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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN:

SHIMA ESMAIL

Appellant:

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

John Larkin KC with Darcy Rollins (instructed by Phoenix Law) for the Appellant
Tony McGleenan KC and Laura Curran (instructed by the Crown Solicitor's Office) for the Respondent

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Before: Keegan LCJ, McCloskey LJ and Kinney J

McCLOSKEY LJ (*delivering the judgment of the court*)

The overarching legal principle

[1] The common law system which prevails in the United Kingdom is seasoned with memorable judicial pronouncements from time to time. These not infrequently occur in unglamorous and unpromising contexts. This may fairly be said of the judicially devised legal principle which lies at the heart of this appeal.

[2] Pursuant to the Industrial Development Act 1966 the Minister of Technology was empowered to make financial grants to certain industrial undertakings if the statutory conditions were satisfied. The business of British Oxygen Company Limited was the production of certain types of gas and kindred substances which were delivered to customers in tanks, cannisters or cylinders. The statutory grants were available to support approved capital expenditure in the provision of certain types of

new machinery or plant satisfying the relevant conditions and requirements. The dispute centred on the aforementioned delivery tanks and hydrogen cylinders. The cylinders were purchased by the company at a cost of around £20 and, during a three year period, the expenditure exceeded £4 million. The Minister's refusal to make grants for these items was the stimulus for litigation: *British Oxygen Company Limited v Minister of Technology* [1971] AC 610.

[3] What was the particular issue? Per Lord Reid, at 623f/g:

> "The appellants complain that the respondent has made a rule not to pay grant on any item of plant costing less than £25, at least unless it is used in conjunction with other items."

(In passing, this was not the only contentious issue). As the same passage highlights, the magical word in the statute was the discretionary "may." Furthermore, the *Padfield* principle was engaged, viz the Minister was obliged to exercise its discretion in accordance with the policy and objects of the statute (*Padfield v Minister of Agriculture* [1968] AC 997). Lord Reid considered that the statute contained scant guidance on the circumstances in which the Minister should exercise the statutory discretion. While His Lordship did not doubt the breadth of this discretion, it was subject to the important qualifications that (a) it "... must not be exercised in bad faith …" and (b) "... must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion": 624f/g. By this route one arrives at the following memorable passage, at 625c/f:

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' …. I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. **What the authority must not do is to refuse to listen at all.**"
> [Emphasis added.]

[4] Three members of the judicial committee concurred with Lord Reid. The fifth, Viscount Dilhorne, while concurring in the outcome did not espouse precisely the same reasoning. The essentially advisory (or declaratory) nature of both judgments is explicable by the character of the proceedings, which involved an application by the company for declarations of entitlement to statutory grant payments referable to specified items of plant and equipment.

[5] Over 50 years later the calibre and potency of the British Oxygen principle remain undiminished. It has featured time out of number in the law reports, in all

manner of contexts. Its status as enshrining one of the core dogmas of modern public law is unquestioned.

The factual matrix

[6] Shima Esmail (the "appellant") is a national of Sudan who has been lawfully resident in the United Kingdom as a naturalised British national for several years. She resides and is settled in Belfast.

[7] There is a substantial quantity of documentary evidence, supplemented by affidavit evidence, before the court. This is the product of evident industry on the part of the appellant's solicitor. As the submissions of Mr McGleenan KC on behalf of the Secretary of State have skilfully demonstrated, it cannot be said that the evidential matrix presented to the Secretary of State and inducing the impugned decision was either complete or free of obscurity. We shall explain the significance of this infra. We shall decide this appeal on the basis of the evidence which is both material and either uncontested or incontestable. This judgment should be considered in this vein.

[8] We return to the appellant's family circumstances. Initially, the appellant's family members who continued to reside in Sudan were her parents, her brother-in-law, her sister and her sister's five children (whom we shall describe as the "claimants"). This has evolved, this court being informed on the hearing of the appeal that the appellant's brother–in-law now resides in Northern Ireland. The appellant's aspiration was that reunification with all of these family members should take place in the United Kingdom. The concrete measure requested of the Secretary of State was the provision of entry visas which would be transmitted to the distant claimants for the purpose of authorising their lawful entry to the United Kingdom. Her request to this effect was refused by the Secretary of State. Her ensuing challenge by judicial review was dismissed by the High Court. The appellant's appeal to this court follows.

Statutory and policy superstructure

[9] The relevant matrix consists of a blend of certain provisions of primary legislation, subordinate legislation and related measures of policy/guidance. For clarity, no specific provision of the Immigration Rules arises for consideration. Section 3(1) of the Immigration Act 1971, which may be viewed as the cornerstone of the extensive and complex immigration statutory regime prevailing in this jurisdiction, 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—

(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].]"

Section 3(1)(b) is highlighted: herein reposes the Secretary of State's overarching discretion. Section 3(2) provides, so far as material:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances…"

[10] There is a further provision of primary legislation, essentially procedural in character, to be considered. This is section 50 of the Immigration, Asylum and Nationality Act 2006, which provides so far as material:

"**50 Procedure**

(1) Rules under section 3 of the Immigration Act 1971 (c 77)—

(a) may require a specified procedure to be followed in making or pursuing an application or claim (whether or not under those rules or any other enactment),

(b) may, in particular, require the use of a specified form and the submission of specified information or documents,

(c) may make provision about the manner in which a fee is to be paid, and

(d) may make provision for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c).

(2) In respect of any application or claim in connection with immigration (whether or not under the rules referred to in subsection (1) or any other enactment) the Secretary of State—

(a) may require the use of a specified form,

(b) may require the submission of specified information or documents, and

(c) may direct the manner in which a fee is to be paid;

and the rules referred to in subsection (1) may provide for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c)."

[11] There is an instructive review of the history of fee charging for applications in connection with immigration or nationality in Macdonald's Immigration Law and Practice (9th ed) at para 3.26 ff. This subject is now regulated by sections 50 and 51 and certain corresponding subordinate measure made thereunder which have undergone periodic development. In the context of this appeal the most important provision is regulation 11 of the Immigration and Nationality (Fees) Regulations 2014. This states unequivocally that where the Regulations specify a fee which must accompany an application the result of a failure to provide the correct fee is that the application is not validly made:

> "**Consequences of failing to pay the specified fee**
>
> 11. Where these Regulations specify a fee which must accompany an application for the purposes of the 2011 Order, the application is not validly made unless it is accompanied by the specified fee."

[12] The further component of the matrix under scrutiny comprises certain measures of related policy/guidance promulgated by the Secretary of State. In the context of these proceedings, three of these are especially significant. The first is "How to Apply for a Visa to come to the UK." This policy specifies, in generally non-imperative language, that a visa application should be made online, should request the type of visa appropriate to the applicant and requires the payment of a fee.

[13] The second is entitled "Unable to Travel to a Visa Application Centre to enrol biometrics (overseas applications)." It expresses the central purpose of biometric enrolment in these terms:

> "The purpose of the biometric enrolment is to record an individual's biometric information and seek to verify their claimed identity and undertake background checks on them ….
>
> Biometrics, in the form of fingerprints and facial images, underpin the current UK immigration system to support identity insurance and suitability checks on foreign nationals who are subject to immigration control. They enable comprehensive checks to be made against immigration and criminality records to identify those who pose a threat to our national security, public safety, immigration controls or are likely to breach our laws if they are allowed to come to the UK."

In a later passage, under the rubric "Individuals must follow the Online Application Process", it is stated:

> "Decision makers will not consider a request to predetermine an application or excuse individuals from the requirement to attend a VAC to enrol their biometric information if the appropriate online application for the type of permission being sought has not been completed, along with any relevant fees for the application properly and correctly paid. Decision makers will <u>not</u> be able to consider requests that are submitted outside of the online process …

> If individuals decide to proceed to make an application for entry clearance even though they consider it is currently unsafe to travel to a VAC, they must complete the appropriate online application form for the type of permission being sought and pay the correct level of fee for the application …
>
> In most circumstances, decision makers must not consider any requests individuals make to either predetermine their application or excuse them from the requirement to attend a VAC to enrol their biometric information unless they have applied using the correct route for their circumstances and the correct application form for that route …
>
> Applications made on the wrong form or where the wrong fee is paid may be liable to be treated as invalid and rejected without consideration."

Notably, the flexible language of "normally … in most cases … unless … for example … in most circumstances ... [and] … would not normally …" features in various parts of this policy.

[14] The third salient instrument of policy/guidance is "Leave Outside the Immigration Rules" (from which the acronym "LOTR" derives). In the context of this appeal the following passage is significant:

> "Applying overseas for LOTR …
>
> Applicants overseas must apply on the application form for the route which most closely matches these circumstances and pay the relevant fees and charges."

The exercise of juxtaposing this provision with other measures of immigration policy/guidance (see next para), with the superimposition of public law principle insofar as necessary, confirms the scope for discretion notwithstanding the superficially inflexible "must."

[15] Next, there are three separate measures of Home Office policy/guidance on the subject of "fee waiver." In the context of this appeal the dense detail of these measures do not fall to be considered. The reason for this is the unequivocal acceptance on the part of the Secretary of State (infra) that if the request from the appellant's solicitors giving rise to the impugned decision had been made via the appropriate form of application it would have been open to the appellant to simultaneously apply for waiver of the applicable fee. In passing, in any case where this dispensation is either not available or refused a breach of section 6 of the Human Rights Act 1998 can

potentially occur: see *R (Oman) v Secretary of State for the Home Department* [2012] EWHC 448 (Admin).

The impugned decision

[16] The impugned decision of the Secretary of State, unusually (though not without precedent), unfolded during the currency of this litigation, giving rise to an amended pleading. These proceedings having been commenced in July 2023 and prior to the grant of leave to apply for judicial review, the material sequence of events by letter written by the appellant's solicitors dated 8 November 2023 to the Crown Solicitor (the Secretary of State's solicitor) the following request was formulated:

> "… we write on behalf of the applicant to make the following representations for visas for the applicant's family members outside the Immigration Rules …
>
> You have had sight of the leave bundle for some time and you will clearly note the plight of the applicant's family …. the dire situation for the applicant's family in Sudan ….
>
> We are respectfully asking you for a grant of leave outside the Rules for the applicant's family members …..
>
> We make this application on compassionate and compelling grounds as per your policy dated 29 August 2023 …
>
> [Having rehearsed certain evidence]
>
> We therefore are asking for a tailor-made individualised solution within the discretion available to you, whereby visas are issued in London and conveyed to the applicant's family in Sudan, by whatever practical means …"

The "policy" mentioned was footnoted in the body of the letter by the mechanism of a hyperlink. It is the Secretary of State's Leave Outside The Immigration Rules ("LOTR") policy guidance.

[17] The Secretary of State's solicitor responded by letter dated 11 January 2024:

> "I refer to your letter …… which asks the Home Office to consider granting 'leave outside the rules' (LOTR) …. in respect of your client's family members, pursuant to the respondent's policy 'Leave Outside the Immigration Rules' 23 August 2023 …

> Our office has now had the opportunity to take instructions. In short, the request you have made **is not possible**.
>
> You will note that the guidance referred to in your letter says explicitly that applications seeking LOTR **cannot** include family and private life, medical, asylum or protection based claims …
>
> You will also be aware from prior cases that asylum and international protection **cannot** be applied for from outside the UK .
>
> Furthermore, applications for LOTR **are not** made by letter. The guidance Leave Outside The Immigration Rules 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.'
>
> It is however still open to apply for abroad for an entry visa." ("for", in the final sentence, clearly is to be read as "from".) [emphasis supplied]

The evolving judicial review challenge

[18] In the High Court, a "Position Paper" was provided by the Secretary of State's counsel. This addressed seriatim each of the appellant's grounds of challenge. Under the rubric "Fettering Discretion" it was stated:

> "The applicant's pleadings allege the first proposed respondent has 'fettered her discretion under section 3(2) of the Immigration Act 1971' by not providing a Sudanese scheme equivalent to the Ukrainian scheme ….
>
> Section 3(2) (Immigration Act 1971) requires the SSHD to set out Immigration rules governing how the immigration system in the UK is to be administered. If the rules change she is required to lay before parliament a set of amended rules …
>
> Section 3(2) creates an obligation on the SSHD, not a discretion. She has not unlawfully fettered her discretion by not introducing a bespoke scheme for Sudanese equivalent to that in place for Ukrainians."

Next, following a contested inter-partes hearing, the High Court ordered that leave to apply for judicial review be granted.

[19] At the time of the last two noted events the prevailing incarnation of the Order 53 Statement was an amended one, which contained the following amended pleading:

> "The applicant challenges the decision communicated by letter dated 11 January 2024 …. that it was 'not possible' to consider granting leave outside the Immigration Rules … to the applicant's family."

Part of the pleading on the irrationality ground was in these terms:

> "The failure of the Home Secretary, against a compelling background of danger and suffering in Sudan, to apply the procedural and substantive flexibility available to him in case of the applicant's family members, most notably in the refusal to consider LOTR, is unreasonable in its defiance of accepted moral standards in the community."

Accompanying the "Fettering of Discretion" ground, there was the following pleading:

> "(a) The [Home Secretary] has fettered her* discretion under section 3(2) of the Immigration Act 1971 by not providing a lawful safe and legal family reunification scheme akin to the one set up by the government for Ukrainian nationals fleeing war in March 2022.
>
> (b) The Home Secretary has fettered his* discretion or not directed himself*s properly as to the extent of his discretion by considering that it was not possible to consider the applicant's request that her family members be granted LOTR or that it was not possible to grant LOTR.
>
> (c) The Home Secretary failed to consider that part of the applicant's request that simply sought leave to enter the United Kingdom."
>
> [* as pleaded]

[20] The organic nature of the appellant's challenge is unmistakable. At first instance, as reflected in the judgment of Humphreys J, the centrepiece of her case (a) had as its target an omission on the part of the Secretary of State to establish for

Sudanese nationals generally a family reunification scheme comparable to the Ukrainian model which (b) stimulated a challenge constructed on the grounds of irrationality, breach of Article 2 of the Windsor Framework, fetter of discretion and disregard of a material consideration.

[21] The effect of the exchange of correspondence outlined in paras [9]–[10] above was to introduce into the equation a new additional decision on the part of the Secretary of State which was subsequently added to the appellant's challenge by amendment of the Order 53 pleading. We consider it apparent from our review (above) of the materials belonging to the first instance phase and the judgment of Humphreys J that at the stage of the substantive hearing the new impugned decision was a subsidiary feature of the appellant's challenge.

[22] By that stage, a further material development had intervened. Following the grant of leave to apply for judicial review, an affidavit was sworn on behalf of the Secretary of State. Most importantly, this affidavit acknowledges the several discretions, each potentially material as regards to the claimants, available to the Secretary of State at the time when the decision contained in the Crown Solicitor's letter was communicated.

[23] At para [29] of the affidavit a twofold discretion (a) to waive or relax the normal application procedure and (b) to grant leave to enter/remain outside the framework of the Immigration Rules is unequivocally acknowledged:

> "There is residual discretion to grant leave outside the Rules when the normal criteria contained within the Immigration Rules have not been met, but the application process must still be adhered to and an application must still be submitted. Failure to comply with a requirement to complete a valid application, submit specified information or documents or pay a fee, where such rules are required, may result in the application being treated as invalid, without any further substantive consideration of its merits. This is stated in the guidance and has a statutory footing in the 2006 Act. It is not the case that the Home Office will never consider an application for LOTR where the procedural requirements have not been fulfilled, but it is exceptional."

At para 33 the deponent avers:

> "Neither the applicant nor her family have submitted any VAF*. The Crown Solicitor's Office letter dated 11 January 2024, which responded to the applicant's solicitor's letter requesting leave outside the Rules for the family, directed

> the applicant to the above guidance and the hyperlink to the guidance on application forms."
> [*denotes 'Visa Application Form']

In the next ensuing paragraph, the deponent adds that applications for leave (to enter/remain in the UK) outside the Rules require the payment of a fee (section 50, 2006 Act - infra). A fee waiver is available for those making a family application and in certain other instances, for example destitution.

[24] Standing back and summarising, each of the following discretions was potentially exercisable by the Secretary of State at the time when the application enshrined in the letter dated 8 November 2023 from the appellant's solicitors was made:

(i) A discretion to waive the requirement to make the application using the appropriate pro-forma.

(ii) A discretion waiving the requirement to provide biometrics as part of the entry visa application.

(iii) A discretion waiving the requirement to make the entry visa application at a particular place.

(iv) A discretion waiving the requirement to pay the appropriate fees in making the application.

(v) A discretion to permit the family unification sought by the appellant by the mechanism of the provision of multiple entry visa authorisations to the relatives concerned outside the regime of the Immigration Rules (ie LOTR).

[25] This court considers that the exercise of all of these discretions was potentially triggered by the circumstances of the claimants at the time when the appellant's solicitors intimated the LOTR application contained in the aforementioned letter. Logically and irresistibly, by the route thus traced one comes to the crux of this appeal, which entails addressing and determining two indelibly inter-related questions. First, what was the request/application addressed on behalf of the appellant's family members to the Secretary of State? Second, what was the response? It is necessary to elaborate briefly on the concept of 'LOTR' before confronting these questions squarely.

"Outside the immigration rules"

[26] The concept of "outside the Immigration Rules" ('LOTR') is firmly embedded in the lexicon of immigration law and practice in the United Kingdom. It is properly understood by considering, firstly, those provisions of the 1971 Act highlighted above. Properly analysed, these provide the genesis of the discretion concerned. It is

developed in subsidiary instruments, in particular the Secretary of State's published policies and guidance.

[27] The juridical status of the Immigration Rules was addressed in the decision of this court in *Said v Secretary of State for the Home Department* [2023] NICA 49, at paras [23]–[32]. These passages inter alia draw together the guidance to be derived from the jurisprudence of the House of Lords and the United Kingdom Supreme Court. At paras [29]–[30] and [32]ff of *Said* the judgment addresses the concept of "Outside the Immigration rules." It is unnecessary to reproduce or re-examine anything in these passages. In the present context it suffices, rather, to observe that Lord Reid's memorable contribution to British public law has lost none of its virility. This is confirmed by the unequivocal statement of principle of the UK Supreme Court in *R (Alvi) v Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants intervening)* [2012] UKSC 33, at para [31]:

> "It is still open to the Secretary of State in her discretion to grant leave to enter or remain to an alien whose application does not meet the requirements of the Immigration rules. It is for her to determine the practice to be followed in the administration of the Act."

This pithy passage expresses the overlay of public law superimposed upon the legal structure formed predominantly by section 3 of the 1971 Act and the Immigration Rules made thereunder. But is this the legal principle which governs the determination of this appeal? We think not, for the reasons to be explained.

[28] As the jurisprudence has evolved, the English Court of Appeal has endorsed the principle that there is no "own motion" (my label) duty on the Secretary of State to consider whether to act outwith the framework of the Immigration rules in any given case. Rather, the British Oxygen non-fetter of discretion principle is engaged only in those instances where a specific request to this effect is made: see *R(AB) v Secretary of State for the Home Department* [2018] EWCA Civ 383 at para [48], considered in para [39] of Said. In *Said* this court (differently constituted) expressed no view on the correctness of *AB*. In the present case, while no argument on this issue was canvassed we shall address it further infra.

The central issue

[29] While the appellant's challenge was initially of more expansive scope, upon appeal to this court it has been refined in the following way. In a sentence, it is contended that the impugned decision is vitiated by an unlawful fetter of the discretion available to the Secretary of State. At first instance, Humphreys J rejected this contention in these terms, at para [49]:

> "[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."

[30] The judge recognised, and rejected, the second element of this ground in the following terms at paras [50]–[51]:

> "[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."

[31] The core proposition advanced by Mr Larkin KC and Ms Rollins, of counsel, on behalf of the appellant has three interlocking components: the Secretary of State has a discretion regarding the form in which applications for leave to enter/remain in the United Kingdom outside the Immigration Rules may be made; the impugned decision

fails to recognise the existence of this discretion; and an unlawful fetter of the discretion, vitiating the impugned decision, materialised in consequence.

[32] The gist of the riposte on behalf of the Secretary of State is set out clearly in paras [4]–[6] of the skeleton argument of Mr McGleenan KC and Ms Curran of counsel:

(i) The applicant sought LOTR on behalf of her family in Sudan by asking her solicitor to send a letter to the Home Office. The guidance states that overseas applicants requesting LOTR, or those applying on their behalf, should select the closest online application form and complete it, along with an explanation of what they are seeking. The applicant, who resides in the UK, could have done that. She could also have requested a waiver of any applicable fee or requirement to enrol biometrics. She failed to do either. Humphreys J concluded that in those circumstances the respondent was entitled to expect her to perform the relatively simple process of applying online in the normal way.

(ii) A letter was sent during the currency of the proceedings, on behalf of the Home Office, which said that LOTR could not be claimed by letter. That letter post-dated the impugned decision. The Home Office, on affidavit, acknowledged that part of the letter to be incorrect. The judge noted this and found that, in the circumstances of **this** case, the respondent was entitled to require the normal process to be followed in terms of presenting the application before determining whether she would thereafter take the exceptional step of granting LOTR.

(iii) There was no error of law in the judge's decision, nor has the appellant identified one. The Home Office acknowledged that it had a discretion to depart from the normal application procedure and it had a discretion thereafter to depart from the Immigration Rules and grant LOTR, albeit instances in which those discretions would be exercised would be rare: see §29 of the affidavit of Janet Gordon-Smith. In respect of the former discretion, there was nothing in the factual circumstances of this case which made it unlawful to require the normal application procedure to be followed. The applicant herself was perfectly capable of applying on behalf of her family.

The battle lines are drawn accordingly.

Our analysis and conclusions

[33] The system of immigration control in the United Kingdom has multiple ingredients. Fundamentally it is a mix of primary legislation, secondary legislation, Immigration Rules and related measures of policy and guidance of the Secretary of State. The cornerstone is the ancient right of every state under customary international law to regulate its borders. It has frequently been stated that one of the

overarching purposes of the UK system is the maintenance of firm and fair immigration control. Lord Hope observed in *Alvi* at para [29] that any system of immigration must be "administratively workable", adding at para [42]:

> "The emphasis now is on certainty in place of discretion, on detail rather than broad guidance. There is much in this change of approach that is to be commended."

In Article 8(2) ECHR terms, the UK system pursues the legitimate aim of protecting the economic interests of the country (*Razgar v SSHD* [2004] 2 AC 368, per Baroness Hale).

[34] In *Huang v SSHD* [2007] UKHL 11 Lord Bingham stated at para [16]:

> "There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory…"

The dominance of the requirement of formal, structured and orderly arrangements has long been recognised. It has featured repeatedly in the reported cases. A single illustration suffices. The Secretary of State's witness statement in *R (MA) v SSHD and Others* [CO/1876/2022] was later invoked with approval by the High Court in HR (supra) at paras [66]–[67]:

> "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.
>
> … 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…"

No aspect of this dominant and long-established philosophy is contested in the case before us.

[35] The precise terms of what the appellant's solicitors requested the Secretary of State to do must be analysed carefully. Fundamentally, there is an indelible nexus between the request made and the impugned decision thereby generated. The forensic exercise which this requires of this court is the key to determining this appeal.

[36] The exercise of evaluating these letters engages certain familiar principles. In particular, the letters must be read in full. Second, they must be considered in their full context. Furthermore, they are not to be construed as a statute or legal instrument. Absent any reason for doing otherwise, the words used will be accorded their natural and ordinary meaning.

[37] The first of the two letters, that dated 8 November 2023 from the applicant's solicitors, unambiguously requested that the appellant's family members be granted visas permitting them to enter the United Kingdom "outside the Immigration rules." This was reiterated in the exhortation for "a tailor-made individualised solution within the discretion available to you …" Furthermore, the Home Office LOTR policy containing the dispensation pursued was footnoted and specifically mentioned. Crucially, this was the only request, or application, made on behalf of the appellant's family members.

[38] In the Crown Solicitor's letter of response on behalf of the Secretary of State the correspondent, correctly and without difficulty, identified the nature of the request which had been made. There are four particular features of this letter. First, it is clearly based on instructions from the Home Office. Second, it betrays no

misunderstanding of any kind. Third, it has unmistakable elements of formality and solemnity, given that it was written by a solicitor in a litigation context. Fourth, a further ingredient of the context was the incontestably dire situation and circumstances of the appellant's family members in Sudan.

[39] In our judgment, the exercise of construing the Crown Solicitor's letter is uncomplicated. Its central message, contained in the second and third paragraphs, was unambiguous. In a sentence, (a) the LOTR guidance explicitly states that LOTR applications cannot include family and private life, medical, asylum or protection-based claims and (b) further, asylum and international protection claims cannot be made from outside the United Kingdom. The second message unequivocally communicated by the letter was that LOTR applications are made not by letter but by completing the appropriate application form.

[40] It is necessary now to focus on the key ingredients of the situation pertaining to the several claimants (ie the appellant's family members) at the time when the solicitor's letter was written. As is now abundantly clear, they claim that at that time they were not able to comply with any of the following requirements:

(i) To complete the requisite pro-forma viz the Visa Application Form ("VAF").

(ii) To provide their biometrics.

(iii) To make their visa applications at, and process them through, a Visa Application Centre ("VAC").

(iv) To pay the requisite fees (estimated in the evidence at £40,000 - £50,000).

[41] By virtue of the operative measures of Home Office Guidance noted above, supplemented insofar as necessary by public law principle, all of these requirements were capable of being waived by the Secretary of State. The further, related consideration of importance is that compliance by the claimants with these requirements or their waiver in whole or in part necessarily belonged to a stage preceding any consideration of their LOTR applications. Logically, realistically, fairly and reasonably, this had to be the sequential process – absent some compelling exceptional fact or factor. The appellant's case does not have any such fact or factor. In short: all requisite procedural formalities first, substantive LOTR consideration (if any) second.

[42] Thus, at the stage when the solicitor's letter was written on behalf of all claimants, they required a series of waivers, or dispensations, to be granted in their favour. However, critically, none had been sought prior to the letter and none was sought via the letter. The single most important feature of the letter is that it requested LOTR only. The letter of response on behalf of the Secretary of State engaged directly with this request: see the first three paragraphs.

[43] In the notional ideal world, the primary response on behalf of the Secretary of State might have been as per the immediately preceding paragraph, while the secondary response might have alluded to the substantive objection expressed in the first three paragraphs of the letter. Alternatively phrased, the fourth paragraph might ideally have preceded the first three. However, immigration decision making is undertaken in an intensely prosaic, real world environment. Furthermore, as already highlighted, a letter of this kind is not to be construed by applying the prism of a statute or legal instrument. While at the hearing we debated with Mr McGleenan KC the question of whether the Secretary of State's affidavit (supra) in substance corrected the Crown Solicitor's letter, we are satisfied that this is not the correct analysis: the letter did not require correcting.

[44] The arguments presented by Mr Larkin KC, thoughtful and thorough as they were, did not identify any legal rule or principle confounding the analysis in the immediately preceding paragraphs. Nor did they invoke any authority (properly so-called) binding on this court to this effect.

[45] The appellant's submissions did bring to the attention of this court a collection of first instance and appellate decisions belonging to the jurisdiction of England and Wales, none of them binding on this court. Our analysis of these is, in brief compass:

(i) The decision in *R (Forrester) v The Secretary of State for the Home Department* [2008] EWHC 2307 (Admin) belongs to the territory of the substantive consideration of whether to grant LOTR – which, on our analysis, was not engaged in the factual matrix of these proceedings.

(ii) The decision in *R (Mashud Kobir) v The Secretary of State for the Home Department* [2011] EWHC 2515 (Admin) belongs to the same category.

(iii) The decision in *R (Beharry and Ullah) v The Secretary of State for the Home Department* [2016] EWCA Civ 702 turned on the court's construction of certain provisions of the Immigration Rules: no issue of rules construction arises in this appeal and, in any event, the Rules provisions concerned are unrelated to the issues before this court.

(iv) The decision in *R(AB) v The Secretary of State for the Home Department* [2018] EWCA Civ 383, properly analysed, is antithetical to the appellant's case for two reasons, one primary and the other secondary. First, on a fundamental point of distinction, as our analysis has demonstrated there was no application or request in our case to the Secretary of State to consider waiving any of the procedural requirements listed in para [38] above and the appellant's case does not involve any challenge to a failure by the Secretary of State to proactively consider doing so. Second, AB decides unequivocally that a failure to request a public authority to consider acting outwith the framework of a rule or other established policy is fatal, as the non-fetter of discretion principle "… does not

require the decision maker to cast around for possible reasons to do so": para [48], per Leggatt LJ (and see further infra).

(v) We are unable to identify anything favourable to the appellant in *R(HR) v The Secretary of State for the Home Department* [2024] EWHC 786 (Admin), a case in which all of the grounds of challenge, one of which related to the exercise of discretion under the Immigration Act 1971, were dismissed.

(vi) *R(Muqtaar) v The Secretary of State for the Home Department* [2012] EWCA Civ 1270 was included in the bundle of authorities but did not feature in argument. It is an unlawful detention case remote from this appeal.

(vii) The last of the decided cases highlighted on behalf of the appellant, *R (Fu) v The Secretary of State for the Home Department* [2010] EWHC 2922 (Admin), is a fact sensitive illustration of the High Court's rejection of an argument that the Secretary of State's refusal of a leave to remain application based on the claimant's failure to comply with a mandatory requirement to provide photographs was vitiated by a failure to exercise discretion.

[46] In *Said*, it was unnecessary for this court to decide whether it endorsed the decision of the English Court of Appeal in *AB*. In this appeal, having had the benefit of fuller bilateral argument, we consider that the jurisprudential foundation of the English Court of Appeal's resolution of the fetter of discretion ground of challenge is unassailable. In short, in the hallowed words of Lord Reid in *British Oxygen*, the complaint that a public authority decision maker has "shut his ears" or refused to "listen to anyone with something new to say" cannot sensibly be levelled in circumstances where the complainant has laid no corresponding evidential foundation establishing that the public authority had information requiring consideration of the exercise of discretion. This, realistically, will almost invariably entail the provision of relevant information by the claimant. The possible qualification noted in para [48] of *AB*, namely a case involving a matrix of "… facts which were so striking that it would be irrational not to consider the grant of leave outside the Rules even in the absence of any request" (and see *Behary* at para [39]), while attractive, does not arise for consideration in this appeal and will be better addressed in a future case when it is a live issue rather than obiter. We decline to address it in consequence.

[47] Finally, it is appropriate to observe, as we have explained above, that the several claimants in the present case were not denied the substantive benefit (LOTR) which they aspired to achieve by some immovable obstacle. No Home Office official's head was buried in the sand. In particular, the refusal which the claimants challenge was not based upon the inflexible application to any of them of any of the statutory or policy procedural requirements noted above. Rather, as we have explained, the true reason for their unsuccessful interaction with the Secretary of State was their failure to make any case for certain material discretions to be exercised in their favour, accompanied by any appropriate supporting evidence, either in advance of or in tandem with their LOTR request.

[48] The next step for the claimants, in tandem with their legal advisers, will be guided by this judgment.

Disposal

[49] For the reasons given, the impugned decision of the Secretary of State is unassailable. It follows that the appeal is dismissed and the judgment and consequential order of Humphreys J are affirmed.