



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

JR-2022-LON-
001274

In the matter of an application for Judicial Review

The King on the application of

THM

NHM

(Minors, by their litigation friend KHM)
(anonymity direction made)

Applicants

versus

Secretary of State for the Home Department

Respondent

FINAL ORDER

UPON a hearing before Upper Tribunal Judge Norton-Taylor at Field House on 9 January 2023

AND UPON hearing P Haywood, Counsel for the Applicants and R Hill, Counsel for the Respondent

AND UPON the handing down of judgment in this judicial review claim at 09:30 on 1 February 2023

IT IS ORDERED THAT:

1. The Applicants' claims for judicial review are dismissed;
2. The Applicants are to pay 70 percent of the Respondent's costs, to be subject to detailed assessment if not agreed. Such costs are not to be enforced without the permission of the Upper Tribunal and an assessment of the Applicants' means pursuant to the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

3. There to be a detailed assessment of the Applicants' publicly funded costs;
4. The Applicants and their litigation friend are the subject of an anonymity direction, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the Applicants and their litigation friend, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.

PERMISSION TO APPEAL

1. The Applicants have sought permission to appeal to the Court of Appeal.
2. The grounds of appeal contend firstly that the Tribunal erred in concluding that the Respondent should not be required to give effect to the expectation created through her email of 1 March 2022.
3. This first ground of challenge is unarguable. The Tribunal adopted a structured approach and undertook a considered balancing exercise as regards the 'third question', namely whether it was proportionate and/or fair for the Respondent not to be fixed with the commitment, which itself had been sent in error. No issues of wider public importance arise in respect of this aspect of the Applicants' challenge.
4. The second basis of challenge is that the Tribunal failed to take account of a relevant consideration, namely requiring the Respondent to make an "in principle" decision on the entry clearance applications would have afforded the Applicants the benefit of an appealable decision.

5. This second ground is also unarguable. First, not each and every aspect of a party's case need be addressed in the precise terms expressed in its submissions. Second, and in any event, the question of any benefit to the Applicants was in fact addressed at [74] of the judgment and the ground of appeal does not identify any arguable error of law in respect of the analysis set out therein (whether taken alone, or in combination with other considerations). Again, no wider issues of public importance arise here.
6. Permission to appeal is refused.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 1 February 2023

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *2 February 2023*

Solicitors:

Ref No.

Home Office Ref:

Notification of appeal rights

A refusal by the Upper Tribunal of permission to bring judicial review proceedings following a hearing, is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission to appeal, the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 7 days** of the Tribunal's decision refusing permission to appeal to the Court of Appeal (CPR 52.9(3)(a)). Time starts to run from the decision refusing permission to appeal at the hearing, and not from the date on which this order was served.



Case No: JR-2022-LON-001274

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

1 February 2023

Before:

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between:

THE KING

on the application of

THM (FIRST APPLICANT)

NHM (SECOND APPLICANT)

(Minors, by their litigation friend, KHM)

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr P Haywood (instructed by The Migrants' Law Project) for the applicants

Miss R Hill (instructed by the Government Legal Department) for the respondent

Hearing date: 9 January 2023

J U D G M E N T

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the applicants and their litigation friend are granted anonymity.

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

Judge Norton-Taylor:

Introduction

1. This case once again concerns the very difficult position in which many migrants find themselves in when seeking to pass through Libya on route to Europe. The difficulties are compounded by the fact that the applicants are both children and that, when seeking to obtain entry clearance to the United Kingdom, they have been

unable to enrol their biometric information (comprising a digital face image and fingerprint scans - hereafter “biometrics”) in Libya due to the absence of a Visa Application Centre (“VAC”) in that country. A similar state of affairs applies in Afghanistan and certain other countries around the world. I am aware that the respondent is in the process of developing a policy in order to address the difficulties encountered by many individuals seeking to travel to the United Kingdom lawfully, but who cannot get to a VAC, or face considerable obstacles in doing so. I will say something more about this at the end of my judgment.

2. Ultimately, the scope of the present case is narrow. The sole ground of challenge relates to: (a) whether, in the particular circumstances, the respondent created a legitimate expectation that the applicants’ applications for entry clearance to join relevant refugees already in United Kingdom would be substantively considered, notwithstanding that their biometrics had not yet been enrolled; (b) if such an expectation was created, whether the respondent should be fixed with that commitment.

The relevant factual background

3. The applicants are both Ethiopian nationals, currently residing unlawfully in Libya. The first applicant is not in fact related to the second, although they were brought up in the same household whilst in Ethiopia and they consider themselves to be, to all intents and purposes, brothers.
4. The first applicant was born in December 2005, and the second in January 2008. Thus, the first applicant is now 17 years old and the second is 15 years old.

5. The United Kingdom-based refugees (KHM and HH - “the sponsors”) are, respectively, the half-brothers of the first applicant. They are not related to the second applicant, but were part of the same household whilst living in Ethiopia. KHM and HH have limited leave to remain in this country. KHM has been approved as the litigation friend for both applicants.
6. The applicants left Ethiopia on an unknown date, although it appears as though it was in the first half of 2021. They made their way to Libya, arriving there in August 2021 at the latest. They were able to register with UNHCR, but were effectively destitute. They were detained by militia in October 2021 and held in very poor conditions. KHM managed to make contact with the applicants through Facebook, Whatsapp and IMO. He began sending funds to them. They were able to secure accommodation for a time, but were subsequently evicted. The UNHCR has not been able to provide accommodation. Messages received by KHM from the applicants are indicative of the very difficult circumstances in which they have found themselves: a lack of food, shelter, and clothing. It appears as though the applicants have been detained on further occasions and then released. The applicants do currently have accommodation, funded by remittances from the sponsors.
7. With the assistance of the British Red Cross, the sponsors were able to obtain the legal representation which continues to date.
8. On 24 January 2022, the applicants completed application forms in order to seek entry clearance to join the sponsors. The applications, as originally submitted, were based on paragraph 319X of the Immigration Rules (as it then stood). The applications were accompanied by applications (for the purposes of this case, I

will use that term, although they may be better described as requests) that the entry clearance applications be substantively considered pending the enrolment of biometrics. Reliance was placed on the case of R (SGW) v SSHD (Biometrics; family reunion policy) [2022] UKUT 15 (IAC). The difficulty faced by the applicants was that they could not travel to the VAC in Tunisia without documentary confirmation that they would be permitted to travel onwards to the United Kingdom. The respondent was asked to arrange for a diplomat from the British Embassy in Tunis to travel to Tripoli with appropriate equipment in order to enrol the biometrics there.

9. A detailed pre-action protocol letter was sent to the respondent on 10 February 2022, accompanying which was a substantial amount of supporting evidence relating to the sponsors and the general situation for irregular migrants residing in Libya.

10. By a response dated 24 February 2022 and drafted by a caseworker at Litigation Operations, Appeals, Litigation and Admin Review, the respondent stated, amongst other matters, that:

“... consideration of [the applicants’] applications will commence pending enrolment of biometrics

...

Your clients’ applications are being considered by the decision maker and a decision will be made within 3 months of the date of this letter, absent special circumstances

...

In light of the above, the Pre-Action protocol is now considered to be concluded.”

11. This prompted an immediate reply from the applicants’ solicitor, who, having quoted the second passage in the preceding

paragraph, sought confirmation that the “applications” referred to were the “substantive applications for entry clearance”.

12. The respondent responded to this request on 1 March 2022 in what is the central item of evidence in these proceedings. A caseworker at Litigation North Sheffield stated that:

“I can confirm that we have been informed that the substantive applications will be considered within 3 months, absent special circumstances.”

13. Following this, the applicants’ solicitor provided further country information relating to the precarious position of migrants in Libya and reiterating the need for expedition in view of the applicants’ minority.

14. On 24 May 2022, the respondent issued decisions (relating to each applicant, but in identical terms), refusing to defer or waive the requirement to enrol biometrics prior to this substantive consideration of the entry clearance applications. In summary, and in reliance on the guidance then in place relating to biometrics enrolment, the respondent concluded that the applicants’ circumstances were not “exceptional and extraordinary”.

15. In further correspondence from the applicants’ solicitor, dated 24 June 2022, reference is made to the Upper Tribunal’s decision in R (MRS and Others) v SSHD JR-2022-LON-000178, in which the respondent’s guidance had been declared unlawful on the basis that it was incompatible with Article 8. In addition, the respondent was expressly informed about another case pending in the Upper Tribunal, R (YBN) v SSHD JR-2022-LON-000674. The GLD Lawyer

with conduct of those proceedings was named, in order that any further details could be sought by way of internal liaison.

16. No further response was provided and, on 22 August 2022, the applicants made this application for judicial review, with an accompanying application for urgent consideration (seeking abridgement of time for the service of an Acknowledgement of Service, an expedited decision on permission, and, if permission were to be granted, a substantive hearing before the end of September 2022). Detailed reasons were given for that application.
17. The grounds of challenge were threefold. First, it was said that the respondent's email of 1 March 2022 created a legitimate expectation that the applicants' applications for entry clearance would be substantively considered pending the enrolment of biometrics, and that the respondent should not be permitted to avoid that commitment. Second, the decisions of 24 May 2022 were unsustainable because the relevant biometrics guidance on which they were based had been declared unlawful in R (MRS and Others). Third, the respondent's refusal to exercise discretion to waive/defer the enrolment of biometrics was irrational.
18. The applications went before an Upper Tribunal Judge as a so-called immediate - i.e. requiring relevant decisions on the day they are made. Somewhat unusually, by an order sealed on 22 August 2022, the judge not only granted the application for expedition, but also granted permission itself.
19. The respondent then made an application to vary the judge's Order of 22 August 2022. The respondent confirmed that the decisions of 24 May 2022 had been withdrawn and the issue of

waiver/deferral of biometrics enrolment would be considered and a new decision made by 21 September 2022. Thus, the second and third grounds of challenge became academic. In respect of the first ground, it was asserted that the substantive hearing should be stayed pending the outcome of R (YBN), which dealt with similar issues. It was also said that the applicants' solicitor had arguably breached the duty of candour when seeking urgent consideration. This was because the solicitor had also been acting in R (YBN) and the similarity between the cases should have been brought to the Upper Tribunal's attention.

20. Subsequent case management decisions by the Upper Tribunal stayed the proceedings pending the outcome of R (YBN) (judgment was handed down on 12 September 2022). On 21 September 2022, the respondent made new decisions in respect of the applications to waive/defer the enrolment of biometrics. The applicants then sought to amend their grounds of challenge in the current proceedings in order to address those new decisions. Permission to amend was refused by an Upper Tribunal Judge by a decision sealed on 10 November 2022. In the event, there are now separate proceedings challenging those decisions (JR-2022-LON-002019).

21. By this route, the scope of these proceedings has narrowed considerably.

The issues

22. In their simplest form, the issues for me to determine are: (a) whether the respondent had, by virtue of the email of 1 March 2022, created a legitimate expectation on the part of the applicants that their substantive entry clearance applications would be decided, notwithstanding the fact that biometrics had

not yet been enrolled; (b) if such an expectation had been created, whether the respondent should be fixed with the commitment made, having regard to all the circumstances.

23. What I am not concerned with is any form of inadvertent backdoor challenge to the respondent's decisions of 21 September 2022, refusing to waive/defer the enrolment of biometrics. Those decisions are the subject of separate proceedings in the Upper Tribunal and I must guard against trespassing on to that territory. I make it clear that I do not regard the applicants as having attempted in any way to intentionally subvert the parallel proceedings.

The relevant legal framework

24. The relevant legal framework relating to legitimate expectation in public law is agreed between the parties and is helpfully summarised in their respective skeleton arguments.

25. The core principles set out below are distilled from the leading authorities which I have been referred by the parties. These are: R (Bancoult) v Foreign Secretary (No.2) [2009] 1 AC 453; R (Coughlan) v North and East Devon Health Authority [2001] QB 213; R (Bibi) v New London Borough Council [2002] 1WLR 237; R (Nadarajah) v SSHD [2005] EWCA Civ 1365; R (Begbie) v SSE [2000] 1 WLR 1115; South Bucks District Council v Flanagan [2002] 1 WLR 2601; and R (A) v Coventry City Council [2009] EWHC 34 (admin). The relevant principles are that:

- (a) legitimate expectation is founded on the principle that a public authority is bound by its undertakings, provided they do not conflict with a legal duty, or if a denial of the

expectation is in all the circumstances proportionate to a legitimate aim pursued;

- (b) any legitimate expectation must be based on a statement relied upon that is “clear, unambiguous and devoid of relevant qualification”;
- (c) a legitimate expectation can relate to either a procedural or a substantive benefit;
- (d) a statement made in error may nonetheless fix a public authority with a commitment, depending on the facts;
- (e) fixing a public authority with a commitment may not be appropriate where it would lead to a conflict with a legal duty;
- (f) it is for the court or tribunal to determine matters of fairness or proportionality where such matters arise;
- (g) relevant considerations pertaining to (f) can include, but are not limited to:
 - (i) whether a commitment involves wider policy or financial implications, or whether it relates simply to an individual;
 - (ii) whether there has been detrimental reliance by the person(s) affected;
 - (iii) the nature of any countervailing public interest(s).

The parties’ submissions in summary

26. I express my gratitude to Mr Haywood and Miss Hill for their extremely helpful skeleton arguments and concise and structured

oral submissions. Similarly, the obvious hard work which has been put in by those instructing them should be acknowledged.

27. I mean no disrespect whatsoever by only summarising very briefly here the parties' respective positions. I have endeavoured to incorporate the main arguments put forward when setting out my analysis of the relevant issues, below.

28. In essence, the applicants submit that in her email of 1 March 2022, the respondent made a statement which was "clear, unambiguous and devoid of relevant qualification", with the effect that she should be held to the commitment to consider the applications for entry clearance pending the enrolment of biometrics. Having regard to all the circumstances, she should be fixed with this commitment even if the email in question was sent in error.

29. The respondent submits that the email of 1 March 2022 did not contain a statement which gave rise to any legitimate expectation. Even if it was sufficiently clear and unambiguous, it had been issued in error and, in all the circumstances, she should not be fixed with the commitment stated therein.

The first question: was there a "clear, unambiguous" statement by the respondent, "devoid of relevant qualification"?

30. It is as well to look again at the relevant parts of the respondent's two communications, dated 24 February and 1 March 2022, together with the applicants' request for clarification.

31. The letter of 24 February 2022 stated:

“Your clients’ applications are being considered by the decision maker and a decision will be made within 3 months of the date of this letter, absent special circumstances

32. It might be said that the reasonable reader, as it were, could have interpreted the above as constituting an undertaking that the “applications” in question were those for entry clearance. However, that is belied by the fact that the applicants then sought clarification by their email of the same date. In a sense, the request for clarification speaks for itself. The respondent’s position in the communication of 24 February 2022 did not constitute a statement which was “clear, unambiguous and avoid of relevant qualification”.

33. It is the email of 1 March 2022 which is all-important:

“I can confirm that we have been informed that the substantive applications will be considered within 3 months, absent special circumstances.”

34. The respondent submits that there were four applications before her at the time the statement was made: one substantive entry clearance application and one waiver/deferral application for each applicant. Therefore, the use of the word “applications” could have referred to either the substantive applications for entry clearance or the applications for waiver/deferral. The communication of 1 March 2022 did not state, as it might have done, that “the applications for entry clearance will be considered within 3 months, absent special circumstances.” The omission of a reference to “the entry clearance applications” was, it is said, fatal to the applicants’ case on legitimate expectation.

35. I do not accept that contention. The statement contained in the email must be read sensibly and in context. As regards the first of these, it seems to me that any sensible interpretation of the words used would lead the reader to conclude that it was the entry clearance applications which would be considered. It was those applications which were, adopting a sensible approach, “substantive” in nature. The applications for waiver/deferral of biometrics enrolment were, by contrast and again adopting a sensible approach, procedural or ancillary in nature.
36. Turning to the context, the respondent’s statement was a direct response to the applicants’ request for clarification/confirmation, as set out in their email of 24 February 2022. There, it was put in the clearest terms:
- “Please can you confirm that when you say that ‘Your clients’ applications are being considered by the decision maker and a decision will be made within 3 months of the date of this letter, absent special circumstances’, the applications being considered are the substantive applications for entry clearance made by [the applicants]...”*
37. It must, or at least should, have been apparent that the “substantive” applications in question were those for entry clearance and not those relating to waiver/deferral of biometrics enrolment.
38. The respondent relies on the facts in R (YBN) in support of her argument that the communication of 1 March 2022 was not clear and unambiguous. In that case, a situation arose during the course of correspondence between the parties which bears some similarity to the present case. There, applications had been made for entry clearance and, at the same time, a deferral of biometrics enrolment. The respondent stated in correspondence that the

“application is being considered”. Following a request for clarification in the same terms as in the present case, the respondent stated that “I can confirm this is being done.” The respondent subsequently refused YBN’s application for deferral of biometrics enrolment.

39. It is apparent that the communications from the respondent in R (YBN) were not as clear as in the present case. The words “I can confirm this is being done” were not, in my judgment, of the same consequence as, “I can confirm that we have been informed that the substantive applications will be considered.” In addition, In R (YBN), Upper Tribunal Judge Pitt concluded that the respondent had not made a “clear and unambiguous” statement and, with respect, that was perfectly understandable on the facts of that case: see paragraphs 33-35. That conclusion does not materially assist the respondent’s argument in this case. It is, however, potentially relevant to whether the email of 1 March 2022 was sent in error. I will return to this later.

40. In summary, I am satisfied that the statement contained in the email of 1 March 2022 was “clear, unambiguous and devoid of any relevant qualification”.

The second question: if there was a relevant statement, would fixing the respondent with the commitment made result in a conflict with a legal duty?

41. This issue can be dealt with briefly. The parties are agreed that requiring the respondent to fulfil the commitment made would not result in a conflict with any statutory or other legal duty.

42. I am satisfied that the parties’ position is correct. Requiring the respondent to undertake substantive consideration of the applications for entry clearance would involve the exercise of

discretion and would not result in any potential breach of a duty imposed by statute: by contrast, see R (Begbie) v SSEE [2000] 1 WLR 1115, at 1125D-G.

The third question: would denial of the expectation be proportionate to a legitimate aim?

43. I turn to the third, and crucial, question in this case. In answering it, I take into account all the factors on which the parties have relied on in their respective arguments.

44. This is clearly a fact-specific exercise, involving an evaluative judgment. In the words of Laws LJ in R (Nadarajah), at paragraph 68:

“Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case.”

The legitimate aim in question

45. The public interest underpinning the legitimate aim pursued, of which the respondent is the guardian, consists of two interconnected elements: the need to maintain effective immigration control and the protection of the security of the United Kingdom.

46. It is the second of these elements which, in my judgment, clearly bears the greatest weight. At paragraph 50 of R (SGW), the Upper Tribunal concluded that the desire for individuals to enrol biometrics was rational and that:

“... there is a legitimate national security purpose to ensuring, in so far as possible, that applicants are who they say they are and do not pose an actual or potential risk to the security of the United Kingdom. The enrolment of biometric information

enables the respondent to undertake appropriate checks against databases and suchlike which may disclose important information. As it was put during the course of argument, it is not just about who a person is, but also who they are not.”

47. The importance of the public interest was more recently addressed by the Upper Tribunal in R (MS and Others) v SSHD JR-2021-LON-001566, a case concerning Afghan nationals who had sought a deferral of biometrics enrolment until arrival in the United Kingdom, following what would have been an “in-principle” decision on the substantive entry clearance applications. That case addressed Article 8, but the point made at paragraph 111 is applicable to the present context:

“The cumulative effect of Mr Burt’s evidence and the authorities to which we have been referred is to demonstrate what in our judgment is a powerful public interest in ensuring that biometrics are enrolled prior to this substantive consideration of a family reunion application. That already powerful public interest is significantly enhanced where, as here, applicants seek to defer the enrolment of biometrics until arrival in the United Kingdom. In such cases, the singular importance of protecting national security will weigh very heavily indeed against a deferral request.”

48. Mr Burt is the deputy policy lead on biometric policy for the Border Security and Identity Policy Unit at the Home Office. There is no doubt that he holds relevant knowledge and expertise in respect of the issues with which I am concerned. He has also provided a detailed witness statement in this case. I will address certain aspects of it relating to the respondent’s email of 1 March 2022, below. For present purposes, I take into account what he says at paragraphs 12 and 40-44:

“12. In other cases, since the taking of and use of biometrics is critical to protecting the UK and its residents, the threshold for

waving or deferring the requirement to provide biometrics is commensurately high.

...

40. The Home office would, in general, prefer not to provide 'in principle' decisions for several reasons. First, even a relatively limited deferral of biometrics of the kind sought would undermine the public interest in "fixing" an applicant's identity at the time of application. Second, making "in principle" decisions without biometrics would create a risk that recipients of negative "in principle" decisions would be able to make further applications under different identities, which is why we would need to be satisfied to a reasonable degree of certainty about the identity of the applicants. Those considerations are relevant to the applicants circumstances in this case because they do not have a passport which means we would have a lower level of confidence as to the applicants identities and, without having recorded biometrics, would make it very difficult to identify them again if they were to make a repeat application using different biographical information.

41. In addition, the legal status of such an "in principle" decision, without confirmation from the applicants of getting an adverse decision after they enrolled their biometrics, may give rise to uncertainty.

42. The Secretary of State needs first be satisfied that the applicant's identity has been established to a reasonable degree of certainty. We must have a reasonable degree of certainty about the biographical information (the identity) provided before considering whether to make an "in principle decision" because the Home Office will use those details to conduct identity and suitability checks. Conducting those checks without credible evidence of identity would significantly decrease the level of confidence we could have in the results of those checks.

43. The applicants hold a UNHCR asylum seeker certificate, however, we have seen no evidence of what was actually provided to UNHCR about their identities to confirm whether the details on the UNHCR certificates are accurate.

44. From our discussions with the UNHCR, it generally records biographical information at face value, unless they have clear contra indicators that suggests the information the applicant is providing appears to be inaccurate...”
49. Mr Burt’s evidence in this case corresponds with the respondent’s position in others. In my judgment, it attracts significant weight, both in respect of the general points made and as it relates to the particular circumstances of this case.
50. I have taken account of the judgment of Lieven J in R (JZ) v SSFCDA and Others [2022] EWHC 771 (Admin), in which she granted interim relief to an Afghan judge who sought an order requiring an “in-principle” decision on his application for family reunion, prior to the enrolment of biometrics, which were to be taken once he reached Pakistan. Relief was granted (his substantive challenge ultimately failed: R (JZ) v SSHD and Others [2022] EWHC 2156 (Admin)).
51. I have mentioned R (JZ) because it shows that the courts have not precluded any possibility of “in-principle” decisions on entry clearance applications being made prior to the enrolment of biometrics. Having said that, Lieven J’s judgment was based to a significant extent on the fact that JZ was a fully-documented individual, whose standing had been attested to by impeccable sources: see paragraphs 43-53. That stands in contrast to the applicants in the present case, who do not, for example, possess passports or any other form of verifiable identification.
52. The judgment also makes it clear that the desire to avoid individuals attempting to use different identities to make applications, where their biometrics have not been enrolled, was,

in general terms, “a good reason” for requiring enrolment prior to substantive decisions: paragraph 41. The possibility of multiple applications being made is a factor relied on by the respondent in the present case.

53. In R (YBN), Upper Tribunal Judge Pitt referred to the “serious policy imperatives” underpinning the requirement for biometrics to be enrolled prior to, or at the same time as, consideration of an individual’s entry clearance application. She too noted the judgment in R (JZ) and the issue of making different applications in different identities, and relied on the fact that the applicant with whom she was concerned possessed no identity document: see paragraphs 48-51.

54. Having regard to the considerations discussed above, the public interest in this case is very strong.

Mistake

55. This is an important consideration. The respondent asserts that if the email of 1 March 2022 constituted a clear and unambiguous statement, it was made in error. The applicants assert that that it was not and, even if it was, the respondent should nonetheless be fixed with the commitment.

56. The wording of the email is somewhat odd. It purports to confirm that the author had been informed by someone else that the substantive applications would be considered. It might therefore seem as though any error would have been made by both the author and someone else.

57. Mr Burt’s evidence is, in my judgment, tolerably clear: the author of the email had not spoken to anyone in order to confirm

that the information being provided was correct. They failed to have the response approved by a Senior Case Worker, in contravention of relevant processes in place at that time.

58. Mr Haywood has made the not unreasonable point that Mr Burt was not part of the litigation team in Sheffield from which the email of 1 March 2022 emanated and his witness statement does not set out the precise investigative steps which he might have undertaken in order to conclude that relevant processes had not been followed. I acknowledge the possible concern. However, I conclude that Mr Burt's evidence is reliable as to the respondent's contention that the email of 1 March 2022 was issued without appropriate processes having been followed and was therefore made without the appropriate authority and so was erroneous. In so doing, I take the following matters into account.

59. It is plain that Mr Burt plays, and has played, a central role in the overall policy development and application in respect of biometrics. It is also the case that he has now been involved in at least three cases before the Upper Tribunal in which the decision-making process relating to deferral has arisen. I am bound to say that I have no doubt that he has taken his responsibilities in respect of the litigation, including the present case, extremely seriously. Following from this, I am satisfied that he was aware of the specific question of whether the email of 1 March 2022 was erroneous in some way, and that he addressed his mind to that question prior to making his witness statement. In turn, I am satisfied that he in fact made relevant enquiries as to the processes followed (or not, as the case may be) by the author of the email.

60. When Mr Burt asserts in his witness statement that there were “processes in place” to ensure that enquiries such as those put forward by the applicants’ solicitor seeking clarification of the previous communication of 24 February 2022 were referred to and then approved by a Senior Case Worker, I conclude that this was indeed the case. It is entirely consistent with the importance attached by the respondent to the need for biometrics to be enrolled prior to consideration of substantive applications and the “commensurately high” threshold for waving or deferring enrolment. It would, in my judgment, be remarkable if there was no process of internal referral to a Senior Case Worker prior to a favourable decision on waiver/deferral being made.
61. Although the respondent’s guidance on biometrics enrolment has not been put before me (this is perhaps unfortunate and responsibility for the omission must lie with the respondent), Mr Burt’s evidence on the internal processes is plainly in step with that guidance (I note that he makes reference to the version of the guidance published on 18 July 2022 at paragraph 13 of his witness statement). The current version, published on 17 November 2022, confirms that a decision to waive/defer biometrics enrolment must be approved at Ministerial level. I do not specifically take the contents of the guidance into account, as it is not before me in evidence. However, I simply note that nothing contained therein is in any way materially inconsistent with the respondent’s evidence in the present case.
62. Further, I have no reason to doubt Mr Burt’s compliance with the duty of candour. If there had, for example, been relevant approval of a decision to consider the entry clearance applications prior to biometrics enrolment, I am satisfied that this would have been recorded in some form and that Mr Burt would have

disclosed the relevant information, or at least the fact that it existed. Thus, I am satisfied that there had been no approval (or indeed, any decision at all) by a Senior Case Worker prior to the email of 1 March 2022.

63. At the hearing, Miss Hill informed me that, on instructions, she had undertaken a check of relevant sources and that there were no records of any communications and/or decisions relating to the deferral request prior to the email of 1 March 2022. I have no reason to doubt the accuracy of that clear confirmation made by Counsel. It is consistent with the overall tenor of Mr Burt's evidence.

64. Miss Hill submitted that Mr Burt's evidence was complete and that there had been no failure to provide evidence of something which simply did not exist. In all the circumstances, I agree. It is unlikely in the extreme that a decision to defer biometrics enrolment until after consideration of the entry clearance applications would not have in some way been recorded by either (a) the initial decision-maker and/or (b) a Senior Case Worker. Either source would have been the 'somebody else' alluded to in the email of 1 March 2022.

65. In light of the above, the applicants' reliance on R (Das) v SSHD [2014] 1 WLR 3538 does not assist their argument as to the claimed deficiencies in the respondent's position. The respondent has not failed to adduce relevant evidence, albeit that more precise details could have been set out.

66. There is a matter which, in my judgment, bears relevance by virtue of its absence in this case. The applicants had made applications for deferral of biometrics enrolment and entry

clearance. It seems to me inescapable that the former required a positive decision by the respondent. Leaving aside the question of processes (in respect of which, see above), no decision letter on the deferral issue prior to that of 24 May 2022 has been provided, nor is one even said to exist. It would, in my judgment, be extraordinary if a decision on such an important matter as deferral would have been made without it being documented and issued to the applicants at the relevant time, or at least being disclosed during the course of these proceedings. There has been no suggestion that the respondent has deliberately or negligently withheld relevant evidence. I am satisfied that no decision on deferral was made prior to that of 24 May 2022.

67. A final point on this issue arises from the judgment in R (YBN). There the Tribunal found that there been no clear and unambiguous statement by the respondent at all: see paragraph 34. Thus, the specific question of whether correspondence had been issued in error did not arise (I note also that it did not form part of the respondent's case). Notwithstanding that, it is clear from the procedural history set out at paragraphs 13-18 of the judgment that an email dated 17 February 2022, sent to apparently answer a point of clarification sought by the applicant, was subsequently re-clarified so as to make clear that only the deferral request would be considered at that time. In paragraph 37 of Mr Burt's statement in the present case, he quotes an additional paragraph from the subsequent correspondence, which confirmed that the initial response of 17 February 2022 be disregarded. I am satisfied that this quote is accurate.

68. The (relatively minor) relevance of the above is that it constituted an indicator to the applicants (through their solicitors, who also acted in R (YBN)) that a consideration of entry clearance

applications would not be undertaken without an express decision on deferral having first been made and communicated. In saying this, I of course acknowledge that each case is different and that the applicants are, in contrast to YBN, minors. However, it formed part of the overall context of the email sent 1 March 2022.

69. I am satisfied that the email of 1 March 2022 was sent in error by virtue of it not having been approved by a Senior Case Worker and that no deferral decision had in fact been made. That the statement was made in error is not, of itself, fatal to the applicants' case, as is made clear by R (Begbie), at 1127C:

“... It may be that a mistaken statement will, even if subsequently sought to be corrected, give rise to a legitimate expectation, whether in the person to whom the statement is made or in others who learnt of it, for example where there has been detrimental reliance on the statement before it was corrected. The court must be alive to the possibility of such unfairness to the individual by the public authority in its conduct as to amount to an abuse of power.”

70. It is also, however, important to consider what was said earlier in the same passage, at 1127B:

“All the circumstances must be considered. Where the court is satisfied that a mistake was made by the Minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of that mistake.”

The practical effect of fixing the respondent with the commitment

71. If the respondent was fixed with the erroneous commitment made in the email of 1 March 2022, what consequences would be likely to flow from this?

72. The immediate consequence would be fulfilment of the commitment to undertake substantive consideration of the applicants' entry clearance applications without biometrics having been enrolled. That would entail making an "in-principle" decision in the absence of relevant identity checks, contrary to the very significant policy imperative established by the evidence and the authorities.
73. It is the case that the respondent would not be bound to say "yes" in any "in-principle" decision on the entry clearance applications. In that sense, it might be said that she would not be fixed with any permanent consequence. In my view, that particular argument has limited merit because the respondent would still be required to make a decision on only a partially informed basis. That part of the information which would be missing is undoubtedly very important indeed, namely the biometrics and any security checks conducted thereon.
74. If, as Mr Haywood was bound to accept, the respondent could take the absence of biometrics enrolment into account as a relevant consideration when making an "in principle" decision, it is difficult to see what practical benefit the applicants could obtain from fixing her with the commitment. On the one hand, it may very well be the case that any such decision would be negative, given the inability to undertake relevant checks against biometrics as part of the consideration process. On the other hand, and in my view more importantly, the evidence from UNHCR adduced in this case (but, as I understand it, having been obtained originally for use in R (SGW)), is that in order to make a legal crossing of the Libyan/Tunisian border, an individual will require clear evidence that they will be able to make the onward journey to the ultimate destination, in this case the United

Kingdom: UNHCR email dated 1 June 2021. Logically, that would appear to mean that any “in-principle” decision would need to be (a) favourable and (b) confirmatory of the applicants’ ability to travel onwards to the United Kingdom pending biometrics enrolment. If the second element was absent (i.e. the favourable decision would only effectively permit the applicants to enrol biometrics in Tunisia and a final decision made there as to their ability to travel onwards to the United Kingdom), the guarantees apparently required by the Libyan authorities could not be met. On that basis, it would appear as though the respondent would be having to agree to defer biometrics enrolment until arrival in the United Kingdom, with the significantly enhanced weight attributable to the public interest that such a scenario would entail, as confirmed in R (MS and Others).

75. This analysis (which I do not regard as unduly speculative) places both the respondent and the applicants in a bind. The former would in effect be required to pursue a course of action contrary to an important public interest consideration, whilst the latter just needs to get to Tunisia. It is a very difficult state of affairs.

76. Returning to the question of the practical effects of fixing the respondent with the commitment arising out of error, I conclude that this consideration favours the respondent’s case above that of the applicants.

The applicants’ minority

77. This is clearly a significant factor in the applicants’ favour as regards the competing interests in this case and one to which I attribute commensurate weight.

78. Their minority can only have compounded the difficulties they have faced in Libya. Whilst they are registered with UNHCR, it appears as though that they are not currently in what might be described as protected accommodation. The most recent witness statement from KHM indicates that money is being sent to the applicants in order to meet at least some of their basic needs, including accommodation and food. Without wishing to suggest that their situation is anything other than very difficult, it is the case that they at least have a source of meaningful support.

79. I have taken account of the country information contained in the trial bundle and referred to in the applicants' skeleton argument. Taken as a whole, this undoubtedly paints a bleak picture insofar as the position of undocumented migrants in Libya is concerned, including unaccompanied children. This evidence adds further weight to the fact of the applicants' minority.

80. Their ages also differentiates the applicants' case from that in R (YBN), a fact which I have taken into account when considering the relevance of that judgment.

Detrimental reliance

81. The existence or otherwise of detrimental reliance on a clear and unambiguous statement is of importance when considering whether the respondent should be fixed with the commitment made.

82. In this case, the applicants have essentially relied on two arguments. First, it is said that reliance on the email of 1 March 2022 led the applicants to delay making their judicial review claim until 22 August 2022, when it could have been made earlier. Second, it is said that the stress caused to the applicants during

the period in which they believed the respondent would consider their entry clearance applications is also relevant.

83. As to the first argument, I agree with Miss Hill's submission that the applicants would in fact have known that the respondent had not considered their entry clearance applications when the decision of 24 May 2022 was issued. That decision was a refusal to defer the enrolment of biometrics and did not relate to the substance of the entry clearance applications. Thus, the period during which they laboured under the misapprehension was just under three months, not close to six. Whilst not minimal, in my judgment it did not constitute a significant period of time.
84. On the issue of the stress caused to them, I accept that they would have been anxious both before and during the period in question. I accept that the decision of 24 May 2022 would have been unexpected and distressing. I take full account of this.
85. It is only right to point out that the email of 1 March 2022 stated that the entry clearance applications would be considered "within 3 months, absent special circumstances." The period between that email and the decision refusing to defer biometrics enrolment was just less than three months. In a sense, the applicants were having to wait in any event. I have not been referred to any evidence that they took any other particular steps during that period which resulted in a detriment.
86. I have not overlooked the likely upset caused to the sponsors by the respondent's apparent change of position as between the email of 1 March 2022 and the decision of 24 May 2022. They, like the applicants, were under the impression that the entry clearance applications would be considered within three months.

With respect to the sponsors, I do not however regard this particular consideration as attracting very much weight.

87. Taking all relevant matters into account, I conclude that there was not detrimental reliance to any significant extent as a result of the email of 1 March 2022.

Narrow application of the clear and unambiguous statement

88. It is clear that a decision to exercise discretion as to the enrolment of biometrics in a particular case would not, all other things being equal, have wider implications in terms of, for example, policy. Given the highly fact-specific nature of cases such as the present, it is very difficult to see that holding the respondent to the statement made in the email of 1 March 2022 could be used as a precedent by other individuals.

89. When placed in the context of the factors discussed above, this consideration does not in my judgment advance the applicants' case greatly, but it certainly does not undermine it in any way.

Overall conclusions on the third question

90. I have undertaken an evaluative judgment of the competing factors relating to the third question posed earlier, taking everything "in the round". It has not been an easy task, but I have been greatly assisted by the high quality work of Counsel and those who instruct them.

91. I re-iterate the importance of good administration by public authorities, together with the precarious position of the applicants and the undoubted anxiety being suffered by the sponsors.

92. Having weighed all relevant matters up and taking account of the varying degrees of importance attributable to each and as discussed, above, I conclude that it is proportionate to deny the applicants the benefit of the expectation set out in the email of 1 March 2022. The considerations weighing in the respondent's favour, when viewed cumulatively, are very significant. On the applicants' side, there are undoubtedly significant considerations, notably their minority, but the balance ultimately rests against them.

93. I acknowledge that the terms "fairness" and "proportionality" have apparently been employed separately in the applicants' skeleton argument. If any material distinction was sought to be drawn between the two concepts, it has not been made clear to me. In any event, everything I have said regarding proportionality applies equally to the question of fairness. For my part, I cannot see that a consideration of the latter would involve any factors which have not been addressed in respect of the former. For the avoidance of any doubt, I conclude that a denial of the expectation set out in the email of 1 March 2022 is not unfair to the applicants.

94. In reaching my conclusions in this case, I am not seeking to pass any comment on the parallel proceedings relating to challenges against the respondent's latest refusals to exercise discretion to defer biometrics enrolment.

The duty of candour issue

95. The respondent alleges that the applicants' solicitor did not fully comply with her duty of candour to the Tribunal by failing to

“disclose that the facts and arguments in R (YBN) are in all material respects identical to the instant case.” Thus, it is said that there had been no need for urgent consideration of these judicial review proceedings.

96. At the hearing, Miss Hill did not resile from this position, although she made no additional oral submissions on the point.

97. I can deal with this issue relatively briefly. For the reasons set out below, I conclude that there was clearly no breach of the duty of candour by the applicants’ solicitor.

98. The case of R (YBN) had been raised with the respondent in pre-action correspondence. Indeed, the applicant’s solicitor had named the relevant GLD Lawyer with conduct of that case in order that they could potentially liaise between each other. The respondent was plainly on notice as to the connection between that case and the present.

99. R (YBN) was also referred to in the application for urgent consideration, it was made clear that the case had been heard and judgment reserved. The existence of certain similar issues in the cases was also made clear.

100. Contrary to the respondent’s assertion, the facts of the present case and those of R (YBN) are not identical “in all material respects”. In particular, the fact that the applicants are minors represents, in my judgment, a material difference and one on which they were entitled to rely when seeking urgent consideration.

101. I accept Mr Haywood's submission that the second original ground of challenge was, if not entirely unanswerable, at least very strong. Following R (MRS and Others), the relevant biometrics guidance, on which the respondent's decisions of 24 May 2022 were partially based, had been declared unlawful. The strength of that aspect of the original challenge was relevant to an application for urgent consideration.

102. It is of note that the applicants had not asked for permission to be granted without first giving the respondent the opportunity to file and serve an Acknowledgement of Service. They simply asked for an abridgement of time. The fact that the Upper Tribunal Judge granted permission on the day the applications were made is not something for which the applicants are answerable. They had not in any way deprived the respondent of providing a response to the grounds of challenge.

Conclusions

103. In what is another difficult case concerning biometrics enrolment and individuals residing in countries without a VAC, my ultimate conclusion is that this judicial review claim fails on the narrow basis with which I have had to grapple.

Observations

104. As presaged at the outset of this judgment, it is appropriate to set out a brief observation. There are clearly very good reasons for the absence of VACs in several countries around the world. However, the consequent difficulties faced by residents in those countries when seeking to enrol biometrics as part of an entry clearance application process are by now relatively long-standing and well-documented. I would respectfully urge the respondent to do all she can to expeditiously finalise and publish the policy

guidance which has been alluded to in this case and MS and Others.

Disposal

105. I would invite the parties to agree an Order which reflects the terms of this judgment and addresses any ancillary matters.

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