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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **02/08/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SHIMA ESMAIL FOR JUDICIAL REVIEW

John Larkin KC with Darcy Rollins (instructed by Phoenix Law) for the Applicant
Tony McGleenan KC with Philip Henry KC & Laura Curran (instructed by the Crown Solicitor's Office) for the Respondents

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HUMPHREYS J

Introduction

[1] The applicant is a citizen of the United Kingdom who is originally from Sudan. Many of her extended family members still live in Sudan.

[2] The evidence before the court reveals that the civil war which broke out in that country in 2023 has left many thousands of people killed and injured. Millions of the country's residents have been displaced. The applicant wishes to secure a safe route by which her family members could join her in the UK.

[3] By this application for judicial review, the applicant seeks to challenge:

(i) The failure by the UK Government to establish a family reunification scheme akin to the one set up for Ukrainian nationals fleeing war; and

(ii) A decision communicated on 11 January 2024 to the effect that it was not possible to consider the grant of leave outside the Immigration Rules to the applicant's family.

[4] The respondents are the Secretary of State for the Home Department ('SSHD') and the Secretary of State for Foreign, Commonwealth and Development Affairs.

The grounds for judicial review

[5] The applicant's challenge essentially resolves to two claims:

(i) Her rights pursuant to the section of the Belfast-Good Friday Agreement ('B-GFA') entitled "Rights, Safeguards and Equality of Opportunity" as enshrined in Article 2 of the Windsor Framework have been breached; and

(ii) The respondents have unlawfully fettered their discretion by not providing a family reunification scheme and/or considering the leave outside the rules ('LOTR') application.

The applicant's evidence

[6] Senior counsel for the applicant vividly described the picture emerging from Sudan as reflecting a Hobbesian state of nature. The civil war has seen a surge in sexual violence, attacks on humanitarian workers and healthcare professionals. There are acute shortages of food, water and medicine and access to the internet is, at best, sporadic. The British Embassy and the Visa Application Centre ('VAC') in Khartoum have been closed indefinitely.

[7] The applicant's family are currently living on a bus situated on the foundations of her parents' home. They are suffering from serious food shortages and there is no access to healthcare. The village where the family live is under the control of rebel forces. The applicant has identified her mother, father, brother, sister and her five children as the family members concerned.

[8] On 8 November 2023 the applicant's solicitor wrote to the respondents' representatives asking for a grant of LOTR in respect of the applicant's family members on what were described as "compassionate and compelling grounds." In its response dated 11 January 2024 the Home Office stated:

> "In short, the request you have made is not possible"

[9] The same letter also indicates that applications for LOTR are not made by letter but must be made on the application form for the route which most closely matches the circumstances and requires payment of the relevant fees and charges.

The Windsor Framework

[10] In *Re NIHRC & JR295's Application* [2024] NIKB 35, at paras [45] to [75], I set out an analysis of the provisions of the Withdrawal Agreement ('WA'), including the Windsor Framework ('WF'), section 7A of the European Union Withdrawal Act 2018 ('the Withdrawal Act') and the Charter of Fundamental Rights ('CFR'). In summary:

(i) Legal or natural persons can rely directly on the provisions of the WA (including the WF) when the conditions for direct effect under European Union law are met;

(ii) The provisions of the WF include article 2, by which the UK shall ensure no diminution of rights, safeguards or equality of opportunity, as set out in the RSE section of the B-GFA;

(iii) The RSE section includes the "civil rights…of everyone in community" which encompasses, inter alia, the rights of those seeking asylum;

(iv) By virtue of articles 2(a) and 4 of the WA and section 7A of the Withdrawal Act, the CFR continues to have effect in Northern Ireland.

[11] The Court of Appeal in *Re SPUC Pro Life Limited's Application* [2023] NICA 35 concluded that in order to establish a breach of article 2 of the WF, it is necessary to show:

(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged;

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020;

(iii) That Northern Ireland law was underpinned by EU law;

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU;

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU. (para [54])

The Immigration Rules and LOTR

[12] Section 3(2) of the Immigration Act 1971 ('the 1971 Act') imposes an obligation on the SSHD to lay before Parliament statements of the rules as to the practice to be followed in the administration of that Act regulating the entry of persons into the United Kingdom.

[13] The Immigration Rules are neither primary nor subordinate legislation but in the words of McCloskey LJ in *Abdul Said v SSHD* [2023] NICA 49 "a unique hybrid." Their nature was analysed by the Supreme Court in *Ali (Iraq) v SSHD* [2016] UKSC 60:

> "…they give effect to the policy of the Secretary of State, who has been entrusted by Parliament with responsibility for immigration control and is accountable to Parliament for her discharge of her responsibilities in this vital area. Furthermore, they are laid before Parliament, may be the subject of debate, and can be disapproved under the negative resolution procedure. They are therefore made in the exercise of powers which have been democratically conferred, and are subject, albeit to a limited extent, to democratic procedures of accountability." (para [17])

[14] The Immigration Rules made under this provision are designed to deal with the vast majority of cases, including those where claims are made relating to article 8 ECHR rights. There remain, however, a category of cases in which leave to enter and/or remain in the United Kingdom is granted despite the fact that the conditions set out in the Immigration Rules have not been met. This is referred to as "leave outside the rules" or LOTR.

[15] In certain recognised LOTR cases, the Home Office has published guidance on the exercise of the discretion, referred to as an "existing published concession." The intention of such guidance is to ensure that LOTR discretion is applied consistently and fairly.

[16] Section 3(1) of the 1971 Act provides:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen—
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—
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> (i) a condition restricting his [work] or occupation in the United Kingdom;
>
> (ia) a condition restricting his studies in the United Kingdom;

(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;

(iii) a condition requiring him to register with the police;

(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

(v) a condition about residence."

[17] In *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32 the Supreme Court analysed the legal position:

> "The Secretary of State is given a wide discretion under sections 3, 3A, 3B and 3C to control the grant and refusal of leave to enter or to remain: see paras 4 to 6 above. The language of these provisions, especially section 3(1)(b) and (c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules." (para [44])

[18] In *Hesham Ali v SSHD* [2016] UKSC 60 the Supreme Court confirmed, in orthodox public law terms, that this discretion must be exercised in accordance with any policy or guidance issued by Parliament and that decision makers must not shut their ears to claims which fall outside adopted policy. Lord Reed stated:

> "The Secretary of State has a wide residual power under the 1971 Act to grant leave to enter or remain in the UK even where leave would not be given under the Rules: *Munir*, para 44. The manner in which that power should be exercised is not, by its very nature, governed by the Rules. There is a duty to exercise the power where a failure to do so is incompatible with Convention rights, by virtue of section 6 of the Human Rights Act 1998." (para [18])

[19] The exercise of the LOTR discretion was considered by the Court of Appeal in England & Wales in *R (Sayaniya) v Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 85. Beatson LJ observed:

> "The sole issue in this appeal concerns the applicability of the public law principle that the exercise of discretion in a particular case should not be fettered by over-reaching policies and mandatory rules in the Immigration Rules …"

[20] The learned Lord Justice found that the non-fettering principle does not apply to the Immigration Rules as it does in other contexts since the 1971 Act expressly obliges and empowers the making of these Rules. The challenge to the particular provision of the Rules on the ground that by reason of its mandatory terms it infringed the public law doctrine of fettering discretion was rejected.

[21] In *R (Beharry) v Secretary of State for the Home Department* [2016] EWCA Civ 702, the court considered the circumstances in which the LOTR discretion may be triggered. It was held that, in general terms, the SSHD is under no duty to consider the exercise of such discretion in the absence of a specific request.

> "Outside cases where there has been a request there may exist, at least in theory, cases where the facts are so striking that it would be irrational in a public law sense not to consider the grant of leave outside the Rules or at least seek clarification from the applicant whether he was seeking such leave. Mr Ullah, who had the benefit of professional assistance, sought leave to remain as a Tier 4 (General) Student. He made no application for leave outside the rules. There is nothing about his circumstances that could engage a public law duty to consider the exercise of the discretion." (para [38])

The procedure

[22] Section 50 of the Immigration, Asylum and Nationality Act 2006 permits the SSHD to specify particular procedures to be followed in the pursuit of an immigration application, including the completion of forms, payment of fees and provision of information.

[23] The evidence filed on behalf of the respondents reveals that, in any case where a person is seeking entry clearance to the UK, a valid application is required. This generally involves the completion of an online Visa Application Form (VAF), together with the payment of any relevant fees and charges and the enrolment of biometrics.

[24] A grant of LOTR requires a VAF to be completed. The relevant guidance document states:

> "Applicants overseas must apply on the application form for the route which most closely matches their

> circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route."

[25] Once a VAF has been submitted, biometrics in the form of a facial image and up to ten finger scans are requested. This process is generally completed at a VAC. An application can be made to waive or defer the biometrics requirement in exceptional circumstances, including where the journey to a VAC would be unsafe.

[26] The respondents suggest that the individuals concerned could pursue one of two application routes provided for in the Immigration Rules:

(i) Appendix FM, albeit this is limited to spouses, partners and children; or

(ii) Adult Dependent Relative ('ADR') which extends to parents, grandparents, children and siblings. This requires that the family member concerned requires long term personal care to carry out everyday tasks, such care not being available in their country of residence.

[27] The applicant's solicitor stresses that there may be considerable difficulties in establishing any entitlement under either of these routes. The relevant VAFs do, however, contain free text boxes where the applicant can make any submissions or representations which may allow for consideration of LOTR.

[28] The respondents recognise the straightened position the applicant's family members find themselves in. In the event that they are unable to complete a VAF, the possibility exists for the applicant to complete the forms on their behalf. The guidance states:

> "You can apply for a visa for someone else. For example, a relative overseas who does not have access to a computer…"

[29] Immigration applications, including those for LOTR, require the payment of fees. The cost of an application to join a family member in the UK is between £1846 as a dependent family member and £3250 for an adult dependent relative. In the former case, an Immigration Health Surcharge of £1035 per applicant per year is also payable. On the analysis of the applicant's solicitor, the fees for all family members to apply could cost some £40,000 to £50,000, well beyond the means of the applicant and her family.

[30] Fee waiver is available in circumstances where the applicant cannot afford the fee, is destitute or at risk of destitution or where there are welfare concerns for a child

of a parent in receipt of low income. No fee waiver application has been made in this case.

[31] In *HR v SSHD* [2024] EWHC 786 (Admin) addresses the proper analytical approach to requests for LOTR. In that case the solicitors for the claimants, three Afghan sisters who were evacuated to the UK in August 2021, emailed the Home Office requesting a grant of LOTR for family members remaining in Afghanistan. When it received a PAP letter challenging the lack of response it pointed out that no application for entry clearance or visa had been made. This response was challenged as being unreasonable and unlawful.

[32] Sir Peter Lane (former President of the Immigration and Asylum Chamber of the Upper Tribunal) affirmed the need to comply with the application form processes, even in circumstances where there was widespread and serious civil disturbance. This requirement was stated to ensure the effectiveness of the immigration system, fairness and the maintenance of a level playing field:

> "66. The starting point is that the case law mentioned in paragraphs 31 to 37 above provides powerful support for the defendant's case. Even in the challenging context of Afghanistan, following the Taliban takeover, the courts have recognised the importance of requiring applications to be made using the online forms: see esp. S at paragraph 130 and S and AZ at paragraph 14. The witness statement of Sally Weston (Head of the Home Office's Simplification and Systems Unit in the Migration and Borders Group), originally filed in connection with another case but provided also in these proceedings, explains that the requirement is not only a matter of good and efficient administration but is imposed "with a view to applicants being treated fairly." The visa application process "involves an integrated system which aims to be efficient and where possible automated to make consideration of applications manageable and which easily enables identification of the type of application for the appropriate Home Office officials to consider." Mr Tabori also points out that the applications process prevents spurious applications being submitted by the same person using multiple identities.
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> 67. These are not considerations to be brushed aside, even where the facts of the individual case are apparently demanding of sympathy. Requiring the process to be followed creates a "level playing field" for all applicants, many of whom might possess characteristics equally demanding of sympathy. It furthermore minimises the

> potential for error. There is also the important point that the LOTR policy involves consideration not only of whether a grant of leave is required in order to avoid a breach of article 8 of the ECHR (and so a breach of section 6 of the 1998 Act) but also whether there are compelling compassionate factors which mean that a refusal of entry clearance "would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of ECHR Article 8…"

[33] The learned judge did not accept the proposition that the evidence established that the alternative remedy was ineffective:

> "…the evidence of Ms Bantleman and Mr Bell does not disclose that the LOTR route is not a suitable alternative one. The response to the call for evidence was so small as to preclude any meaningful conclusions. The fact that some LOTR applications were unsuccessful underscores the point that grants are expressly acknowledged by the defendant in the LOTR policy document to be "rare." It does not mean that applications by the interested parties will be doomed to failure or so unlikely as to make that process an inadequate remedy. The evidence regarding fee waiver does not show a systemic degree of delay on the part of the defendant's officials. The points made by Mr Bell about difficulties the father would encounter in proving his income in Afghanistan are ones that can be made in the application…" (para [72])

[34] The applicant in this case therefore has a route available to her which entails the completion of VAFs and applications for any requisite waivers. None of this may be straightforward but nonetheless it represents a viable and available route to achieve the desired outcome.

The Charter of Fundamental Rights

[35] The CFR rights relied upon provide as follows:

(i) Article 1 - human dignity:

> "Human dignity is inviolable. It must be respected and protected."

(ii) Article 2 - right to life:

> "1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed."

(iii) Article 3 - right to the integrity of the person:

"1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings."

(iv) Article 4 - prohibition of torture and inhuman or degrading treatment or punishment:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

(v) Article 6 - right to liberty and security

"Everyone has the right to liberty and security of person."

(vi) Article 7 - respect for private and family life

"Everyone has the right to respect for his or her private and family life, home and communications."

[36] The applicant does not particularise how it is said, within the evidential framework of this application for judicial review, that each of these rights have been breached.

[37] Moreover, Article 51 of the CFR provides that its provisions only apply when implementing EU law:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

[38] In C-609/17 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* [2020] 2 CMLR 11, the CJEU held:

> "Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the member states with regard thereto, the national rule enacted by a member state as regard that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in light of the provisions of the Charter: *Hernández*, para 35; *Miravitlles Ciurana v Contimark SA* (Case C-243/16) EU:C:2017:969, para 34 and *Consorzio Italian Management v Rete Ferroviaria Italiana SpA* (Case C-152/17) EU:C:2018:264, paras 34 and 35" (paragraph 53).

[39] The applicant has not identified any anchor provision of EU law upon which she seeks to rely in this application. The CFR itself cannot be the source of the obligation relied upon since it is only applies when EU law is itself being implemented. This contrasts with the position in *Re NIHRC & JR295* and in *Re Angesom* [2023] NIKB 102 where the CFR was invoked in support of rights under EU law contained in the relevant Directives and Regulations.

[40] In *CG v Department for Communities* (Case C709/20, CJEU 15 July 2021) and in *SSWP v AT* [2023] EWCA Civ 1307, the anchoring rights relied upon were found in the TFEU itself and the Citizens Rights Directive. Thus, in *CG*, the CJEU said:

> "In particular, it is for the host Member State, in accordance with Article 1 of the Charter, to ensure that a Union citizen who has made use of his or her freedom to move and to reside within the territory of the Member States, who has a right of residence on the basis of national law, and who is in a vulnerable situation, may nevertheless live in dignified conditions." (para [89])

[41] CFR rights can continue to be relied upon when the matter falls within the scope of EU law. As Green LJ made clear in *AT* the CFR:

> "Charter rights exist as secondary or supplementary rights which apply only where some other express right has first been established into whose scope the Charter then applies" (para [84])

[42] The WA does not elevate the CFR rights to any enhanced status. An anchoring right is still required albeit that right may be found in the WA itself, provided the conditions for direct effect are met, such as the right of residence in Article 13.

[43] Absent any such EU law right being identified and relied upon, the claim based on freestanding CFR rights must fail.

[44] Even if such a right had been established, there is no evidence of the diminution of such a right by reason of the UK's exit from the EU.

[45] Prior to the UK's departure from the EU, a person whose right to family life under article 8 ECHR was affected could have sought to invoke the procedure under Appendix FM or the ADR Appendix to the Immigration Rules in order to secure the entry of loved ones into the UK. Where the circumstances relied upon do not fall within the ambit of article 8, then LOTR could be sought. These rights and routes remain in place after the exit from the EU. There is therefore no diminution of rights in this particular case.

[46] Equally, the political decision not to implement a Sudanese reunification scheme akin to that developed in relation to Ukraine cannot be said to have any connection to the UK's exit from the EU. There has been no diminution in right in this respect and even if there were, it could not have occurred as a result of the withdrawal from the EU.

[47] The applicant's case grounded on breach of Article 2(1) of the WF does not therefore stand up to analysis.

Fettering of discretion

[48] The applicant alleges that the respondent has unlawfully fettered the discretion under section 3(2) of the 1971 Act by failing to establish a Sudanese scheme equivalent to the Ukrainian scheme.

[49] It must be recognised that the creation of such a scheme is a decision made on the macro-political plain. It is well-established that the court's supervisory jurisdiction in such territory will be exercised with considerable caution. It will be a matter for the government of the day to determine the appropriate reaction to crises and conflicts which occur throughout the world. Such response may include the creation of bespoke routes to permit entry into the UK. This is by no means the only possible course of action to meet a given humanitarian crisis.

[50] The applicant also submits that the communication of 11 January 2024, whereby the respondents stated it was "not possible" to consider a grant of LOTR was an unlawful fetter on discretion. There can be no doubt that the SSHD has a discretion, in any case, to make a decision which is outside the Immigration Rules. As I stressed in *Re Sweeney's Application* [2024] NIKB 5, a decision maker entrusted with such a discretion cannot disable himself from exercising it by the adoption of a fixed rule of policy. He may, of course, adopt a policy which indicates that all types of cases will be dealt with in a particular way, in the interests of fairness and consistency, but he must always keep his mind open as to the possibility of an exceptional approach.

[51] In their evidence, the respondents fully acknowledge the existence of the discretion to act outside the Rules and refer to the existing guidance for decision makers in this regard. The guidance states that a grant of LOTR should be "rare" and the discretion "used sparingly" but nonetheless it exists. In this context, the reference to such a grant not being possible in the instant case was inaccurate. I am, however, not satisfied, in light of all the evidence, that there was any unlawful fetter on discretion. Fundamentally, the respondents were entitled to require that a request be made, in the appropriate form, before any exercise of the undeniable discretion was called for.

Conclusion

[52] For all these reasons, none of the grounds for judicial review have been made out and the application must be dismissed.