason that the Claimant could not access employment was a reason other than an inability to demonstrate lawful status. This was a conclusion reasonably open to the decision maker and was not irrational or illogical at all. The stamp is not therefore “plainly an irrelevant consideration” regarding the period prior to 1998 – indeed that assertion is itself based upon an impermissibly narrow approach to evaluating evidence which is contrary to the WCS. Similarly, contrary to SFG §73, the decisions makers did not “dismiss” the Claimant's evidence. It was evaluated alongside all other evidence and a conclusion reached for the reasons given.”

75. The Claimant submits that these passages indicate that the decision-maker accepted the Claimant's evidence. Since that evidence included the point that employers told her she could not be employed because she could not prove her right to work in the UK, it follows that she had established 'causation' i.e. that the reason she could not get work was inability to prove immigration status. Accordingly there was no rational basis on which to reject her claim.
76. In my view, some of these passages in the SSHD's Grounds (partly reflected also in her skeleton argument) are somewhat confused and do not accurately reflect the contents of the Review Decision. In particular, the statements in §37 to the effect that “*even accepting*” the Claimant's evidence she had not established that any inability to prove lawful status was the reason why she was unable to access employment, and that the decision-maker did not need to decide whether they 'accepted' the evidence because it made no difference, are in my view incorrect. The paragraphs from the minute of the Review Decision quoted in § 48. above show that the reviewer understood very clearly that according to the Claimant's evidence, she had been unable to obtain employment by reason of her inability to prove her right to work in

the UK. Equally, it is clear from the reasoning set out in the minute, which I quote/summarise in §§ 49. and 51. above, that the reviewer did not accept that aspect of the Claimant's evidence. As the last sentence of § 42 of the Detailed Grounds puts it, the Claimant's evidence was evaluated alongside all other evidence and a conclusion reached for the reasons given. In my view, there was no failure lawfully to assess her evidence and no flaw in the reviewer's reasoning.

77. Finally, the Claimant submits that insofar as the review decision took into account her ability to travel and prove her immigration status to immigration officers up to and including the date when the ILE stamp was put into her Indian passport, it was not probative of her ability to prove status to an employer and was an irrelevant consideration. In my view that overstates the position. Ability to satisfy immigration officers of immigration was not directly probative of the position with employers, but it was a factor that could properly be taken into account, alongside other factors, as having some indicative value. It formed part of an overall picture in which there was positive evidence that lack of provable status had not in fact hampered the Claimant's ability to come and go freely to/from the UK, and an absence of corroboration for the Claimant's and her son's evidence about the many times on which she claimed to have applied for jobs yet been rejected due to lack of provable status.

(F) GROUND 3: ACCESS TO BENEFITS WITHIN ANNEX E

78. The Claimant applied for a tariff award for denial of welfare benefits, under Annex E to the Scheme. The claimed tariff award is worth a maximum of £4,864 (£1,264 for child benefit; £2,500 for child tax credits; and £1,100 for working tax credits). The Scheme does not compensate the value of benefits lost: instead, the Secretary of State refers claim for backdated benefits to the Department of Work and Pensions or HMRC to be addressed under their rules for back-payments. However, the Scheme compensates for "*loss of access*" to child benefit, child tax credit and working tax credit through a fixed award.

79. The Claimant's evidence is that she asked to claim benefits at job centres but, when she showed her Indian passport, she was told that she was not eligible for benefits. She says in her application form:

"I was told whenever I attempted to claim the above benefits that I do not qualify because I am not able to prove my right to remain in the UK with my Indian passport. ..."

I do not have evidence of claiming any benefits as I was never encouraged or advised to make a claim for the benefits by the benefits advisers and was simply told I do not qualify for Benefits because I cannot prove any lawful right to remain in the UK with my Indian passport. ..."

80. The Claimant did not provide any documentary evidence of any applications for benefit or any rejections. However, her and Mr Boparai's letter of 29 December 2019 said that the Claimant repeatedly applied for benefits at two named benefit offices in Birmingham, and was repeatedly told, when she presented her Indian passport for identification purposes, that she did not qualify as she could not prove her lawful immigration status.

81. Paragraph E1 of the WCS provides:

“An award for loss of access to child benefit or child tax credit may be made to a primary claimant or estate if one of the following conditions is met.

...

(b) Where the claimant (or in the case of an estate) the deceased applied for child benefit or child tax credit and:

(i) that application was refused;

(ii) the reason for that refusal was the claimant or deceased’s inability to demonstrate their lawful status in the United Kingdom; and

(iii) HMRC has not made a payment in relation to that benefit under the arrangements set out in paragraphs 3.11 and 3.12 of the Scheme (or otherwise) for benefit payable during the period of loss of access.

...

(d) Where the claimant (or in the case of an estate) the deceased applied for working tax credit and

(i) that application was refused;

(ii) the reason for that refusal was notwithstanding that they were in remunerative work, the claimant or deceased’s inability to demonstrate their lawful status in the United Kingdom; and

(iii) HMRC has not made a payment in relation to that benefit under the arrangements set out in paragraphs 3.11 and 3.12 of the Scheme (or otherwise) for benefit payable during the period of loss of access.”

82. The Claimant’s claim was refused on the basis that she had not made an application for benefits, nor had such an application been refused, so as to fall within § E1.

83. On the present judicial review application, the Claimant makes the following points:

i) As a matter of ordinary language, a person who asks for a welfare benefit at a benefits office and is told orally by a state official that they cannot have the benefit because of their immigration status, has “*applied for*” the benefit and had “*that application refused*”. That is how a reasonable claimant would understand the Scheme. The SSHD is wrong to contend that, as a matter of ordinary language, something is only an application if it is made in writing. The Scheme should be read in a non-technical way having regard to the

substance of the situations, like other compensation schemes (cf *Raissi*, above).

- ii) Proposition (i) above is consistent with the design of the rest of the Scheme. The rest of the Scheme does not require applications to have been documented. The SSHD does not dispute that entitlement to the awards available under Annex D (loss of access to employment) is based on any application for employment, whether the application was made orally or in writing; even though awards under Annex D are potentially much larger than the tariff sums available under Annex E.
- iii) That view is consistent with the overarching purpose of the Scheme (as described by the Secretary of State and Mr Forde KC, the author of the Scheme), which is to compensate for all demonstrable losses. The Claimant refers to the Secretary of State's 23 April 2018 announcement of her intention to establish a compensation scheme "*which will be run by an independent person*", so that "*where people have suffered loss, they will be compensated*"; and to the evidence of that independent person, Martin Forde KC, that:

"The Scheme is meant to cover all identifiable financial losses arising from the inability to demonstrate lawful immigration status";

"It would be contrary to the basic purpose of the Scheme to deny compensation to someone in Ms Kaur's position on the basis that they had not insisted on completing an application form which they had been told was futile"; and

the Home Office accepted his advice that the Scheme should "*cover situations that were not documented*".

The Claimant submits that a person who is prevented from completing an application form on the ground of their immigration status suffers the same loss and injustice as a person whose application is refused after completing a form. The wrong which the Scheme is designed to compensate (i.e. the failure of the Home Office to provide the documents needed to prove status) is the same in both cases.

- iv) The Claimant notes that, in her Detailed Grounds, the SSHD contends that it is pragmatic to limit Annex E of the Scheme to cases in which a written application was made because that will enable caseworkers to check with the relevant benefits agency whether an application was in fact made. The Claimant accepts that the Scheme could have been designed in that way. However, she submits, that is not how the Scheme is in fact designed; and if the SSHD had wanted to limit Annex E to written applications, it would have been easy for the drafter to have said so; on the contrary, the drafter of the Scheme (Mr Forde KC) explains that the Scheme was deliberately drafted so as not to exclude undocumented evidence of loss.

84. I do not accept those submissions. An individual normally has to make a claim in order to become entitled to a social security benefit (Social Security Administration

Act 1992, section 1), and it is a matter of common knowledge that almost any state benefit claim requires a form of some kind to be completed. The natural meaning of “*applied for*” and “*that application was refused*” in § E1 of the WCS is that the individual has in fact submitted a claim for child benefit, child tax credit or working tax credit, using whatever form of application was required at the time. It is not necessary for the Scheme to specify that the application was made in writing, because that is already inherent in the concept of applying for a state benefit.

85. It may be possible for an award to be made under Annex D in respect of an oral application for employment. However, that is because such an application can be made orally: something which is not true of applications for benefits. It does not make it a general feature of the Scheme as a whole that claims can be founded on applications that were made orally.
86. The general purpose of the Scheme is to compensate for *demonstrable* losses, whilst seeking to ensure that public funds are not paid out unless the basis of claim has been sufficiently demonstrated. For example, by requiring an application to have been made for a benefit, the Scheme enables a check to be made with the relevant benefits agency as to whether an application was made. It will then also be more likely to be possible to establish why the application failed, i.e. whether it was due to inability to prove immigration status. There is a difference of substance between a person who has made an actual application for benefits and a person who claims merely to have been discouraged from doing so or told that any application would fail.
87. The extent to which the Home Office accepted the advice which Mr Forde KC says he gave, to the effect that the Scheme should “*cover situations that were not documented*”, is to be judged by interpreting the Scheme in the ordinary way, taking account of its terms as a whole, in the context of its overall purpose. The Scheme can apply to cases where documentary evidence cannot be found; indeed, one example of such a case might be where an application for benefits had in fact been made, which the Home Office could verify with the benefits agency even if the applicant no longer had a record of the application. However, it does not follow that no claim can properly fail (a) for lack of documentary support where it could reasonably be expected to exist, or (b) where the Scheme by its terms, properly construed, requires an event to have happened that will by its nature have involved a document having been created (here, an application for benefits).
88. For these reasons, Ground 3 does not succeed.

(G) GROUND 5: ACCESS TO BENEFITS WITHIN ANNEX I

89. The Claimant submits that if her claim for loss of access to benefits does not fall within Annex E, then a discretionary award should be made under Annex I in respect of the same matters.
90. Annex I § 1 states:

“Annex I: Discretionary Award

11. An award may be considered under this Annex to a primary claimant, an estate or a close family member if the following

conditions are met.

(a) The primary claimant or (in the case of an estate) the deceased experienced significant impacts, loss or detriment of a financial nature as a direct consequence of being unable to establish their lawful status.

(b) In relation to a close family member, the close family member experienced significant impacts, loss or detriment of a financial nature as a result of being adversely affected by the primary claimant's or the deceased's inability to establish their lawful status.

(c) The impact, loss or detriment is not of a kind provided for in Annexes B to H, whether or not an award has been made under one or more of those Annexes.

(d) The impact, loss or detriment is not of a kind excluded from consideration under paragraph 3.15 of the Scheme.

(e) The Home Office is satisfied the evidence, mitigation and causation requirements set out in paragraph I2 have all been met.”

91. The Claimant submits that if her inability to access benefits, as a result of being told by the benefits office that she could not claim benefits because she had an Indian passport, did not fall within the scope of Annex E, it falls within Annex I. Specifically, she submits that it is not a loss “*of a kind provided for in Annex E*” within § I1(c).
92. Applying the principles for interpreting policies set out earlier, the Claimant argues that the natural meaning of those words is that a claim for financial loss under Annex I is precluded only if the loss is capable in principle of being claimed under Annex E. In other words, an individual who cannot evidence a loss that (if evidenced) would be covered by Annex E cannot side-step that evidential deficiency by relying on Annex I. Nor can an award whose amount is restricted under another Annex be topped up by an award under Annex I. In that sense, the Claimant accepts that Annex I does not cover ‘near misses’ under other Annexes.
93. However, the Claimant submits, a loss that in principle falls outside Annex E – here, because the Claimant made no actual application for benefits – can fall within Annex I. She draws attention to the fact that § I1(d) also uses the words “*of a kind*” in stating that the impact, loss or detriment must not be “*of a kind excluded from consideration under paragraph 3.15 of the Scheme*”. Paragraph 3.15 states:

“An award under the Scheme, including an award under Annex I, will not be made in respect of:

(a) immigration fees and legal costs in respect of immigration applications incurred save where provided for in Annex B;

- (b) costs incurred or losses arising from detention, deportation, removal or return save where provided for in Annex C;
- (c) employment-related losses or lost employment benefits associated with the termination of a contract of employment or contract for services, or the withdrawal of an offer of employment or the offer of a contract for services, save where provided for in Annex D;
- (d) impacts or losses relating to occupational pension schemes or other pension-related matters or entitlements;
- (e) loss of access to services save where provided for in Annex F;
- (f) costs incurred or losses arising from homelessness save where provided for in Annex G;
- (g) non-financial losses or detriment associated with the types of impacts specified in Annex H, save to the extent provided for in that Annex; or
- (h) loss of opportunity to invest money for the purpose of profit or income generation, or other potential losses which are of an essentially speculative nature.”

The Claimant says it is thus clear that the words “*of a kind excluded from consideration ...*” in § 11(d) simply mean loss etc. that is excluded by § 3.15: the words “*of a kind*” do not materially widen the provision. The same applies in § 11(c): it merely excludes losses etc. that fall outside the preceding annexes, rather than catching a broader category of claims. Moreover, the drafting technique used in the scheme, illustrated by the way in which § 3.15(c) refers to employment-related losses and lost employment benefits, is specifically to excluded non-claimable losses, rather than to rely on general wording such as “*of a kind*”.

94. The Claimant also notes that the SSHD’s caseworker guidance expresses the § 11(c) criterion in this way:

“the impact, loss or detriment does not qualify for compensation under any other categories under the scheme, whether or not an award has been made under one or more of those categories”

which she says is consistent with her approach to its meaning.

95. The Claimant adds that if the Scheme were read so that some demonstrable financial losses caused by a Windrush victim’s inability to prove status are incapable of falling within either (i) Annexes B-H or (ii) Annex I, then the Scheme would fail to compensate victims for some, proven financial losses resulting from the Windrush injustice. That would be fundamentally contrary to the purpose of the Scheme, which is to compensate all identifiable financial losses. Read in light of the overarching

purpose of the Scheme, the obvious purpose of Annex I is to pick up any financial losses that cannot in principle be claimed under Annex B-H.

96. The Claimant cites a hypothetical example where the contents of a letter from the Home Office wrongly led a potential Windrush claimant to believe they that were not entitled to remain in the UK or to claim benefits, with the result that they never visited the benefits office at all. She also points out that the SSHD's approach could appear to mean that benefits other than those covered by Annex E (child benefit, child tax credit and working tax) might be recoverable, in substance, under Annex I yet claims for those three benefits that did not meet the Annex E criteria would not be.
97. I am unable to accept those submissions. In my view, the operation of § 11(c) is fairly simple. Annexes B, C, D, E, F, G and H are respectively headed "*Immigration fees and legal costs in respect of immigration applications*", "*Detention, deportation, removal and return*", "*Loss of access to employment*", "*Loss of access to child benefit, child tax credit or working tax credit*", "*Denial of Access to Services*" (with subheadings covering housing, health, education, banking), "*Homelessness*" and "*Impact on Life*" (covering specified non-financial impacts). § 11(c) makes clear that Annexes B to H set out an exhaustive regime for the categories of loss or harm within their scope: thus, for example, Annex B sets comprehensively the circumstances in which an award can be made in respect of immigration fees and legal costs in respect of immigration applications. Equally, Annex E comprehensively the circumstances in which an award can be made in respect of loss of access to child benefit, child tax credit or working tax credit. An award cannot therefore be made under Annex I in respect of loss of access to child benefit, child tax credit or working tax credit, whether or not a claim has been made (successfully or unsuccessfully) for such loss under Annex E.
98. I consider that to be the natural meaning of § 11(c). Further, it does not in principle involved giving the words "*of a kind*" a different meaning in §§ 11(c) and (d), though the overall manner of operation of those two clauses is different. Paragraph 11(d) in substance incorporates by cross-reference a provision (§ 3.15) which itself comprises a series of exclusions, so the words "*of a kind*" simply denote types of loss falling within the scope of that exclusion. Paragraph 11(c), on the other hand, excludes losses of a kind set out in Annexes B-H, which are provisions that confer entitlements. The words "*of a kind*" in § 11(c) reflect the fact that the paragraph is not designed simply to exclude losses that have already been the subject of an award under Annexes B-H (an interpretation which would be inconsistent with the words "*whether or not an award has been made*"); rather, it aims to exclude losses falling in the categories to which those Annexes are directed and for which those Annexes provide the applicable criteria.
99. Further, I do not accept the suggestion that this results in the Scheme failing, contrary to its intended purpose, to compensate for some types of proven loss. Rather, the Scheme sets out, category by category, detailed criteria for use in assessing which alleged losses in each category will and will not be met. It is in that sense inherent in the Scheme that some types of loss may fall outside the criteria and hence the Scheme. On the Claimant's approach, Annex I would tend to obliterate many of the dividing lines deliberately drawn in the preceding Annexes.

100. Finally, I do not consider that the hypothetical example referred to in § 96. (1st sentence) above requires the analysis to be altered. I agree with the SSHD that it is best viewed as a potential ‘hard case’ for which other remedies might be available but which does not justify interpreting the Scheme in a way that would, in my view, depart from its natural and obviously intended meaning.

(H) GROUND 4: DISCRIMINATION IN RELATION TO BENEFITS

101. The Claimant submits that if Annex E applies only to cases where there was a (written) application for benefits, and losses arising from “*unwritten applications for welfare benefits*” (as she puts it) fall outside Annex I, then the WPS unlawfully discriminated against her on the grounds of “*other status*” within Article 14 of the European Convention on Human Rights:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

102. In approaching such a question it is necessary to consider:

- i) whether the circumstances fall within the ambit of one or more of the Convention rights;
- ii) whether there has been a difference of treatment between two persons who are in an analogous situation;
- iii) whether that difference of treatment was on the ground of one of the specific characteristics listed in Article 14 or “*other status*”; and
- iv) whether there is an objective justification for the difference in treatment.

(See, e.g., *In re McLaughlin* [2018] 1WLR 4250 § 15, where it is noted that these questions are not rigidly compartmentalised.)

103. The focus in the present case is on elements (iii) (‘*other status*’) and (iv) (justification).

104. An “*other status*” must be “*a personal or identifiable characteristic*” (*Clift v UK*, App. No. 7205/07 § 60, cited in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 § 22). The Claimant relies on a series of statements about the breadth of the concept:

- i) In *Mathieson*, Lord Wilson said it is “*clear that, if the alleged discrimination falls within the scope of a Convention right, the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status*” (§ 22).
- ii) “*In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing*

point” (*Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123 § 41, following a review of the case law).

- iii) The courts are required to give a “*generous meaning*” to the concept of other status (*R (Stott) v Secretary of State for Justice* [2020] AC 83 § 81). In that case, the Supreme Court held that the difference in treatment as to release dates of prisoners serving extended determinate sentences was a difference on the grounds of ‘other status’.
 - iv) “[C]ases where the [Strasbourg] court has found the ‘status’ requirement not to be satisfied are few and far between” (*R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 § 71).
105. The Claimant also cites examples of ‘other status’ being construed broadly in benefit-related cases:
- i) *Stevenson* concerned the difference in treatment of individuals who had claimed a welfare benefit after 4 January 2009 (who were entitled to “*support for mortgage interest*” on up to £200,000 of a mortgage) compared to those who had claimed a welfare benefit before 4 January 2009 (who were only entitled to support on up to £100,000 of a mortgage). The Court of Appeal held that there was “*no doubt*” that the fact of having claimed a welfare benefit before 4 January 2009 constituted an “*other status*” for the purposes of Article 14 (§ 50).
 - ii) *R (TP) v Secretary of State for Work and Pensions* [2020] PTSR 1785 concerned the difference in treatment of individuals who moved across a local authority boundary. They had to apply for benefits from the new authority under the then-applicable Universal Benefits regime, whereas those who did not move could continue to claim legacy benefits. The Court of Appeal held that moving across a local authority boundary constituted an “*other status*” for the purposes of Article 14 (§ 112).
 - iii) In *R (Carter) v Chief Constable of Essex Police* [2020] ICR 1156 at § 57 Pepperall J held that being married *after retirement* (which rendered the claimant ineligible for a widow’s pension) was a legitimate subdivision of the status of being married, just as “*disabled children who are in hospital for more than 84 days*” are a legitimate subdivision of disabled children (*Mathieson*), “*lone parents of children under the age of two*” are a legitimate subdivision of lone parents (*R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289) and “*victims of assault by someone under the same roof*” are a legitimate subdivision of victims of assault (*JT v First-tier Tribunal* [2019] 1 WLR 1313).
 - iv) In *R (Vanriel) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin), a Windrush-related case, Bourne J held that the authorities indicated there was no legal impediment to allowing ‘status’ to those in a recognisable legal situation referable to the WCS, and that an Article 14 complaint could be raised on the ground that an individual was recognisable as a person to whom the Scheme applies (because they were denied entry to the UK) and had been unable to satisfy the rule under the British Nationality Act

1981 requiring five years' presence in the UK before applying for British citizenship (§§ 52 and 53).

106. In *R (SC) v Secretary of State for Work and Pensions* (cited above), a 7-person Supreme Court held not to be discriminatory a new rule providing that a new claim for child tax credit for a child born on or after 6 April 2017 would in general not be met if the family was already receiving child tax credit for two or more children. One of the issues was whether being a child with two or more siblings constituted a relevant characteristic or status for the purposes of article 14. The High Court had stated that a relevant characteristic or status had to have an existence separately from the difference in treatment: otherwise, the requirement of a relevant status would cease to be distinct from the existence of a difference in treatment (§ 67). The Court of Appeal and Supreme Court in substance agreed on that point, finding that the words from “*on any ground*” to the end of Article 14 were intended to add something to the requirement of discrimination. Thus status could not be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic that is not merely a description of the difference in treatment itself. On the other hand, the court said, there is no reason to impose a requirement that the status should exist independently in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. Being a child member of a household containing more than two children could be regarded as an individual characteristic or status for Article 14 purposes (§§ 69-70). The Supreme Court went on to say at § 71:

“... the issue of “status” is one which rarely troubles the European court. In the context of article 14, “status” merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called “suspect” grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in *Clift v United Kingdom*, para 60, “*the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified*”. Consistently with that purpose, it added at para 61 that “*while ... there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed*”. Accordingly, cases where the court has

found the “status” requirement not to be satisfied are few and far between.”

107. In *R (T) v Secretary of State for Work and Pensions* [2022] EWHC 351 (Admin), Swift J, following *SC*, held that being a person in receipt of ‘legacy’ benefits – the predecessors to Universal Credit – as opposed to being in receipt of Universal Credit was not an Article 14 ‘other status’ because there was no meaningful difference between the status relied on and the difference of treatment (which Swift J characterised as “*the failure to raise the amount paid as a personal allowance to persons in receipt of a legacy benefit*” (§ 24)).
108. The distinction between cases where a person’s putative status can or cannot be said to be defined solely by reason to the difference of treatment itself is not easy to apply. I was taken to § 17(iv) of *Stott*, where Lady Black expressed some difficulty in following parts of the judgments in *Clift v SSHD* [2007] 1 AC 484 where the distinction was set forth, as well as §§ 26, 33 and 72-75 of *Stott* noting the Strasbourg court’s rejection in *Clift v UK* of the notion that an ‘other status’ cannot be defined by reference to the differential treatment of which complaint is made. Lady Black observed at § 74 of *Stott* that even if the distinction is correct in principle, it is difficult to see what it really means.
109. It is to be expected that when a rule is alleged to be discriminatory, there will be (a) a difference of treatment arising from the rule and (b) a fact or factor that, under the terms of the rule, leads to that difference of outcome. In one case, fact (b) might be something that obviously amounts to a personal characteristic, such as nationality or one of the other characteristics specifically listed in Article 14. In another case, it might be something much further away from a personal characteristic, such as having crossed a local authority boundary (*TP*) or having applied for a benefit after rather than before a particular date (*Stevenson*). In both types of case, though, (a) the difference of treatment and (b) the factual difference giving rise to it, would appear to be conceptually different things. In that sense it is difficult to discern in what circumstances an alleged status can be said to be defined solely by reference to the difference of treatment: other than, perhaps, by an elision of the two concepts that, taken to its logical conclusion, would rule out Article 14 status in any case. Further, the rule under challenge may make explicit reference to the alleged ‘status’, whether it be nationality/marital status at one end of the spectrum or movement between local authority areas/date of benefit application at the other end. It does not follow, though, that the alleged status is in some way ‘indistinguishable’ from the difference of treatment for which the rule provides. In each case, the difference of treatment arises by reason of the factual difference. The more pertinent question would appear to be what types of factual difference are to be regarded as constituting a ‘status’.
110. However, once one dispenses with the idea that the factual difference needs to have any separate social or legal importance in itself, it becomes increasingly difficult to see any workable basis on which the concept of an ‘other status’ can be demarcated. If moving from one local authority area to another, or applying for a benefit before/after a certain date, can constitute an ‘other status’, then it is not easy to see why having made an oral ‘application’ for a benefit rather than a written one should be regarded any differently.

111. Thus, on the current state of the law, with the concept of ‘other status’ having progressively moved far away from the core concept of personal characteristics (as reflected in the characteristics specifically listed in Article 14), I do not consider it possible to conclude here that the difference of treatment in the present case did not occur by reason of an ‘other status’ within Article 14.
112. It is therefore appropriate to move on to the question of justification.
113. For a difference in treatment to be justified, it must satisfy the criteria summarised in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39:

“(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.”

(§ 74)

114. The state generally enjoys a broad margin of appreciation, making a low intensity of review appropriate, in matters of general social policy where there is no difference of treatment on ‘suspect’ grounds (gender, nationality and so on): see, e.g., the discussion in *SC* at §§ 115, 129, 142 and culminating at §§ 158-161:

“158. ... In the light of [the Strasbourg] jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified. ... Equally, even where there is no "suspect" ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.

159. It is therefore 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* and *R (RJM) v Secretary of State for Work and Pensions*, 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.

160. It may also be helpful to observe that the phrase "manifestly without reasonable foundation", as used by the European court, is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues.

161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. ..."

115. The court in *SC* also made the following observations, relevant to cases such as the present one where a discrimination challenge is made to rules that do not provide for differential treatment on 'suspect' grounds:

"162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD [JD and A v United Kingdom]* [2020] HLR 5], para 11:

"Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."

In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise

support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented (*ibid*):

"Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated."

116. The SSHD bears the legal and evidential burden of demonstrating that the criteria are satisfied (see, e.g., *R (JP & BS) v Secretary of State for the Home Department* [2020] 1 WLR 918 § 152).
117. In *In re Brewster* [2017] 1 WLR 519 §§ 50-52 and 64-65, the Supreme Court stated that where a measure is sought to be defended on grounds that were not present to the mind of the decision-maker at the time the decision was made, greater scrutiny is appropriate, though even retrospective judgments if made within the decision-maker's sphere of expertise are worthy of respect provided they are made *bona fide*.
118. The Claimant submits that:
 - i) the justification put forward in the SSHD's Detailed Grounds – that the rule is necessary to enable caseworkers to verify that an application was made – it is fundamentally inconsistent with the way in which the rest of the Scheme is designed. Annex E permits compensation for loss of access to employment based on an oral application for work, and the SSHD must therefore be taken to have been satisfied that an oral application is capable in principle of being proved;
 - ii) as set out earlier, Mr Forde KC as the drafter of the Scheme intended that this form of loss should be compensated; if the drafter failed to achieve this, then that was a mistake resulting from inadequate drafting, which is incapable of constituting proportionate justification; and
 - iii) the SSHD has filed no evidence on the question of justification. There is no evidence at all to show either that (a) there was a deliberate policy choice to exclude this kind of financial loss or (b) that requiring caseworkers to assess forms of evidence other than written applications would prejudice the administration of the Scheme (e.g. by showing that there were difficulties under earlier versions of the Scheme in administering claims under Annex E (employment) in the absence of a written application). In the absence of any evidence, the court cannot place any real weight on the asserted ground of

justification (see *In re Brewster* § 65; *JP & BS* §§ 161(iii)-(iv), 162 and 164-166; and *Langford v Secretary of State for Defence* [2020] 1 WLR 537 §§ 64-66).

119. I do not accept those submissions.
120. The WCS is a measure of general social policy, and the challenged rule does not treat people differently based on ‘suspect’ grounds. A broad margin of appreciation applies. The scheme aims to provide compensation where merited, whilst seeking to ensure that public money are distributed only where the claimant has actually suffered loss due to an inability to demonstrate immigration status. Confining paragraph E to cases where a benefit has been applied for, which in effect means that a written application has been made, provides a workable method of differentiating consistently between cases. It is usually possible to verify whether an actual application has been made and why it was refused, by reference to documentary records. If no application has been made, it is likely to be very difficult, if not impossible, to verify the reasons why no application has been made (e.g. whether there was because of oral discouragement and, if so, by whom and when and what precisely they said) and what would have happened if an application had been made.
121. It is true that some similar problems can arise in employment cases, but those do not provide a true parallel. Unlike State benefits, jobs can be applied for orally, so a rule limiting Annex D to cases where a written application for employment was made would be different in kind and more far-reaching than the rule limiting Annex E to cases where a benefits application was made. In addition, in employment cases different types of evidence might be available (e.g. evidence from the prospective employers themselves) that would not be available in benefits cases.
122. The SSHD does not, in my view, need to establish that assessing evidence other than that arising from written applications is impractical. Rather, it is sufficient to say that a rule which limits Annex E claims to cases where a benefit application has actually been made is (a) logically coherent in itself (b) liable to improve the prospects of a reliable assessment as to whether loss has in fact occurred and has in fact been caused by inability to prove immigration status.
123. The evidence from Mr Forde KC, even if admissible, would not establish that a mistake had been made in the drafting of the Scheme. The ultimate decision-maker as to the terms of the Scheme was the SSHD rather than Mr Forde KC.
124. As to evidence, the remarks quoted above from *SC* § 162 are relevant here. It is not to be expected that a decision-maker will be able to provide evidence of a deliberate policy choice in relation to each and every dividing line drawn in regulations, any of which might be subject to challenge at some stage. The position would be different if the challenged rule treated people differently on a ‘suspect’ ground, such that weighty reasons would be required in order to justify the rule. Such grounds (marital status) were in play in *Brewster* and *Langford*; and *JP* concerned fundamental rights (the challenge was to a practice of deferring decisions on whether to grant leave pursuant to Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings 2005, and hence the support required to be given to victims of human trafficking). By contrast, in cases such as the present one, the decision-maker is in my

view entitled to justify a rule, if necessary, by reference to arguments of principle of the kind the SSHD advances here.

125. I therefore consider that the SSHD was entitled to formulate Annex E in terms limited to losses arising from actual applications for benefit. The rule serves the objective of focussing compensation (paid from public money) on cases where a demonstrable and verifiable loss has occurred; it is rationally connected with that objective; no less intrusive measure could be said to satisfy the objective without unacceptably compromising it; and the importance of the objective justifies such effects as it has on the rights of would-be claimants
126. I therefore consider that the difference of treatment was justified, and do not uphold the challenge based on discrimination.

(I) GROUND 6: LEVEL OF IMPACT ON LIFE WITHIN ANNEX H

127. Annex H, 'Impact on Life' provides for compensation for non-financial impacts of a claimant having been unable to demonstrate their lawful status. If the caseworker is satisfied that there has been at least a marked detriment, he or she must identify the appropriate tariff sum by reference to the severity of the adverse impact.

128. Level 3 is defined as follows:

“Ability to live a relatively normal life was substantially affected. More than one area of the claimant’s life may have been affected and the overall impacts were significant. Cumulative impacts will have been experienced for an extended period (several months) with recovery or a return to normal life having taken a reasonable amount of time. Short periods of focused medical treatment may have been necessary.”

129. Level 4 is defined as follows:

“Significant impacts to the extent that the claimant’s ability to live a relatively normal life was seriously compromised. Cumulative impacts will have been experienced for a prolonged period (months or years). The claimant’s life will have undergone change of some description, such as having regular medical treatment, care visits or other therapeutic intervention, with recovery taking a significant amount of time”.

130. In the decision letter dated 8 March 2021, the caseworker described the Claimant’s account, recording *inter alia*:

“You told us that you were forced to live a miserable life with no financial support ...without enough heating or lighting ... and how you regularly sat with your children, in rooms lit by candle-light. You also told us about your family sleeping, huddled up together, as you could only afford to heat one room. ...You described your life as being akin to life in the Victorian

era. You described your life as a destitute one, focussed purely on survival”

The Claimant’s evidence was that she lived in this way for decades.

131. The decision of 8 March 2021 stated:

“After considering the information available, the impacts you experienced align to the descriptors set out at Level 3”.

132. The review decision letter dated 13 April 2021 stated:

“Home Office records have been thoroughly checked. There is insufficient information to conclude that cumulative impacts caused by difficulties demonstrating your lawful status have led to your life being seriously compromised prior to 23 February 1997”.

133. The Claimant submits:

i) The caseworker was required to give adequate reasons for the decision. For reasons to be adequate, they must explain what was decided and why in relation to the key issues (*South Bucks v Porter, supra*). The caseworker needed to explain why she considered that this was a Level 3 and not a Level 4 case. The Claimant refers also to the WCS Oversight Board’s statement that:

“It will support improved decision making and understanding of applicants if the Home Office:

- Is specific as to the elements of detriment/ impact that are accepted and makes a clear distinction between decisions as to detriment and causality.
- Is clear how the relative detriment and duration have been assessed in reaching a decision in an Impact on Life award.” (§ 22)

ii) The Claimant’s account, if accepted, aligned with at least Level 4 in relation to both severity of impact and duration of impact, rather than Level 3.

iii) The caseworker did not question the accuracy of the Claimant’s account or the Claimant’s characterisation of her life.

iv) In those circumstances, if the caseworker was to find that this was a Level 3 rather than Level 4 case, there was a need to explain why – particularly when, on its face, this would be inconsistent with the wording of Levels 3 and 4.

v) However, both decision-makers failed to provide any such reasons. The statements in the Caseworker Decision letter and the Review Decision letter simply beg the question of why they took that view. Absent reasons, the decisions appear irrational.

134. I am unable to accept these submissions. I would not accept the Claimant's premise that the decision-makers necessarily accepted her account of events in full and without reservation. The decision-makers' task was to look at the available information (including topics where supporting evidence might be sparse or non-existent) and form a view on where they could, with an adequate degree of confidence, place the case within the various categories. Realistically, the decision-maker would rarely (if ever) be in a position positively to rebut a claimant's assertion that he or she had (for example) been forced to live in poverty for decades by reason of lack of funds due to inability to prove immigration status. However, when considering an award for Impact on Life (especially having already made adverse decisions on the specific topics of loss of access to employment and loss of access to benefits), the decision-maker was in my view entitled to form a broad view about what conclusions could reliably be drawn about impact in general. Having done so, the decision-maker could reasonably be expected to give brief reasons of the kind given here, but was not in my view obliged to go further. Nor has any particular prejudice been shown in the present case as a result of the brevity of the reasons provided. The Impact on Life award here was in my judgment not irrational nor otherwise unlawful.

(J) CONCLUSION

135. The Claimant's claims must therefore be dismissed.

136. I am grateful to all counsel for their helpful written and oral submissions.