JR-2024-LON-000689

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

In the matter of an application for Judicial Review

The King on the application of
AK AND OTHERS

Applicants

versus

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

BEFORE Upper Tribunal Judge Smith

ON THE APPLICATION for judicial review of the respondent's decisions of 20 December 2023 and 2 February 2024 refusing the applicants' requests for predetermination of their entry clearance applications made on 24 November 2023.

HAVING considered all documents lodged

AND UPON hearing Ms C Kilroy KC and Ms M Knorr of Counsel, instructed by Islington Law Centre, for the Applicants and Mr C Thomann KC and Ms S Reeves of Counsel, instructed by GLD, for the Respondent at a hearing at Field House on Thursday 28 March 2024

AND UPON the Tribunal on 3 April 2024 making an Order allowing the Applicants' judicial review on ground 2 (Article 8 ECHR), reserving the decision in relation to the further grounds with reasons to follow, and granting remedies as set out in the 3 April 2024 Order.

IT IS ORDERED THAT:

(1) The Applicants' claim for judicial review is also granted permission and allowed on Grounds 1 and 3 for the reasons set out in the judgment dated 18 April 2024.

(2) The Tribunal declares that the guidance in the Unsafe Journey Policy, Version 1, 3 May 2023 is unlawful as requiring an applicant to show that their circumstances are unique when compared with the general situation.

(3) The Respondent do pay the Applicants' reasonable costs to be assessed if not agreed.

(4) The Applicants' legally aided costs be subject to a detailed assessment.

(5) Permission to appeal is refused because the Respondent relies on arguments already put forward which were considered in the judgment. They do not identify an arguable error of law in that judgment.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: **18 April 2024**

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): 18/04/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review 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, either in response to an application or by virtue of rule 44(4B), then 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 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2024-LON-000689

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

18 April 2024

Before:

UPPER TRIBUNAL JUDGE SMITH

- -

Between:

THE KING
on the application of
(1) AK, (2) RS, (3) RK*, (4) MK*, (5) EK, (6) MA, (7) WA*, (8) SA*, (9) DA*, (10) ZA* ("AK and others")
(3rd, 4th 7th, 8th, 9th and 10th Applicants by their litigation friend, MS)
[ANONYMITY ORDERS MADE]

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms C Kilroy KC and Ms M Knorr
(instructed by Islington Law Centre), for the Applicants

Mr C Thomann KC and Ms S Reeves
(instructed by the Government Legal Department) for the Respondent

Hearing date: Thursday 28 March 2024

- -

J U D G M E N T

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

Judge Smith:

BACKGROUND

1. This application for judicial review came before me as a rolled-up hearing, pursuant to an order of Upper Tribunal Judge Kamara dated 12 March 2024. The application was issued on 11 March 2024. Judge Kamara was satisfied that the case was suitable for expedition in light of the situation in which the Applicants find themselves. She therefore gave directions for pleadings and evidence to be filed, culminating in a rolled-up hearing on 26 March 2024 or as soon thereafter as possible.

2. The Applicants are two families currently living in Gaza. The First Applicant and the Fifth Applicant are the half-brother and half-sister respectively of MS, who is a Palestinian national, living in the UK since August 2020 and recognised here as a refugee. The Second Applicant is the wife of the First Applicant. The Third and Fourth Applicants are their minor children. The Sixth Applicant is the husband of the Fifth Applicant and the Seventh to Tenth Applicants are their minor children.

3. On 24 November 2023, the Applicants made urgent applications for entry clearance. Due to the situation in Gaza, there is no visa application centre ("VAC") there. The Applicants have therefore been unable to enrol their biometrics. They therefore sought a pre-determination of their applications with a view to thereafter making the journey out of Gaza to Cairo where they would enrol their biometrics.

4. The Respondent refused to pre-determine the applications by decisions dated 20 December 2023 and 2 February 2024 ("the Decisions"). I come to the reasons for those refusals below. The Decisions are those under challenge.

5. MS is living in the UK with her own children. Her husband applied to join her here and arrived in the UK on 16 January 2024. She is the only child of a relationship between her mother and father which broke down when her mother was pregnant with her. Her father re-married shortly thereafter. The First and Fifth Applicants are the children of MS's father from his second marriage.

6. MS grew up with her mother until she was aged seven. Her mother then re-married and she moved to her father's family property where she lived with her paternal grandmother until she was aged fifteen. She then moved in with her father, stepmother and their family including the First and Fifth Applicants. MS's stepmother was frequently absent from the family home and therefore MS was given the responsibility of looking after the First and Fifth Applicants. She

was a teenager. The First Applicant was at that time newly born and the Fifth Applicant was a young child. MS says that she was both older sibling and mother to the children in her stepmother's absence.

7. In 2000, MS married and moved to be with her husband. The First and Fifth Applicants came to visit her for breaks and holidays. As they grew up, the bond continued to be strong. The Fifth Applicant helped MS when the latter had her children. They continued to speak regularly and confided in each other even after MS left Gaza. MS supported the First and Fifth Applicants financially and in kind when they married.

8. MS left Gaza in 2008. Her husband worked for the Palestinian Authority. When Hamas took over in 2007, MS's husband was forced to flee. MS joined him after giving birth to her daughter. The family lived in Saudi Arabia from 2008 to 2015 where MS's husband continued to work for the Palestinian Authority. They then moved to Egypt. MS came to the UK in August 2020.

9. MS's family came to visit her in Saudi Arabia from time to time. They maintained contact remotely. MS visited Gaza in 2013 and 2019. In 2019, she was accompanied by her three daughters.

10. The Respondent does not challenge the relationship between the Applicants and MS. Nor does he challenge the Applicants' identities.

11. I do not need to go into detail about the Applicants' circumstances in Gaza. The Respondent accepts that the conditions there are dire. In addition to bombardments of the area by the Israeli forces, the population of Gaza including the Applicants face starvation due to lack of food supplies and water. The Respondent also accepts that there is a risk to life and limb both as a result of the bombings but also due to increasing malnutrition and other health issues.

12. Communication between MS and the Applicants has been difficult. The Applicants have been displaced several times and are now living in tents in an area outside Khan Younis.

13. MS is suffering from her own mental health problems. Those are detailed in a report from Professor Cornelius Katona dated 29 November 2023. That evidence is not disputed by the Respondent. Broadly, Professor Katona diagnoses MS with an adjustment disorder including moderately severe depression and severe anxiety. That is said to be caused in part by MS's continued separation from her husband at that time but also by concerns about and fears for the situation of the Applicants in Gaza.

14. At the hearing before me, I had a voluminous bundle of evidence (running to 1340 pages) and an equally substantial bundle of

authorities and a supplemental bundle of authorities. I also had detailed grounds of claim from Ms Kilroy KC and Ms Knorr dated 11 March 2024 and a skeleton argument of Mr Thomann KC, Ms Reeves and Mr James dated 27 March 2024. I refer to documents in the bundle so far as necessary below as [B/xx]. I have read the documents but refer only to those which are relevant to the issues I have to decide.

15. Before dealing with the substance of the parties' cases, it is necessary for me to say something about other cases which have been brought by applicants living in Gaza.

16. In a case before the Administrative Court brought against the Secretary of State for Foreign, Commonwealth and Development Affairs (R (BSO) v SSFCDA – AC-2024-LON-000165), the Foreign, Commonwealth and Development Office ("FCDO") withdrew its decision not to extend consular assistance to an eighteen-year-old boy living in Gaza to assist him to join his Palestinian parents and adult brothers in the UK. The FCDO agreed to reconsider BSO's request for consular support. BSO in fact managed to leave Gaza without FCDO assistance.

17. The case of R (HS and others) v Secretary of State for the Home Department (JR-2024-LON-000457) concerned an application for the wife and four minor children of a refugee sponsor living in the UK to join him here. Decisions refusing to excuse biometrics (until arrival in the UK) or to pre-determine the application for entry clearance were made on 9 and 15 February 2024. The application for judicial review was heard by Upper Tribunal Judge Kamara on 5 March 2024. At the end of the hearing on that day, Judge Kamara made an interim decision granting permission and allowing the judicial review on Article 8 ECHR grounds only with reasons to follow. Judgment was reserved on the remaining issues. A decision has, I understand, been made on the entry clearance application. The embargoed version of that judgment was issued on 4 April 2024 but is not due to be handed down until 26 April 2024. I therefore need say no more about that case.

18. On 29 February 2024, Upper Tribunal Judges Gleeson and Jackson heard the combined cases of RM and others v Secretary of State for the Home Department (JR-2024-LON-000128) and WM and others v Secretary of State for the Home Department (JR-2024-LON-000082) ("RM and others; WM and others"). Following that hearing, on 7 March 2024, Judges Gleeson and Jackson issued an interim decision also allowing the claims on Article 8 ECHR grounds with reasons to follow and reserving judgment on the remaining grounds. The judgment was issued in embargoed form on the day of the hearing before me and was handed down on 4 April 2024.

19. The case of RM and others concerned an application for a young, female student living in the UK to be joined by her parents and minor siblings. The case of WM and others concerned a mother and four minor children seeking to join their brother/uncle who is a British citizen living in the UK. I was told by Ms Kilroy that although decisions have been made without biometrics in both cases in accordance with the interim decision of the Tribunal, the decisions in both cases were refusals of entry clearance. The applicants in those cases have appealed those decisions. However, I was also told that the applicants in one of those cases had managed to leave Gaza by other means.

20. Given the potential overlap between the judgment in those cases with the case before me, I indicated to the parties that I would give them time to make written submissions following hand down of that judgment (until 4pm on 5 April 2024). In the case of the Respondent, Mr Thomann quite properly could not be given access to the judgment prior to hand down as he was not Leading Counsel in those cases. The parties made brief written submissions. The Applicants did not add to the submissions made already but submitted that the judgment strongly supported their submissions. The Respondent acknowledged that the wider guidance in RM and others; WM and others was contrary to his submissions on a number of points but accepted that the judgment must be followed unless there were good reasons to depart from it. However, he maintained his position as set out in his skeleton argument, submitted that each case is fact sensitive and reserved his position with respect to onward appeal.

21. At the hearing on 28 March, Ms Kilroy invited me to follow the course taken by the Judges hearing the other cases and to make an interim decision on the Article 8 ECHR issues. I declined that invitation but indicated that, due to the potential delay caused by the possible need for written submissions following the handing down of judgment in RM and others; WM and others, I would consider whether it was possible to give an interim decision in line with the decisions made in the other cases.

22. There was discussion at the end of the hearing before me regarding the form of any interim decision. The parties were given time (on Tuesday 2 April 2024) to provide any further submissions about the form of the decision (if I were to issue one).

23. Having received those submissions and considered them, I issued an interim decision on Wednesday 3 April 2024 granting permission and allowing the application on Article 8 ECHR grounds with reasons to follow and reserving judgment on the other issues. This judgment deals with the reasons for allowing the claim on Article 8 ECHR grounds and with the other grounds, taking into account also the judgment in RM and others; WM and others.

THE DECISIONS

24. The Decisions appear at [B/85-86] and [B/87-94] respectively.

25. The Decision dated 20 December 2023 sets out the reasons for the need for biometrics and makes reference to the Respondent's policy entitled "Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)" version 1.0 dated 3 May 2023 ("the Unsafe Journeys Guidance"). The point is made that the Unsafe Journeys Guidance requires an applicant to show that he/she is able to leave the country and make an onwards journey to the UK. The decision concludes that "[w]here a person's request is regarding inability to exit/enter a country to submit biometrics at a VAC that is not in itself a sufficient reason to be granted a pre-determination or biometric deferral".

26. The Decision dated 2 February 2024 is more detailed. As Mr Thomann pointed out, that is due in part to the provision by the Applicants of more evidence between 20 December 2023 and 2 February 2024.

27. In summary, the reasons for refusal were, first that there was insufficient evidence that a pre-determination would assist the Applicants to leave Gaza. I will come to the evidence submitted by the Applicants below as this is one of the main issues in dispute.

28. The Respondent accepted the Applicants' identities based on the documents they had provided.

29. The Respondent went on to say the following:

> "23. No reasons have been identified, nor put forward that the family are of targeted interest from those directly involved in the fighting ongoing in Gaza.
> 24. In accordance with the Unsafe Journeys Guidance, decision makers will not agree to an individual's request to pre-determine their application or excuse the requirement for them to attend a VAC to enrol their biometric information, unless the individual provides objective evidence that shows they would personally be at risk of harm.
> 25. The situation your clients have outlined in respect of their circumstances in Gaza, whilst deserving of great sympathy, are similar to the very difficult circumstances faced by the wider population of that territory and do not attest to a particular circumstance that would mean that your clients as individuals would face an Unsafe Journey in comparison to other people who are currently living on the territory. Whilst the situation in Gaza is undoubtedly very difficult, I am not satisfied that your clients have demonstrated that they are at personal risk, need to make an urgent journey, or that any such journey would

be particularly unsafe for them over and above other persons currently living on the territory."

30. Under the heading of "Compelling circumstances consideration", the Respondent began by saying (at [26]) that "[f]or the reasons given above your clients have not provided information as to why their circumstances are different to other people currently living in Gaza". Having set out the evidence before the decision maker including reference to MS's circumstances in the UK and the report of Professor Katona, the Respondent went on to say the following:

> "31. Without minimising any stress or anxiety caused to the sponsor and the potential benefit of your clients being able to come to the UK, I am not satisfied that your clients have demonstrated circumstances which are so compelling as to make them exceptional. Unfortunately, many persons who have family members in Gaza are caused distress and anxiety because of the situation in Gaza and their separation from their family members. Whilst the unfortunate impact on the sponsor's health is noted, the sponsor has her children with her in the UK and her husband has been issued with a visa to join her in the UK and, if necessary, she can access medical care and support whilst in the UK.
> 32. I have also considered whether Article 8 of the European Convention on Human Rights requires your clients' applications to be pre-determined.
> 33. Since your clients have not established any reasonable prospect of leaving Gaza it is not accepted that the decision not to predetermine the Application interferes with the Article 8 rights of the family member in the UK.
> 34. Even proceeding on the basis that Article 8 could be engaged and a refusal to pre-determine the application does interfere with the family's Article 8 rights, any interference is considered proportionate to the weighty public interest in obtaining biometrics prior to an entry clearance application being decided.
> 35. Biometrics, in the form of a facial image and fingerprints, underpin the UK's immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. They enable us to conduct comprehensive checks to prevent leave being granted to those who pose a threat to national security or are likely to breach our laws. The submission of biometrics forms part of UKVI's standard operating procedures which require, as part of an online application, attendance at a Visa Application Centre in order to submit a photograph, biometrics and any identity documents or other evidence. This information is then used as part of the decision-making process on entry clearance applications, by ensuring that mandatory security checks can be completed and only those who are suitable are granted entry clearance and allowed entry to the UK, alongside meeting the requisite eligibility requirements for the visa route applied under.
> 36. By not undertaking biometric checks prior to arrival, would mean in the event of an adverse hit once biometrics are taking in the UK, the public interest in the protection of national security, the prevention of crime and protection of our borders would be placed at

risk. It would also heighten the risk of an individual entering into the UK who we would normally refuse on non-conducive grounds should an adverse hit arise once biometrics are taken and may prevent the UK's ability to return them to their country of origin. Additionally, a major policy reason for requiring fingerprint biometrics is to prevent abusive applications being submitted using multiple identities.

37. In considering Article 8, I note that your clients are two family groups who are believed to be together. Although there are difficulties in obtaining food and water it is not suggested that they have been unable to do so. I have taken into account the ages of children as part of the family groups making the request and note that they are with their family with no suggestion that they are unaccompanied. It is also noted that reference is made to other family members of the applicants, throughout the evidence who are also in Gaza. Their position therefore is not materially different to other people in Gaza. As for the sponsor I note that she has her children with her in the UK, her husband has been issued with a visa to join her in the UK (it is unclear if he has now joined her) and can access medical treatment if this is needed. As such, having regards to the current family circumstances, the decision not to predetermine the applications would, if Article 8 is engaged, be proportionate and not breach Article 8 ECHR.

38. Section 55 of the Borders, Citizenship and Immigration Act 2009 has been considered. The duty in section 55 of the 2009 Act does not apply to children outside the United Kingdom. In so far as statutory guidance requires adherence to the spirit of the duty, for the reasons above, the evidence provided does not support the proposition your clients (the applicants) are at particular risk beyond any other individual in Gaza. Due regard has been given to the sponsor's children in the UK. The three children under the age of 18 have their immediate family with them (mother and elder siblings over the age of 18), their father is due (if not already) to join them in the UK, they can access support if needed and are not at specific risk.

39. It is open to your clients to complete their applications by attending a visa application centre to enrol their biometrics within 240 days from the date of last submission of their online application, which was on 24 November 2003."

STATUTORY FRAMEWORK AND POLICIES

31. As Ms Kilroy pointed out, the requirement for biometrics contained in sections 5 to 8 and 15 of the UK Borders Act 2007 (which is the enabling statute) is entirely at the discretion of the Respondent. The Act provides a permissive power to make regulations governing the taking of biometrics.

32. The regulations made thereunder are the Immigration (Biometric Registration) Regulations 2008. Broadly, those regulations mandate the provision of biometrics for entry clearance applications seeking leave to enter of more than six months and permit or mandate the refusal of applications made which do not comply with the

regulations or fail to provide biometric information where that is mandated.

33. The Respondent has issued guidance concerning biometric enrolment entitled "Biometric Enrolment: policy guidance" ("the Biometrics Guidance"). Version 9 is dated 24 October 2023 and Version 10 is dated 8 February 2024. The two versions are the same insofar as relevant to this case. The relevant part of the Biometrics Guidance setting out the policy imperative behind the taking of biometrics is as follows:

> **"**Biometrics, in the form of fingerprints and facial images, underpin the current UK immigration system to support identity assurance and suitability checks on foreign nationals who are subject to immigration control. Information about biometrics is contained in the policy guidance Biometric Information: introduction.
> We use biometrics to fix and confirm the identities of all foreign nationals who are required to apply for an Electronic Travel Authorisation (ETA), to apply for entry clearance or are applying to extend their stay in the UK for over 6 months and then from those applying to become British citizens.
> Biometrics enable us to conduct comprehensive checks against immigration and criminality records to prevent leave being granted to illegal immigrants and foreign nationals who are a public protection threat or use multiple identities. For example, enrolling fingerprints from individuals who apply for a visa has helped us to identify individuals who are involved in terrorist activities or organised criminality and enabled us to prevent them coming to the UK.
> We require biometrics to be enrolled as part of an application for an immigration product or British citizenship. They **must**, in most circumstances, be enrolled before a decision is made on an application as they enable us to confirm the identity of individuals and assess their suitability, by checking for any criminality or immigration offending unless they are exempt or excused."

34. As the Biometrics Guidance sets out, the enrolment of biometrics serves the dual purpose of identity assurance and protection of national security.

35. The Unsafe Journeys Guidance sets out the Respondent's policy on processing requests from individuals who are applying to come to the UK and claim that it is too unsafe for them to travel to a VAC, either in their own country or another country, to enrol their biometrics. Version 1.0 of the Unsafe Journeys Guidance was in place at the time of the Decisions. The Unsafe Journeys Guidance was amended to version 2.0 on 8 February 2024. Although, as I come to below, the Applicants also challenge the amended version of the Unsafe Journeys Guidance, they accept that this version is only relevant to their cases if I were to order that the Respondent reconsider his decisions refusing pre-determination of the applications. If, as has been done in other cases and as I have done here, I decide that the

Respondent is bound to pre-determine the applications, version 2.0 of the Unsafe Journeys Guidance is not relevant.

36. Turning then to version 1.0, there are two types of request which can be made under the Unsafe Journeys Guidance. Pre-determination is an assessment of the entry clearance application prior to the enrolment of biometrics. A provisional decision is made subject to the individual attending a VAC and enrolling biometrics. Biometric excuse is where the individual is excused from attending a VAC to enrol biometrics and the requirement to provide biometrics is normally deferred until after the individual has been granted entry clearance and arrived in the UK. Ms Kilroy confirmed that the Applicants seek pre-determination until they are able to enrol biometrics in Cairo. They do not seek biometric excuse.

37. The Unsafe Journeys Guidance highlights the importance of the role played by biometrics and the need for compelling circumstances to be established in order to justify waiver/deferral as follows:

> **"Important principles**
> Any decision to predetermine or excuse an individual from the requirement to attend a VAC to enrol their biometric information should be an exceptional occurrence, because biometrics are an essential part of ensuring we protect the public. Decision makers should only offer to predetermine an application or excuse individuals from the requirement to attend a VAC to enrol their biometric information, where the individual's circumstances are so compelling as to be exceptional and there are no alternative options.
> Decision makers must only agree to predetermine an application or excuse the requirement for individuals to attend a VAC to enrol their biometric information in exceptional circumstances. This applies, even where individuals find it difficult to safely travel to a VAC, unless they can demonstrate their circumstances are so compelling as to make them exceptional and to refuse to predetermine their application or waive the requirement for them to attend a VAC to enrol their biometric information would be a disproportionate barrier to them completing an application to come to the UK."

38. The Unsafe Journeys Guidance sets out four criteria, all of which must be satisfied in order for a decision maker to agree a predetermination or biometric excuse request:
    (1) The individual must satisfy a decision maker about their identity to a reasonable degree of certainty before coming to the UK.
    (2) The individual must provide evidence that they need to make an urgent journey to a VAC that would be particularly unsafe for them based on the current situation where they are located and along the route they would need to take to travel to the VAC and that they cannot delay their journey or use an alternative route.
    (3) The individual must demonstrate that their circumstances are so compelling as to make them exceptional. Those circumstances must go beyond simply joining family members in the UK.

(4) The individual must confirm that they are able to travel to a VAC (in the case of predetermination).

39. In this case, the first criteria is accepted to be met. The other criteria are at issue. In relation to the fourth criteria, the Unsafe Journeys Guidance states that "[d]ecision makers must not offer to predetermine an application or excuse the requirement to attend a VAC to enrol biometric information in circumstances where individuals have no reasonable prospect of being able to travel to the UK".

40. Although there may be no need for me to consider the updated version of the Unsafe Journeys Guidance, for completeness, I set out the reasons why it is said that the guidance required updating as follows:

> **"**This guidance has been updated to make it clear that:
> • individuals should either request to be excused from attending a VAC to enrol their biometrics or for their application to be predetermined, not both when the request is made
> • where individuals meet the compelling circumstances criterion under this
> guidance, it should not be interpreted they meet it for the purposes of their entry clearance application
> • the purpose of a predetermination is not to support an application to another non-UK authority for entry or exit permits to enable an individual to travel to a third-country"

EVIDENCE

41. The Applicants rely on statements from MS dated 23 November 2023 ([B/179-203]) and 13 February 2024 ([B/617-620] as well as a statement from MS's daughter, LS, dated 29 November 2023 ([B/356-361]). Those set out the detailed history of MS's relationship with the Applicants, the impact on her, LS and MS's other children of the Applicants' current situation, and a detailed account of the Applicants' situation as that has changed since the onset of the conflict in Gaza.

42. I have read those statements, but I do not need to set out the content of them as the facts are largely undisputed and are adequately summarised above. Mr Thomann accepted in his submissions that although the relationship between MS and the Applicants is not a core family aspect, for the purposes of pre-determination, the relationship engages Article 8 ECHR (particularly as regards the procedural aspect of Article 8 ECHR). As the Respondent points out, whether Article 8 is engaged for the purposes of pre-determination is not an acceptance that it would be accepted to be engaged in any substantive consideration of the entry clearance application.

43. The Applicants also rely on four statements from their solicitor, Juliane Heider dated 29 November 2023 ([B/319-327]), 13 February 2024 ([B/621-623]), 11 March 2024 ([B/682-698]) and 25 March 2024 ([B/1139-1141]). Those statements record her interaction with the Applicants themselves and set out their circumstances in Gaza. They also set out an account of other similar cases. Again, given the agreement about the facts, as set out above, I do not need to deal with the content of the statements in those regards. She also deals in her second and third witness statements with whether the Applicants would be able to leave Gaza to travel to the VAC in Cairo and if so how. This is a controversial issue and I deal with the evidence in that regard below.

44. The Applicants also rely on a statement from Anastasia Solopova dated 16 January 2024 ([B/435-449]). That is a statement filed in the case of R (BSO) v Secretary of State for the Home Department (JR-2024-LON-000069). It also deals with ways in which an individual may be able to leave Gaza and reports on conversations with Ms Galili of Gisha ("an Israeli not-for-profit organization, founded in 2005, whose goal is to protect the freedom of movement of Palestinians, especially Gaza residents"). Again, I refer to that evidence so far as necessary when dealing with the ability of the Applicants to leave Gaza to travel to the VAC in Cairo.

45. Finally, the Applicants also rely on a witness statement from Amanda Taylor, an immigration advisor with Refugee and Migrant Forum of Essex and London dated 11 January 2024 ([B/656-659]). That relates to another judicial review (which it appears may not have been issued) which was to be brought by another individual who was killed in Gaza whilst awaiting a decision on his application for a refugee family reunion visa to join his wife and child in the UK. This deals with the consular assistance which the FCDO may be able to give in order to facilitate exit from Gaza.

46. The Respondent relies on a statement from John Allen dated 22 March 2024 ([B/1331-1340]). Mr Allen is the Head of Biometric Policy and Strategy at the Home Office. The statement was filed and served late but admitted without objection from the Applicants. I am satisfied that it was appropriate to extend time to admit this statement given the very tight time constraints under which both parties were operating.

47. Mr Allen sets out the importance of enrolment of biometrics generally, specifically in relation to Gaza and how that applies to these Applicants. He also explains the public interest behind the Unsafe Journeys Guidance.

48. Ms Kilroy suggested in her submissions that, insofar as Mr Allen provides reasons why enrolment of biometrics is important in these

cases, this amounts to ex-post facto reasoning. I am unpersuaded by that submission. Whilst there is no doubt that Mr Allen's statement provides more detailed reasons why biometrics may be important in these cases and the Respondent's concerns about pre-determining the applications without biometrics, it is fair to say that there has been evidence on both sides which post-dates the Decisions. Of course, that post-dating evidence (on both sides) cannot be taken into account when considering whether the Decisions are unlawful or irrational on public law (common law) grounds. However, it is relevant to my consideration whether the Decisions breach Article 8 ECHR rights.

THE APPLICANTS' GROUNDS

49. The Applicants challenge the Decisions and the Unsafe Journeys Guidance.

50. Under ground one, the Applicants challenge the Decisions on the basis that they are irrational and/or otherwise unlawful on public law grounds at common law in the following respects:
    (a) The refusal to accept that the Applicants' circumstances are so compelling as to make them exceptional is irrational. There is a failure to consider whether those circumstances outweigh the public interest.
    (b) In any event, the Applicants' circumstances fall within the Unsafe Journeys Policy as follows:
        (i) Their identities are accepted;
        (ii) They are unable to travel to a VAC because they are trapped in a war zone;
        (iii) Their lives, physical and mental well-being is at imminent risk so that their circumstances are sufficiently compelling;
        (iv) Once they receive a positive pre-determination, there is a reasonable prospect that they will be able to arrange exit from Gaza.

51. Ground two argues that the Respondent's failure to exercise his discretion by insisting on the provision of biometrics breaches Article 8 ECHR.

52. Article 8 is said to be engaged in its procedural form by the process of consideration of entry clearance applications based on the family life between the Applicants and MS. The Respondent, it is argued, has a procedural obligation under Article 8 ECHR to provide the Applicants with access to a fair procedure for achieving family reunification and a procedure which provides the requisite protection of their interests in an expeditious manner.

53. The refusal to even consider the entry clearance applications is therefore said to be an interference because it blocks the Applicants from making an effective application and may, given the circumstances in Gaza, do so permanently.

54. The Decisions are challenged for failure properly to consider Article 8 ECHR. The Decision dated 20 December 2023 does not consider it at all. The Decision dated 2 February 2024 is said to be deficient in the following respects:
    (a) The assertion that Article 8 is not engaged because the Applicants will not be able to leave Gaza is said to be irrational on the evidence. Inability to leave Gaza is perhaps more relevant to interference with the Applicants' rights. The Respondent's position is that the refusal to pre-determine the applications would not interfere with the Applicants' rights if they would not be able to leave Gaza with or without a positive pre-determination or if a positive pre-determination would not materially affect the position.
    (b) The public interest factors relied on do not apply to the Applicants' cases.
    (c) The Respondent fails properly to weigh the factors on the other side of the balance and applies a "prohibited exceptionality approach" by comparing the situation of the Applicants with the situation in which the general population of Gaza finds itself.
    (d) The impact of family separation is barely addressed. On this factor, it is perhaps important to recognise that what is at issue here is not a refusal to grant entry clearance but a refusal to pre-determine the applications without biometrics which is one step removed from the substance of the family life considerations.

55. Ground three is in two parts. The first part challenges the Unsafe Journeys Guidance version 1.0. The second part challenges the second version of that policy.

56. As I have already noted, the second part of ground three arises only if I am persuaded that it is appropriate to order a reconsideration of the refusal to pre-determine the entry clearance applications. If I were to make a mandatory order that the entry clearance applications be determined without prior enrolment of biometrics (because otherwise the refusal would breach Article 8 ECHR) (as the Applicants seek and as I have done) then version 2.0 of the Unsafe Journeys Guidance has no relevance to this case.

57. It might of course also be argued that the challenge to version 1.0 of the Unsafe Journeys Guidance is now academic as the policy has been superseded. Since I heard argument about the lawfulness of

that version of the guidance, however, I consider it appropriate to determine that part of the third ground.

DISCUSSION

58. Before turning to address the grounds, I need to address the main issues in dispute between the parties which are:
    (a) The standard and intensity of review at common law.
    (b) Exceptionality and relevance of the general situation in Gaza.
    (c) Whether the Applicants are able to exit Gaza with or without a positive pre-determination.
    (d) The nature and extent of the public interest.

Standard and intensity of review at common law

59. Ms Kilroy referred me to the judgment in R v Lord Saville of Newdigate and Others ex parte A [2000] 1 WLR 1855 ("A") and R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] 1 WLR 2697 ("Sandiford"). As she correctly pointed out, both cases involve challenges determined under the common law rather than human rights law. The first arose in that way because it pre-dated the coming into force of the Human Rights Act 1998. The second was considered on that basis because the applicant was outside the territorial jurisdiction of the ECHR.

60. Ms Kilroy submitted that these cases show that where right to life considerations are at issue, policy reasons to outweigh those considerations have to be strong, the options available to a decision maker are curtailed and it is easier to surmount the high threshold implicit in the Wednesbury standard. She also emphasised the requirement for anxious scrutiny.

61. Dealing first with the intensity of review, whilst it is undoubtedly the case that anxious scrutiny is required particularly where a person's life is at stake, I do not consider that to impose any different test for the Tribunal or indeed a decision-maker. It simply goes to the level of scrutiny to which the courts will expose the decision-maker's reasoning.

62. Nor do I accept that these cases show that the rationality standard is impacted by the rights at issue. It is clear from the passage at [34] to [37] of the judgment in A that, although the Human Rights Act was not yet in force, the Court was looking at the case through the lens of the ECHR. The point being made is not that a lesser standard of rationality applies but that, the greater the interference with fundamental rights, the higher the public interest to justify that interference will need to be.

63. The point made at [66] of the judgment in Sandiford is similar. The degree of scrutiny by the courts is likely to be higher in a case involving the right to life and to that extent an irrationality challenge may be an easier hurdle to surmount but not because any lesser standard applies to the rationality test. The test at common law is still one of whether a reasonable decision maker properly directed could reach the decision under challenge.

64. The point made by the Applicants relates to the weight or otherwise given to the Applicants' lives when assessing whether their applications should be pre-determined. Ms Kilroy pointed out that at [25] of the Decision dated 2 February 2024, the decision maker stated that the Applicants' situation whilst deserving of sympathy was not relevant to the decision whether to pre-determine the applications. In effect, that is a submission that the Respondent failed to take into account a relevant consideration.

Exceptionality and relevance of the general situation in Gaza

65. I did not understand Ms Kilroy to suggest that an exceptionality test is unlawful per se provided that the word exceptional is properly understood in terms of a high threshold rather than a requirement for something unique or rare. It is in this latter way that the Applicants say the test has been applied here and that this is unlawful.

66. Both parties rely on the Supreme Court's judgment in R (Hesham Ali) v Secretary of State for the Home Department [2016] UKSC 60 ("Ali"). The following passage is relevant to my consideration:

> "37. How is the reference in paragraph 398 to 'exceptional circumstances' to be understood, compatibly with Convention rights? That question was considered in *MF (Nigeria) v Secretary of State for the Home Department* [2014] 1 WLR 544. The Court of Appeal accepted the submission made on behalf of the Secretary of State that the reference to exceptional circumstances (an expression which had been derived from the *Jeunesse* line of case law) served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who did not satisfy paragraphs 398 and 399 or 399A, and that it was only exceptionally that such foreign criminals would succeed in showing that their rights under article 8 trumped the public interest in their deportation: paras 40—41. The court went on to explain that this did not mean that a test of exceptionality was being applied. Rather, the word 'exceptional' denoted a departure from a general rule, at para 43:
>
> 'The general rule in the present context is that, in the case of a foreign prisoner [sic] to whom paragraphs 399 and 399A do not apply, very
>
> compelling reasons will be required to outweigh the public interest in

> deportation. These compelling reasons are the 'exceptional circumstances'.'
>
> The court added that the 'exceptional circumstances to be considered in the
> balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence': para 44. As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.
>
> 38 The implication of the new rules is that paragraphs 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of paragraphs 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules
> themselves, are likely to be a very small minority (particularly in non-settled
> cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of
> State accepted, consistently with the *Huang* case [2007] 2 AC 167, para 20), but they can be said to involve 'exceptional circumstances' in the sense that they involve a departure from the general rule."

67. The Respondent contends that he is entitled to measure the Applicants' circumstances by reference to the situation of the general population in Gaza. He relies in that regard on what is said at [38] of the judgment in Ali. I do not consider that to assist the Respondent. As Ms Kilroy points out, "general situation" is not the same thing as "general rule".

68. In Ali, the Court was considering a situation where the Respondent had struck in the immigration rules what he considered to be a fair balance between the impact on the individual and the public interest

in deportation cases. It would only be in those cases where the impact on the individual went beyond the norm that the public interest would be outweighed.

69. The Respondent is entitled by his policy to strike what he considers to be a fair balance between the impact on individuals (including the general situation in which they find themselves) and the public interest but that does not involve measuring the impact on one individual by reference to the impact on other individuals in the same situation.

70. In effect, the Applicants say that the approach adopted involves the taking into account of an irrelevant consideration (namely the plight of the general population in Gaza). They refer in that regard to [26] and [31] of the Decision dated 2 February 2024. They contend that the approach taken in relation to Article 8 ECHR is similarly flawed (see in particular [37] of the Decision dated 2 February 2024).

Applicants' Ability to Leave Gaza

71. The Respondent does not accept that there would be any interference with the Applicants' right to family life and/or says that the Unsafe Journeys Guidance does not apply (because the fourth criteria is not met).

72. The Respondent's position is that the Applicants will be unable to leave Gaza with or without a positive pre-determination of their applications and/or that having a pre-determination of their applications would make no difference to their ability to leave. That reasoning emerges from the Decision dated 20 December 2023 and at [5] to [15] of the Decision dated 2 February 2024.

73. The Applicants say that there are two ways in which they may be able to leave Gaza. The first is with consular assistance from the FCDO. The second is by making "co-ordination payments". The latter might be thought to be not dissimilar to bribes and for that reason as Mr Thomann submitted it might be thought to be unattractive for the Respondent to rely on that method of exit. The Applicants say however that such a method of exit is and always has been commonplace in Gaza and involves payment for inclusion on an exit list rather than payment to actually exit Gaza. The Applicants also say that it might be possible to negotiate exit with other countries facilitating evacuations, but I was not addressed about this and there is limited evidence that this is anything but a remote possibility.

74. The evidence about whether the Applicants could leave Gaza by one of the methods suggested is contested by the Respondent as being inadequate or unconvincing, speculative or not relevant to the Applicants' circumstances.

FCDO Assistance

75. As Mr Thomann was at pains to point out, the most that the FCDO can do is to offer consular support by putting forward individuals for inclusion on a list for possible evacuation. That list has to be approved by both the Egyptian and Israeli authorities. They are responsible for arranging the actual exit.

76. The Respondent's position in this regard is that there is no reasonable prospect of such assistance being offered by the FCDO in the Applicants' cases. There is no evidence that the Applicants have liaised with FCDO, and they do not meet the criteria of FCDO to be put on an eligibility list.

77. The Applicants rely on the evidence provided by Ms Anastasia Solopova, a solicitor at the Migrants' Law Project, Asylum Aid. Her statement was submitted to the Respondent in these cases on 26 January 2024 [B/434] although the substance of it is also set out in submissions made by the Applicants' solicitor in representations dated 18 December 2023 ([B/401-425).

78. Ms Solopova says the following:

> "Ms Galili of Gisha confirmed that foreign citizens or residents and their family members, who are submitted by embassies and approved for the official evacuation list are able to exit Gaza; she stated that which family members are submitted is at the discretion of the individual embassies but that in their experience, if an embassy pushes for someone to be evacuated, the Egyptian and Israeli authorities normally agree to include them on the list."

79. Based on information from Ms Galili, at [11] of her statement Ms Solopova says that "it was clear that most of the people who had been evacuated from Rafah were those who had been placed on the evacuation list by embassies" and that people in this category "have the 'best hope of getting out'". Ms Solopova explained the pre-determination option to Ms Galili who "said that she believes this type of decision would also make someone more likely to be allowed to exit via the Rafah crossing".

80. At [14] to [21] of her statement, Ms Solopova sets out what she understands the FCDO policy to be in relation to eligibility for consular assistance. The specific categories do not relate to these Applicants. They are not British or dual nationals. They are not immediate family members (spouse and children under 18 or parents and siblings under 18 of a British citizen child). Any remaining discretion would only be exercised based on "the specific circumstances of the person or people involved". The criteria are said to have been widened in December 2023 to include "Palestinians

who have strong links to the UK by having either a spouse or children under 18 currently living in the UK and who currently hold valid permission to enter or remain for longer than 6 months". As Mr Thomann pointed out, the Applicants are neither spouse nor children of a person living in the UK (they are half-siblings and their families). Nor do any of the Applicants hold visas.

81. The individual examples given by Ms Solopova are not directly relevant to the Applicants' circumstances. The first is a spouse of a British national who already held a spouse visa. Although Palestinian, the FCDO agreed to assist.

82. Another British citizen evacuated in December 2023 told Ms Solopova that his cousin, her husband and her husband's children were evacuated after being put on the FCDO list. However, the children were British citizens and therefore the father fell squarely within the category of immediate family members. Although I accept that the cousin does not appear to have been the biological parent of the child, as their stepmother travelling as part of the family unit it is not difficult to see why the FCDO might have exercised its discretion in her favour.

83. Although the example given at [21] of the statement at first blush appears to go slightly beyond the policy in that the spouse/father was not a British citizen but a skilled worker (doctor) living in the UK, the individuals in that case had visas as his dependents and had lived with him in the UK before becoming stranded in Gaza whilst on holiday when the conflict began. The FCDO initially refused to assist but then agreed to offer assistance based on the widened policy and the reference to the spouse and minor children of Palestinians with strong links to the UK who already held visas. As such, those individuals fell within the extended policy.

84. The examples of those evacuated from Gaza following FCDO assistance who were subsequently granted visas speedily (at [24] to [29] of the statement) are not relevant either. All were immediate family members of British citizens. Even in cases involving immediate family members of recognised refugees, Ms Solopova's evidence suggests that the FCDO were not willing to assist absent the grant of a visa.

85. One of those cases is that detailed in the witness statement of Amanda Taylor dated 11 January 2024. That statement was submitted to the Respondent with representations made on 19 February 2024 and therefore after the date of the Decisions ([B/598-616]). Ms Taylor says that, having been told of her efforts to secure a pre-determination of her client's application for entry clearance, the FCDO indicated that it might be prepared to reconsider. The extract from the email cited at [13] of that statement however says only that

the FCDO would reconsider the case if there were a positive pre-determination. There is no commitment to assist.

86. Ms Heider (the Applicants' solicitor) adds to the evidence in this regard at [8] to [11] of her third statement dated 11 March 2024 (also post-dating the Decisions).

87. She refers first to the case of R (HS and others) v Secretary of State for the Home Department (JR-2024-LON-000143) in which Ms Solopova was instructed. Again, the point is made that the FCDO indicated that the applicant could revert to them if a positive pre-determination decision were made. However, as set out at [9] of that statement, after the judicial review was allowed (by Judge Kamara with reasons to follow), the application came before the High Court on the basis that the Respondent had failed to comply with Judge Kamara's order. As there noted, the FCDO refused to assist because the family did not yet have visas. It is said that the FCDO was not asked to exercise its discretion. This example does not assist the Applicants in any event as the applicants in that case were immediate family members of the refugee spouse/father.

88. At [10] of the statement, Ms Heider refers to the case of BSO. As I have already noted, although the FCDO refused to assist initially, it agreed to reconsider following a judicial review challenge. However, BSO left before the reconsideration and so this does not provide evidence that the reconsideration would have been in BSO's favour.

89. None of the evidence put forward by the Applicants shows that they would be assisted by the FCDO. The examples given are either those who fall directly within the FCDO policy or are closely aligned with it. There is little if any evidence that the FCDO would be prepared to exercise discretion in favour of these Applicants.

90. It is worthy of note that in the cases of RM and others; WM and others, both families were refused entry clearance following pre-determination of their applications. One of the families however managed to leave without a positive pre-determination. That brings me on then to the evidence about "co-ordination payments".

"Co-ordination payments"

91. The Applicants drew attention to the Respondent's own country evidence. That is a report of a Home Office Fact Finding Mission entitled "Occupied Palestinian Territories: freedom of movement, security and human rights situation" ([B/625-627]). The fact-finding mission took place in September 2019. The report is dated March 2020.

92. Although I accept that this report refers to the possibility of exit via the Rafah crossing by payment of bribes (and I also observe includes reference to evidence taken from Gisha), I also accept Mr Thomann's submission that this does not assist me when looking at the position following the start of the conflict in Gaza. At the time of this report, the border was controlled by the Egyptian authorities on one side and Hamas on the Gaza side. Now the crossing is controlled by the Egyptian and Israeli authorities.

93. Ms Solopova deals with "co-ordination payments" at [43] to [47] of her statement. She says that "[t]here is evidence that a positive pre-determination or grant of a visa will assist to facilitate exit via this route". She makes general points about bribes being used to facilitate border crossings and refers to a Guardian article dated 8 January 2024, which shows only that bribes are being paid to make the crossing. She says also that the Hala travel agency "described above by Al-Jazeera as one of the largest companies facilitating exit via Rafah to Egypt in return for payment of a fee, appears to be resuming some services". The evidence of that is said to be posts on Facebook from November/December 2023. She also provides two examples of persons who have managed to leave by payment of bribes. However, in both cases, the individuals concerned had visas for onward travel. There is no evidence of positive pre-determination decisions assisting the process.

94. As was pointed out by Mr Thomann in circumstances where the Israeli authorities control the Gaza side of the border, one might assume that, if anything, checks will have tightened although I also accept Ms Kilroy's point that, although the payments might appear similar to bribes, they are payments for individuals to be put on a list rather than payments to officials at the border.

95. The Applicants rely on the second statement of Ms Heider in this regard. That is dated 13 February 2024 and therefore also post-dates the Decisions. That statement relies largely on the evidence from Ms Solopova and the general evidence to which I have already referred. However, it also sets out the following:

> "6. An online search with the key words 'bribery at Rafah crossing' brings up multiple articles from journalistic sources, including Bloomberg, Al Jazeera, El Pais, Le Monde, Middle East Eye, to name just a few. These articles range from 2016 to the present. Recent ones cover the entirety of the period since the Rafah crossing opened with articles throughout November and December 2023, when the Claimant applied for and then was refused entry clearance. Since the start of January 2024, reports of crossings that were made possible following payment of bribes abound. Recent articles corroborate the accounts of the individuals that Ms Solopova spoke to and who are referred to in her statement (§§46-47) who described agents having resumed to facilitate exit from Gaza but now quoting exorbitant fees. The reports

> are also consistent with communication that I have had since Ms Solopova's statement was finalised, including a further call with Ms Galili from the Israeli organisation Gisha whom both Ms Solopova and I spoke to previously (Solopova2 at §§8, 9(a), 11).
>
> 7. Whilst there are many reports/articles regarding the possibility of exit if a person is able to pay fees to agents, I exhibit two recent examples to illustrate the current potential for exit from Gaza at a price.
>
> a. In a report entitled 'Only those with money can leave' Gazans Pay Thousands to Escape Through Egypt' published on 25 January 2024 (Exhibit RT3/2), the Organised Crime and Corruption Reporting Project ('OCCRP') and Egyptian fact-checking journalistic organisation Saheeh Masr investigated the evidence of bribery to secure exit from Gaza. Reporters reached out to more than a dozen agencies and brokers to understand and compile the information included in the investigation regarding the functioning at Rafah since the start of the ongoing hostilities. The report acknowledges the history of money exchanging hands to ensure swifter entry and exit into Gaza. The report makes clear that prices fluctuate depending on the situation: when it is harder to exit, prices increase exponentially. Consistent with other evidence the investigation discloses that, at the present time, people are exiting Gaza through the assistance of agencies paying between $4,500 to $10,000.
>
> b. Similarly, in a recent article 'Want Out of Gaza? Pay Us $10,000' published
>
> on 29 January 2024 (Exhibit RT3/3) in the Israeli publication Haaretz, the journalist Amira Hass reported on stories of Palestinians trying to crowdfund in the hope of obtaining enough money to pay agents to facilitate their exit from Gaza. The article cites four examples of relatives abroad seeking to 'crowd-fund' thousands of US Dollars for their family members to be able to exit via Rafah and, further, mentions a Facebook group called Rafah Inland Crossing Network where many more such requests are being posted daily. Ms Hass' article states: "*The people I mentioned in the first five paragraphs are referring to a route that the Egyptians deny exists but is known to everyone. It has been covered in many media outlets including this one. For a high price - which has risen to $10,000 per person from $4,000 at the beginning of the war - anonymous intermediaries promise to get Gazans through the Rafah crossing into Egypt. The euphemism for this huge bribery enterprise is 'coordination.*"'

96. In response to this evidence, Mr Thomann submitted that it was not clear whether this related only to payments to accelerate exit when a person has permission to cross or whether it provides an opportunity to leave without permission. As he said, some of the evidence pre-dates the conflict and does not assist. As I have already accepted, the concrete examples given do not relate to persons in a similar position to these Applicants. Nonetheless, by reference to what is said in Ms Heider's second statement, I do accept that there is now some general background evidence that "co-ordination payments" make the possibility of exit from Gaza at least a reasonable prospect.

97. I also accept, as was said at [121] of the judgment in RM and others; WM and others that given the ongoing conflict, it may be difficult to provide concrete evidence of what is going on in Gaza. Although there is some force to the Respondent's submission that there is limited if any evidence that positive pre-determinations assist in permitting individuals to cross the border, as was also said at [121] of the judgment in RM and others; WM and others, it is common sense that if a person has permission to travel onwards from Egypt to another country (even if that is a conditional permission), officials may be more likely to be willing to assist. Moreover, as cases of applicants from Gaza seeking pre-determination decisions are very much in an initial phase, it is unlikely that there would be evidence in this regard.

Conclusion regarding the Applicants' ability to exit Gaza

98. I do not accept that there is evidence that the FCDO would be willing to assist these Applicants to exit Gaza. They are not within the category of persons who the FCDO is generally willing to assist. There is no evidence that the FCDO would be willing to exercise its discretion in their favour.

99. It was suggested by Ms Kilroy that the FCDO would have to take into account in the exercise of its discretion if a refusal to assist would breach the Applicants' Article 8 rights. I agree with Mr Thomann's submission in this regard. The FCDO is exercising its functions outside the UK and outside the territorial scope of the ECHR. As such, Article 8 would have no part to play.

100. As at the date of Decisions, the Respondent was entitled to take the view that the evidence on which the Applicants relied was too speculative to meet even the low threshold under the Unsafe Journeys Guidance. The Applicants' grounds in this regard refer predominantly to evidence which post-dates the Decisions. Ms Taylor's statement and Ms Heider's second and third statements were not available to the Respondent at the date of the Decisions. Although the evidence of Ms Solopova was available, I have explained why that evidence does not relate to the situation of these Applicants. The Respondent has lawfully considered that evidence in the Decision dated 2 February 2024.

101. However, overall and for the reasons given above, I accept that the evidence by the date of hearing does show that there is a reasonable prospect of exit from Gaza for these Applicants should they receive a positive pre-determination decision (or even without one).

102. I accept, given the evidence about the possibility of exit by use of "co-ordination payments" and that a positive pre-determination decision may assist in securing exit by those means, the refusal to

make a pre-determination decision does constitute an interference with the Applicants' Article 8 rights.

Nature and Extent of the Public Interest

103. That is not to say however that the Applicants can succeed unless their circumstances are sufficiently compelling as to outweigh the public interest considerations.

104. As I have set out at [34] above, there is a general policy imperative of obtaining biometrics from applicants in entry clearance cases. As there noted, there are two objectives of the biometric enrolment policy – to conduct security and identity checks of those coming to the UK before they arrive and to protect against identity abuse.

105. I accept the Respondent's submission that the system of requiring biometrics in general has an important public interest role and that it is open to the Respondent to have a policy which recognises the importance of that role so that only very compelling circumstances can outweigh that interest (see in this regard the Tribunal's decision in R (THM & NHM) v Secretary of State for the Home Department (JR-2022-LON-002019) and R (on the application of MRS and FS) v Entry Clearance Officers (Biometrics – entry clearance – Article 8) [2023] UKUT 00085). I also accept the proposition that the mere fact that a person is in a difficult situation such as a conflict zone does not of itself justify a waiver of biometrics (see R (JZ) v Secretary of State for Foreign, Commonwealth and Development Affairs & Ors [2022] EWHC 771 (Admin) – "JZ").

106. However, as I understand the Respondent to accept, in the case of these Applicants, the security implications are less important if they have any part to play at all. That is because the Applicants are not seeking biometric excuse. Their biometrics will be enrolled prior to coming to the UK. I asked Mr Thomann whether the Egyptian authorities would require the UK to take the Applicants even if any security issues were thrown up when biometrics were enrolled (which of course I do not suggest would or even might happen but is relevant to the public interest concern). He confirmed on instructions the Respondent's understanding that the Egyptian authorities would not do so.

107. The issue therefore is one of protection against identity abuse. In this regard, I do not consider that the fact of the Applicants' identities being accepted by the Respondent to be determinative of that public interest. The risks associated with identity abuse are manifold as explained by Mr Allen in his statement as follows:

    (1) Inability to check authenticity of identity documents: as the Applicants point out, their documents could be checked with the Palestinian authorities. In any event, checks will be made

in the event that the Applicants obtain a positive pre-determination decision and attend a VAC, in Cairo.

(2) Risk that a foreign government would require the UK to take someone with adverse security checks: this is no longer an issue here as Mr Thomann accepted.

(3) Pre-determination decisions are not made on secure paper (they are if I understand the position correctly simply decisions made on the application in the usual way). As such, abuse by way of copying is at the very least possible and may be the more so if the practice of issuing such letters becomes widespread: I accept this may be an issue.

(4) There may be a risk to security if the decision letter were to fall into the wrong hands (ie in this case a member of Hamas): that is unlikely where the individual's identity is established by the provision of documents prior to pre-determination as here.

(5) An individual may make multiple requests in the event of a negative pre-determination using different identities or multiple sponsors: it is not suggested that these Applicants have any sponsor other than MS in the UK and, as above, their identities are "fixed" to some extent at least by the provision of identity documents which have enabled the Respondent to accept the Applicants' identities for the purposes of the Unsafe Journeys Policy.

108. I accept based on the above that there remains a public interest reason for requiring biometrics. However, given that the Applicants are requiring pre-determination rather than biometric excuse and that their identities are accepted by the Respondent, I do not accept that the public interest is as strong as it might be in cases of biometric excuse where identities cannot be checked prior to arrival in the UK.

109. I base that assessment on what is said at [15] of Mr Allen's statement as follows ([B/1336]):

> "It is fair to say that the public interest is protected to some extent in circumstances where applicants are not coming straight to the UK but going to Egypt where biometrics are taken. However, as we would not have already captured a person's biometrics it would remain open to them to make multiple applications using different identities. Even with the constraint of requiring a sponsor, some people could have multiple sponsors and it may not be possible to identify whether a person has applied in a different identity. It is also worthy of note that the Egyptian authorities expects the UK authorities to do all that it can to ensure the identity of those who may cross the border. Any issues with that system would likely lead to difficulties in that relationship which, in turn, could well impact upon those who genuinely do meet the criteria for predetermination. It also risks placing pressure on the UK regardless of any outcome that biometric checks might uncover."

110. In relation to the Unsafe Journeys Guidance, the Applicants' main complaint is that the guidance is being interpreted as requiring the Applicants to face individual risks beyond those faced by the general population. As I understood Ms Kilroy to accept, that is not necessarily the way in which the guidance has to be read (at least not in version 1.0). The second criterion which is relevant here is that the applicant has to demonstrate an urgent need to travel to a VAC where the journey or the location they are in is "particularly unsafe for them". Other than the use of the word "particularly", the context might suggest only that the Applicants have to show that the route or location is unsafe based on their own current situation. As Ms Kilroy put it, even if the general population of Gaza can show that they are at personal or particular risk, the Applicants can still do so also.

111. However, it is clear from [23] and [25] of the Decision dated 2 February 2024, that the Respondent is interpreting this as meaning that an applicant has to show an individual risk beyond that faced by the general population.

112. That is perhaps understandable when one reads the section of the guidance regarding the application of this part of the guidance as follows:

> "Decision makers must not normally agree to predetermine an application or excuse the requirement to attend a VAC just because individuals consider their journey to the VAC is unsafe. Individuals must provide evidence they:
> • face dangers beyond the current situation that exist in area where they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics and there are no alternative routes they could use
> • personally face an immediate and real risk of significant injury or harm because of their personal circumstances, if they attempt to travel to any VAC
> • have an overriding need to travel urgently and cannot delay their journey
> • are in an area of ongoing conflict or the area has become unsafe following a catastrophic natural disaster or where the way of travelling to any VAC is through an area of conflict and there are no alternative options available to them
> • needed to travel to an unsafe location, when they could have safely travelled to another place to provide their biometric information"
> [my emphasis]

113. As Ms Kilroy submitted, however, that section of the guidance appears to be by way of examples for decision-makers to consider. They are not obviously cumulative. As such, read as a whole, they do not appear to require an applicant to show an individual risk beyond that faced by others in the same situation.

114. However, the Respondent's position is that the way in which the guidance is expected to be applied is as it was applied here (and similarly to the approach which he says applies to whether there are compelling circumstances: see [67] above).

115. Dealing with the Respondent's case, I accept that the guidance is intended to apply to countries and regions across the world where people face hardship and risks of harm due to conflict or other reasons. I accept also the general proposition that the UK cannot be expected to take in every person in such regions based only on the fact that they are living in those difficult situations. That point is made in JZ albeit in the context of biometric waiver rather than a challenge to the Unsafe Journeys Guidance.

116. I accept however Ms Kilroy's point that the Unsafe Journeys Guidance itself cannot have that broad compass because it only applies to those who have a potential basis of entitlement to come to the UK and, on the face of the guidance itself "[i]t is primarily aimed at individuals who are applying to join sponsoring family members in the UK, such as those who have protection status, settled in the UK or are British citizens, and may have been granted protection when they came to the UK".

117. That position is underlined in the context of human rights law. I entirely accept the Respondent's submission that the ECHR cannot require the UK to have a policy directed at the entire population of a conflict zone. However, it could not be required to do so in any event due to the territorial scope of the ECHR.

118. Mr Thomann sought to persuade me that a policy of using a local situation as a yardstick was in any event compatible with the ECHR. He referred me to the case of AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 which he said referred to a comparative exercise in determining whether removal would expose an individual to a significant reduction in life expectancy. He referred me in particular to [31] and [32] of the judgment.

119. If I understood Mr Thomann's submission correctly, it is that the Strasbourg jurisprudence entitles a member state to adopt a high threshold in Article 3 medical cases to recognise the limitations on that member state's ability to provide access to medical support due to the economic consequences which this would have. The threshold in such cases is necessarily a high one as Article 3 itself is absolute and involves that very high threshold. I do not read that passage as indicating that there is any higher threshold than would normally apply in an Article 3 case. However, I do accept that it recognises that it is only in cases where that high threshold is established that an obligation would arise for a member state.

120. This case is however one which engages Article 8 ECHR (at least in its procedural form). The need for limitations in such cases is catered for by balancing the public interest considerations against the impact for the individual and it is only where that individual has a strong case (again at least based on Article 8 procedural requirements) that the Respondent will be required to accede to the request for pre-determination.

121. I repeat also what I have already said above. The Unsafe Journeys Guidance could not apply to the general population of Gaza for the simple reason that not everyone will have a basis (even a potential one) for coming to the UK and the guidance on its face applies normally only where the individual applicant has a family member in the UK with British citizenship or at the very least some lawful basis of stay in the UK.

122. In conclusion, the issue whether the Applicants face an individual risk beyond that faced by others in Gaza on the journey to reach a VAC is not a relevant consideration. It is also not relevant to the issue whether the Applicants' circumstances are so compelling as to outweigh the public interest. The issue under Article 8 ECHR is whether those individual circumstances outweigh the public interest as outlined above.

Ground One

123. Drawing together the conclusions above, I accept that the Decisions are unlawful in requiring the Applicants to show "why their circumstances are different to other people living in Gaza" ([26] of the Decision dated 2 February 2024). The Respondent also unlawfully relied on the Applicants needing to show that they "are of a targeted interest from those directly involved in the fighting ongoing in Gaza" and that "they would personally be at risk of harm" ([23] and [24]) when undertaking the journey to a VAC. Those were all irrelevant considerations when considering whether the Unsafe Journeys Guidance was met.

124. When dealing with the Applicants' circumstances and whether those were compelling, the Decisions were also unlawful for a similar reason: they required the Applicants to show that their circumstances were different from those facing the general population in Gaza ([26] and [31] of the Decision dated 2 February 2024).

125. Those were also unlawful considerations when assessing Article 8 ECHR (see [37] of the Decision dated 2 February 2024). The Respondent unlawfully failed to assess the individual circumstances of the Applicants and MS against the public interest.

126. I accept that the Respondent's conclusion that the Applicants had not shown that they would be able to leave Gaza with a positive pre-determination was open to him at the time of the Decisions. The Respondent was entitled to take that conclusion into account when assessing whether the Decisions interfered with the Applicants' Article 8 rights.

127. It might be said that the unlawfulness when assessing Article 8 ECHR was for that reason immaterial. However, the Respondent considered in the alternative whether Article 8 would be breached assuming there was interference and has failed in that regard to balance the Applicants' individual circumstances against the public interest (in particular at [37] of the Decision dated 2 February 2024).

128. For those reasons, I am satisfied that the Applicants have shown that the Decisions are unlawful and should be quashed. I grant permission on ground one and allow the application on that ground.

Ground Two

129. In relation to Article 8 ECHR, it is for the Tribunal to make its own assessment whether the Applicants' rights are breached and to do so taking into account all evidence including that post-dating the Decisions.

130. Mr Thomann did not submit that Article 8 was not engaged in this case. He was right not to do so. The Respondent will of course need to consider whether family life exists between MS and the Applicants when making his substantive decision. However, at this stage, Article 8 in its procedural aspect is engaged. The Respondent has to provide access to a fair procedure for achieving family reunification.

131. I have accepted on the evidence before me that the Respondent's refusal to pre-determine the Applicants' applications interferes with their Article 8 rights in this regard. Although the evidence at the date of the Decisions was insufficient to show that the Applicants would have a reasonable prospect of leaving Gaza, there is evidence post-dating the Decisions which shows that "co-ordination payments" are still being used for the purpose of gaining access to a list for exit (assuming of course that the Applicants can afford to make those payments).

132. I accept also that the interference with the rights of MS and the Applicants is potentially extreme given the risk to life caused by the ongoing conflict in Gaza, both from bombardments, lack of food and health risks. It stands to reason that, if the Applicants were to die or be killed, such family life as exists between MS and the Applicants would be totally extinguished. The interference is for those reasons particularly acute. The evidence also shows the toll which the plight

of the Applicants is having on MS's mental health. I take that into account also.

133. Although I accept that there is a public interest in the requirement for biometrics to be enrolled at the time of application, that is not such an elevated threshold in this case. The Applicants are not suggesting that they should be allowed to enter the UK without enrolling their biometrics. Any security concerns can therefore be overcome by the enrolment of biometrics in Cairo (as the Respondent now accepts). I have also explained, by reference to the evidence of Mr Allen, why the public interest in "fixing" identity at the time of application is lessened in this particular case.

134. Balancing the interference with the Applicants' rights against the public interest, I am satisfied that the refusal to pre-determine the Applicants' applications breaches their Article 8 rights (as I concluded in the interim decision). I therefore grant permission on ground two and allow the application on that ground.

135. I again emphasise that I am here considering whether those rights are breached by the refusal to pre-determine their applications. Whether the Applicants enjoy family life with MS so as to engage Article 8 for the purposes of entry clearance is a matter for consideration by the Respondent. I understand it to be accepted that, were the pre-determination decision to be a refusal of entry clearance, the Applicants would have a right of appeal.

Ground Three

136. The Applicants did not require a decision whether version 2.0 of the Unsafe Journeys Guidance is unlawful. The Respondent submitted that I should not consider this issue as that version of the guidance did not apply to the Decisions in this case and that it would be wrong for me to make any declaration about a policy which did not apply unless and until that were applied. The Applicants accepted that this version of the guidance did not become relevant unless I were to order a reconsideration of the Decisions which I do not need to do because I have reached my own conclusion on the substance of the Applicants' challenge based on Article 8 ECHR.

137. Turning then to version 1.0 of the Unsafe Journeys Guidance, as I noted at [110] above, Ms Kilroy accepted that the guidance might be capable of being read in a way which was not unlawful. It was the Respondent's interpretation of that guidance when making the Decisions which was unlawful (as I have accepted).

138. Both parties agreed that the guiding principles for a court or tribunal faced with a challenge to a policy are to be found in the Supreme

Court's judgment in R (A) v Secretary of State for the Home Department [2021] 1 WLR 3931 at [41] as follows:

> "The test set out in Gillick is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations: see also our judgment in BF (Eritrea) [2021] 1WLR 3967."

139. I have accepted that version 1.0 of the Unsafe Journeys Guidance was being interpreted unlawfully as contrary to Article 8 ECHR by requiring the individual circumstances of an applicant to be measured against others affected by the same general situation in the country from which they are coming. However, that arises in the most part from the way in which the guidance was being interpreted by decision makers and not from the face of the guidance itself.

140. The guidance did not require that approach save for the use of the word "particular" under the second criterion as underlined by one of the examples given in the detailed section dealing with that criterion. I have carefully considered whether that criticism meets the "Gillick" test, particularly given Ms Kilroy's acceptance that the example was only one of a number, that there was no criticism of the other examples and that the examples were not cumulative.

141. However, having regard to the fact that the guidance has been interpreted in an unlawful manner not just in this case but also in the cases of RM and others; WM and others (see [92] and [93] of the judgment read with [143]), I have concluded that the guidance is unlawful as requiring an applicant to show that their circumstances are unique when compared with the general situation.

142. The challenge to version 1.0 of the Unsafe Journeys Guidance may now be academic given the amendment of that guidance by version 2.0 (which I do not need to consider). I will however hear from the parties as to the form of order (if any) which should be made in that regard.

CONCLUSION

143. For the foregoing reasons, I grant permission to apply for judicial review and the application for judicial review is allowed on grounds of unlawfulness/irrationality (for taking into account irrelevant considerations) and on Article 8 grounds.

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