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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:

ABDUL SAID

Appellant:

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Before: McCloskey LJ, Horner LJ and Colton J

Mr John Larkin KC and Ms Darcy Rollins (instructed by Phoenix Law) for the Appellant
Mr Tony McGleenan KC and Mr Aidan Sands (instructed by The Crown Solicitor) for the Respondent

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

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Introduction

[1] Abdul Said ("*the appellant*"), appeals against the judgment and consequential order of Humphreys J whereby the appellant's application for judicial review of the decision of the Secretary of State for the Home Department (the "*Secretary of State*") refusing his application to be provided with an Application Registration Card ("*ARC*") was dismissed. The impugned decision, contained in the Secretary of State's letter dated 28 January 2022, is in these terms:

> "Following the refusal of your asylum claim on 21 September 2015 you have lodged further submissions on 13 May 2021 which are awaiting consideration. However, as you no longer have an asylum application pending you are not entitled to be issued with an ARC in line with paragraph 359 of the Immigration Rules."

The Application Registration Card

[2] The Application Registration Card ("*ARC*") is a device established and regulated by certain provisions of the Immigration Rules (the "*Rules*"). The relevant provisions are contained in paras 359 – 359C:

> "359 The Secretary of State shall ensure that, within three working days of recording an asylum application, a document is made available to that asylum applicant, issued in his own name, certifying his status as an asylum applicant or testifying that he is allowed to remain in the United Kingdom while his asylum application is pending. For the avoidance of doubt, in cases where the Secretary of State declines to examine an application it will no longer be pending for the purposes of this rule.
>
> 359A The obligation in paragraph 359 above shall not apply where the asylum applicant is detained under the Immigration Acts, the Immigration and Asylum Act 1999 or the Nationality, Immigration and Asylum Act 2002.
>
> 359B A document issued to an asylum applicant under paragraph 359 does not constitute evidence of the asylum applicant's identity.
>
> 359C In specific cases the Secretary of State or an Immigration Officer may provide an asylum applicant with evidence equivalent to that provided under rule 359.

> This might be, for example, in circumstances in which it is only possible or desirable to issue a time-limited document."

While it is unnecessary to consider the full suite of Rules provisions relating to asylum applications, it is convenient at this juncture to reproduce paragraph 353 as this is of unquestionable materiality in the legal context to which the appellant's challenge applies. Paragraph 353 Immigration Rules provides:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas."

[3] Paragraph 359 of the Rules is supplemented by a published policy of the Secretary of State, entitled "Application Registration Card." The iteration of this policy, self-described "Guidance", in vogue when the impugned decision was made is Version 5.0. (In passing, the assembled evidence includes a more recent iteration, dated 11 February 2022).

[4] The guidance is largely informative and explanatory in nature. It explains the ARC in the following terms:

> "The … ARC is a credit card-sized plastic card issued by the Home Office to individuals who claim asylum. It contains information about the holder's identity or claimed identity although it is not evidence of identity. This includes details of their nationality as well as age …
>
> The ARC certifies that its holder is an asylum claimant and as such will be allowed to remain in the United Kingdom while their asylum claim is still pending.

> Furthermore, it also confirms whether the claimant has permission to work at the time of issue."

In a discrete section entitled "Policy Intention" the purposes of the ARC are outlined:

> "The ARC is issued in order to:
>
> - Confirm that the person has made a claim for international protection in the United Kingdom or are a dependant of a main claimant.
>
> - Provide easier access to services, for example a general practitioner (doctor) may ask to see evidence of status when an asylum claimant (or an asylum dependant) registers with them.
>
> - Indicate to a prospective employer whether the holder is permitted to take employment, in accordance with the Home Office's Permission to Work Policy.
>
> - Present to Home Office officials or police officers, for example at a reporting event, to demonstrate who they are."

A later paragraph makes clear that paragraphs 359 to 359C of the Rules are designed to transpose article 6(2) of the EU Reception Conditions Directive (2003/9/EC) (the "Reception Directive" – infra).

The Reception Directive

[5] At this point the Reception Directive must be considered. This measure of EU law, introduced on 27 January 2003, prescribes minimum standards for the reception of asylum applicants. As appears from its recitals one of the aims of this measure is "… to ensure [asylum applicants] a dignified standard of living and comparable living conditions in all Member States …" Chapter II establishes "General Provisions on reception conditions." Among the provisions which follow article 6 is of central materiality in these proceedings. It provides, under the rubric "Documentation":

> "1. Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his or her own name certifying his or her status as an applicant or testifying that he or she is allowed to

stay on the territory of the Member State while his or her application is pending or being examined.
If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify that fact.

2. Member States may exclude application of this Article when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State. In specific cases, during the examination of an application for international protection, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

3. The document referred to in paragraph 1 need not certify the identity of the applicant.

4. Member States shall adopt the necessary measures to provide applicants with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain on the territory of the Member State concerned.

5. Member States may provide applicants with a travel document when serious humanitarian reasons arise that require their presence in another State.

6. Member States shall not impose unnecessary or disproportionate documentation or other administrative requirements on applicants before granting them the rights to which they are entitled under this Directive for the sole reason that they are applicants for international protection."

[6] As noted in para [4] above, para 359 of the Rules is designed to transpose article 6 of the Reception Directive. There was no issue at first instance or at the appeal hearing about the effectiveness of transposition. In the context of the present challenge, the most important feature of the Directive is that it applies exclusively to asylum applicants. It neither recognises nor makes provision for persons belonging to the category of unsuccessful asylum applicants attempting to make a second or subsequent asylum application in the host country.

Factual Matrix

[7] The appellant is a national of Somalia. He has been in the United Kingdom, residing in Northern Ireland, since at latest January 2013, with the exception of a brief four-month sojourn in Italy (August–December 2013). He has made two unsuccessful applications for refugee status in the United Kingdom. The first such application was refused circa August 2013. His second application, made following his return in the wake of his brief sojourn in Italy, was refused on 18 September 2015. His ensuing appeal to the First-tier Tribunal ("*FtT*") was dismissed on 15 November 2016. This was followed by a refusal of permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber), on 9 January 2017.

[8] Between February 2017 and March 2020 the appellant invoked the "further submissions" regime of paragraph 353 of the Rules (*supra*) on nine occasions altogether. Each of these was the subject of a negative decision, the last such decision being dated 21 August 2020. On 13 May 2021 the appellant invoked the further submissions regime for a tenth time. Events thereafter have proceeded at a leisurely pace. The only response to these further submissions consists of a letter dated June 2023 requesting the provision of certain further evidence.

[9] According to the agreed chronology of facts the impugned decision is contained in a letter dated 5 April 2022. Each party has sworn an affidavit. Neither party's affidavit having exhibited this letter, the court proactively raised this issue and further written submissions were invited. This elicited the following on behalf of the appellant:

(i) The appellant's starting point is an assertion. He asserts via a footnote to counsels' further written submission that he had previously been in possession of an ARC which he had "lost" before its expiry and had subsequently been without one for some 3½ years.

(ii) In December 2021 the appellant applied online for an ARC.

(iii) The negative response of the Secretary of State included the key passage reproduced in para [1] above. The appellant was invited to address "any further queries" about the response to a specific email address. He made no response.

(iv) The PAP letter dated 24 March 2022 from the appellant's solicitors followed.

(v) By its PAP response letter dated 5 April 2022 the Secretary of State responded, rejecting the claim intimated by the former letter.

(vi) (Per counsel's written submission) "… the litigation target of these proceedings at first instance was (and remains) the decision contained in the respondent's pre-action response of 5th April 2022."

Proceedings were commenced on 4 July 2022.

[10] The material averments in the affidavit sworn on behalf of the Secretary of State include:

> "The application [for an ARC] was refused because [the appellant] did not meet the criteria to be issued with an ARC …
>
> … [the letter dated] 28 January 2022 … [stated] that as he no longer had an asylum application pending, he was not entitled to be issued with an ARC, in line with paragraph 359 of the Immigration Rules …
>
> Under the published policy of the Secretary of State he is not eligible for an ARC. While he has made further submissions for the tenth time under paragraph 353 of the Immigration Rules, this does not amount to an asylum application unless and until a decision maker decides under paragraph 353 that they amount to a fresh claim."

In the Order 53 Statement the impugned decision is described in these terms:

> "… The proposed respondent's decision dated 4th April whereby it was determined that the applicant was not entitled to an … ARC and the ongoing failure of the proposed respondent to provide the applicant with (an ARC)."

In passing, and subject to what follows in this judgment, the date is plainly erroneous: it should be 5 April 2022.

[11] In the further written submission on behalf of the Secretary of State the following position is adopted:

> "The appellant made an online application for an ARC in July 2021. He received a reply by letter dated 28 January 2022 (TB1 Part 2 page 94). The appellant's solicitor wrote to the Home Office by letter dated 24 March 2022. Although not described as such in the appellant's grounding affidavit, this was a standard pre-action protocol letter (TB1 Part 2 page 96). The Home Office replied by in a formal pre-action protocol response dated 5 April 2022 (TB1 Part 2 page 102). At paragraph 7 of the response it is clearly stated that any application for

> judicial review should be made within 3 months of the action against which the claim should be made, namely the decision of 28 January 2022. The appellant has not complied with the requirements of Order 53 Rule 4. There has been no application for an extension of time and no evidence has been put before the court to explain the delay."

The court having permitted the appellant to provide a rejoinder submission, it was highlighted on his behalf that there is no respondent's notice raising the issue of time. This is an indirect reference to Order 59, Rule 6(1)(b) and Order 53, Rule 4 of the Rules of the Court of Judicature. It is convenient to add here the parties' agreement that no time issue under Order 53, Rule 4 was raised at first instance.

[12] According to the last-mentioned affidavit when the appellant made his latest Paragraph 353 further submissions (13 May 2021) he also requested an ARC. There is no such request in the further submissions letter from his solicitors. In his affidavit the appellant claims that he applied for an ARC using an online form in July 2021. This is unevidenced and, further, is not addressed in the Secretary of State's affidavit. Thus, before directing the parties' further submissions the court did not know whether the appellant had advanced any reasons or material in support of his application. It is now clear from the appellant's further submissions to this court that no such reasons or material were provided.

[13] The appellant's affidavit offers no explanation of why in making his application for an ARC he failed to provide any supporting reasons or material and did not invite the Secretary of State to consider the exercise of discretion. Counsels' further written submissions contain the following assertion:

> "The respondent's online form offered only a tick-box format thus disabling the appellant from putting material before the respondent for the exercise of her discretion."

The introduction of this assertion has materialised at a very late stage and in an inappropriate manner. It lacks supporting evidence and is not an agreed fact. In these circumstances the court will disregard it. The court will adopt the same approach to the further assertion in a footnote (noted above) that the appellant's application to the Secretary of State was for a replacement ARC which he had "lost" when unexpired. This new assertion is directly contradicted by the following averment of the appellant:

> "I was previously given an (ARC) during my first asylum claim which then expired."

[14] While it is unnecessary for this appellate court to attempt to determine conclusively the foregoing factual issues, the probability is that <u>if</u> the appellant was

at any time in possession of an ARC this was confined to his initial period of sojourn in the United Kingdom between January 2013 when he made his application for asylum and August 2013 when this was refused by the Secretary of State. While there is in theory a possibility that he was in receipt of a new ARC for a further period subsequently – see the chronology rehearsed in para [7] above - this would have expired upon the second refusal decision dated 18 September 2015. We would add that via a combination of the evidence assembled and the agreed facts the further assertion in counsels' written submission that when the appellant applied for an ARC in December 2021, he had not been in possession of one for some 3.5 years must similarly be rejected by this court.

[15] Certain averments in the appellant's affidavit repay careful reading. They yield the following analysis. In support of his application for judicial review of the impugned decision the appellant describes but a single material concrete event in Northern Ireland during the period of over nine years immediately preceding the date of swearing. This event revolved around his Home Office "Aspen" card, the device whereby those in receipt of the relevant publicly funded support can make purchases in retail outlets. The appellant – although he fails to explain this clearly in his averments – evidently made a purchase and then forgot to repossess his card at the checkout. Upon returning to the store for this purpose his request was rejected because he could not produce identification. Police officers became involved and at this stage the appellant's earlier proposed solution, namely that a store employee would insert the card thereby enabling the appellant to employ the PIN, was accepted. While the appellant makes other averments about access to education these are couched in the most general terms, singularly lacking in the most basic particularity. Finally, the case made by the appellant's solicitors in the PAP letter that in the absence of an ARC the appellant has been unable to open a bank account "… which has left him vulnerable to exploitation as he must rely on others to take out money for him" finds no echo whatsoever in the appellant's affidavit or elsewhere.

[16] It follows from the preceding assessment that, evidentially, there are material discrepancies and lacunae in the appellant's case. The court will address this issue further *infra*.

Grounds of Challenge

[17] The appellant's case is that the impugned decision of the Secretary of State is unsustainable in law because it:

(i) is vitiated by a demonstrable fetter of the Secretary of State's discretion;

(ii) violates the appellant's right to respect for private life protected by article 8(1) ECHR via section 6 of the Human Rights Act 1998; and

(iii) violates article 8(1) in conjunction with article 14 ECHR.

We shall examine each ground in turn.

The appellant's status in the United Kingdom

[18] The appellant's status in the United Kingdom is a matter of central importance. The correct analysis is that he has had several different types of status during the ten-year period in question:

(a) Upon first arriving in the United Kingdom, he was a person of irregular immigration status, having no right to enter or remain.

(b) Having entered and having made his first claim for refugee status, his domestic law status became that of a person entitled to remain pending determination of his asylum application.

(c) Upon the dismissal of his first asylum application, he reverted to having status (a).

(d) Following his removal from and subsequent re-entry to the United Kingdom the appellant reverted to status (a).

(e) Upon making his second asylum application a conversion to status (b) occurred.

(f) Upon the dismissal of his second asylum application, he reverted to status (a).

[19] What, therefore, has the appellant's status in the United Kingdom been since the last-mentioned event? One element of the answer to this question is not altogether clear. His status in domestic law or policy in the United Kingdom since the refusal of his ninth further submissions under paragraph 353 of the Rules is not addressed in the evidence or the parties' submissions or in agreed terms. In particular, there is no indication that the appellant has been granted limited leave to remain in the United Kingdom. Furthermore, he cannot lay claim to either of the two basic types of status recognised in substance by the Refugee Convention namely (a) that of a person who has applied for refugee status and awaits determination of their application or (b) that of a person who has been granted refugee status by the host country.

[20] Subject to the reservations mentioned, it seems likely that most recent status of the appellant – and that of any person awaiting the outcome of a paragraph 353 further submissions application – belongs to a twilight zone in which their continued presence in the United Kingdom is tolerated as a matter of grace by the executive.

On any showing it is, in the language of the immigration law and practice lexicon, a status of the most precarious kind.

[21] Unlike the first element of the answer to the question posed in para [19] above, the second element is abundantly clear. The appellant does not have the status of asylum applicant. Rather his status has two salient characteristics. He is (a) an unsuccessful asylum applicant who (b) via the domestic law paragraph 353 machinery is seeking to re-acquire the status of asylum applicant. This follows from the terms of para 353 of the Rules (see para [2] *supra*), which contemplate a two-stage approach in the case of "further submissions" applicants. At the first stage, the decision maker will, applying the specified tests, "… determine whether [the further submissions] amount to a fresh claim." A negative determination will generate a final decision adverse to the claimant, without more. In contrast, a positive determination will trigger a second stage, entailing a substantive and final assessment and determination of what is accepted as being a fresh claim. This analysis was not contentious as between the parties.

[22] Consequently, it is incontestable that in his quest to secure an ARC the appellant has at all times been unable to bring himself within the framework of paragraph 359 of the Rules. Those who do fall within paragraph 359 are, prima facie at least, entitled to assert a right namely a right to be granted an ARC. Being outwith the framework of paragraph 359 the appellant is driven to make the case that the Secretary of State is empowered to grant him an ARC as a matter of discretion. The first of his three grounds of challenge reflects this.

The Immigration Rules: Status

[23] Reflection on the status of the Immigration Rules is appropriate at this juncture. Whether the Rules have the status of law in the United Kingdom legal system has been the subject of previous judicial consideration. The Rules are neither primary legislation nor subordinate legislation. The *vires* to make the Rules derives from section 3(2) of the Immigration Act 1971 and is vested in the Secretary of State.

[24] Section 1 (2) must first be considered:

> "Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain)."

The dominant provision is section 3(1). This 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]."

[25] Section 3(2) provides:

> "(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; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)."

Sections 3A, 3B and 3C must also be considered. So too section 4(1):

> "**4 Administration of control**
>
> (1) The **power** under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the **power** to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions) **[**or to cancel any leave under section 3C(3A)**]**, shall be exercised by the Secretary of State; and, unless otherwise **[**allowed by or under**]** this Act, those **powers** shall be exercised by notice in writing given to the person affected, except that the **powers** under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument."

As emphasised, the important word in this provision is "power."

[26] The Immigration Rules are a unique hybrid, capable of giving rise to legal duties, rights and consequences. Their juridical status has been considered at the highest judicial level. In *Odelola v Secretary of State for the Home Department* [2009] UKHL 25 the assessment of the House of Lords was that the Immigration Rules are non-statutory in origin and are the product of the exercise of prerogative power,

with the result that they are not subordinate legislation within the meaning of section 2(1) of the Interpretation Act 1978 because they are not made "under" the statute. However, soon thereafter the Supreme Court retreated from one key aspect of this assessment, in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, holding that as the 1971 Act gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative, the statute was the exclusive source of the power to make the Rules: see especially per Lord Hope at para [32].

[27] This approach was reaffirmed in *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32, at paras [27]–[29] especially. Lord Dyson, delivering the unanimous judgement of the court, observed at para [44]:

> "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."

[28] The Supreme Court has continued to analyse the juridical character of the Rules in its more recent jurisprudence. In these decisions the themes of policy, consistency of decision making and discretion feature prominently. In *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 the Supreme Court stated at para 15:

> "Decision-making in relation to immigration and deportation is not exhaustively regulated by legislation. It also involves the exercise of discretion, and the making of evaluative judgments, by the Secretary of State and her officials. A perennial challenge, in such a situation, is to achieve consistency in decision-making while reaching decisions which are appropriate to the case in hand. The solution generally lies in the adoption of administrative policies to guide decision-making: something which the courts have accepted is legitimate, provided two general requirements are met. First, discretionary powers must be exercised in accordance with any policy or guidance indicated by Parliament in the relevant legislation: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997… Secondly, decision-makers should not shut

> their ears to claims falling outside the policies they have adopted: *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610)."

At para 17 the Supreme Court held:

> "The Rules are not law (although they are treated as if they were law for the purposes of section 86(3)(a) of the 2002 Act: see para 8 above), but a statement of the Secretary of State's administrative practice: see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230, paras 6 and 7; *Munir*, para 37; *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48, para 10; *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45; [2012] 1 AC 621, para 61; and *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208, paras 32 and 33. They do not therefore possess the same degree of democratic legitimacy as legislation made by Parliament: *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 17. Nevertheless, 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…"

[29] With regard to the discretion of the Secretary of State the Supreme Court stated at para 18:

> "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."

Thus the "outside the Rules" discretion derives exclusively from the parent statute.

[30] Most recently, this analysis was affirmed by the Supreme Court in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, at para [3] especially. At para [4] the court highlighted the interaction between discretion and duty in cases involving Convention Rights:

> "The Secretary of State also has a discretionary 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: *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192 , para 44. The manner in which that discretion is exercised may be the subject of a policy, which may be expressed in guidance to the Secretary of State's officials. The discretion may also be converted into an obligation where the duty of the Secretary of State to act compatibility with Convention rights is applicable."

[31] Summarising, the presumptively empowering "may" and "power" in the relevant provisions of the Immigration Act are the classic language of discretion conferral. Viewed through this prism, section 3(1) establishes two identifiable discretionary powers. The first is the Secretary of State's discretionary power to allow a person who is not a British citizen leave to enter or, where appropriate, remain in the United Kingdom for a limited or indefinite period. The second of the Secretary of State's discretionary powers is to grant leave to enter or remain subject to any of the conditions contained in the statutory menu. Neither of the discretions contained in section 3(1) is expressed to be subject to subsection (2). Nor does subsection (2), or any other provision of the statute, qualify either of these discretions in any way.

> "Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain)."

"***Outside The Immigration Rules"***

[32] It follows that in any given case the Secretary of State is empowered, as a matter of discretion, to make a decision or take a course of action which is not required, mandated or contemplated by the Rules. This power is commonly described as one to act "outside the Rules."

[33] The concept of "outside the Rules" was explored by the English Court of Appeal in *R (Sayaniya) v Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 85. There the claimant was an Indian national, lawfully present as a student in the United Kingdom pursuant to a grant of leave to enter and remain. His

application to extend his period of leave to remain was refused on the ground that he had failed to disclose a material fact (two driving convictions). The first issue was whether a provision of the Rules – paragraph 322(1A) – pursuant to which the appellant's application for an extension of his leave to remain in the United Kingdom was refused on the basis of non-disclosure of a material fact was *ultra vires* the 1971 Act (*supra*) because it was expressed in mandatory terms thereby unlawfully fettering the broad discretion invested in the Secretary of State by section 3(1) to grant or refuse leave to remain in the United Kingdom. The appellant's case failed at every level.

[34] Beatson LJ delivered the unanimous judgement of the Court of Appeal. This judgment represents the most comprehensive analysis of the "outside the Rules" concept in the context of the non – fettering of discretion principle. It is worthy of particular attention for this reason. The opening sentence, at para [1] sets the scene:

> "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 …."

Beatson LJ continued at para [15]:

> "My starting point is that the decisions on the "non-fettering" principle relied on by Mr Malik such as *Attorney-General ex rel Tilley v Wandsworth London Borough Council* [1981] 1 WLR854 and *R v Secretary of State for the Home Department, Ex p Venables*[1998] AC407, 469; [1997] 3WLR23 did not concern a statute which expressly permits rules to be made, as the 1971 Act does. Neither does *British Oxygen Co Ltd v Board of Trade* [1971] AC610; [1970] 3WLR488 which contains an earlier and classic review of the position. While, as will be seen, immigration rules are not law in the sense that a statute or a statutory instrument is, there are many decisions of the House of Lords and the Supreme Court involving the application of provisions of a mandatory nature in the Immigration Rules. They are susceptible to challenge on grounds of error of law, *Wednesbury* unreasonableness or irrationality and proportionality but in none of the cases is it suggested that their mandatory nature in itself makes them ultra vires. The second reason is that given by the judge when refusing permission to apply for judicial review. It is that, although paragraph 322(1A) is in mandatory terms, the Secretary of State may depart from it by making a decision more beneficial to an applicant

> such as to grant discretionary leave to remain "outside the rules" when the Rules provide that leave should not be given."

The discourse which follows at paras [16]–[17] identifies the competing values in play: certainty and predictability (on the one hand) and individualised justice (on the other). His Lordship observed that a departure from discretionary powers accompanied by a discernible trajectory in favour of rules-based arrangements has become a feature of administrative law in the last four decades. In the specific context of the immigration rules this was endorsed by the UK Supreme Court in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.

[35] Next, at para [21] Beatson LJ robustly rejected the submission that the provisions of the Immigration Rules are statements of policy thus engaging the familiar public law constraints on policies and discretionary powers, including the non-fettering principle. In the following passages His Lordship emphasised the statutory origins of the Rules. His Lordship next observed that some of the provisions of the Rules are expressed in mandatory language, while others are expressed in more open-textured language akin to advisory guidance or a statement of policy. These characteristics, however, do not alter their essential character. In the passages which follow there is emphasis on the statutory purpose underpinning the Rules. This culminates in the conclusion at para [35]:

> "… The non-fettering rule does not apply to [Immigration Rules] in the same way as it does to policies made in very different statutory contexts …"

Thus, 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.

[36] The second issue for the court concerned the question of the Secretary of State granting leave to remain "outside the Rules." Notably, it was positively argued on behalf of the Secretary of State, at para [36], that she/he:

> "… has discretion outside the rules and frequently exercises it in favour of those who do not qualify under them."

Beatson LJ then quoted with approval a passage from the judgement of Mostyn J in *R (Thebo) v Entry Clearance Officer Islamabad* [2013] EWHC 146 (Admin) at para [30] employing the language of "the safety net of a residual discretion."

[37] The second limb of the challenge in *Sayaniya* failed. Careful reading of paras [36]–[41] of the judgment of Beatson LJ yields the analysis that this was based on the concession by counsel for the Secretary of State noted above. The Secretary of State's

concession that there was a discretion to make a decision "outside the Rules" was accepted by the Court of Appeal, albeit with a degree of reluctance. Notably the Court of Appeal did not endorse this concession. Beatson LJ expressed reservations about it: note the language of "unclear" and "concern" at para [41]. In the same passage the possibility of the Secretary of State making a fresh decision entailing a refusal to recognise the exercise of any residual discretion with an ensuing legal challenge was explicitly noted.

[38] Soon thereafter, in *R (Beharry) v Secretary of State for the Home Department* [2016] EWCA Civ 702, another leave to remain case, the English Court of Appeal addressed the question of when the Secretary of State's statutory discretion to act "outside the Rules" is triggered. The court was of the opinion that the requirement to consider exercising this discretion is of a circumscribed nature. It does not arise routinely in every case. Rather, as a general rule, it is dependent upon a request by the affected person to exercise discretion in their case. This, in practice, will entail specifically inviting the dilution, nullification or disapplication of a provision or provisions of the Rules to the benefit of the person concerned. The court stated at para [38]:

> "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."

This approach was subsequently endorsed in *Asiweh v Secretary of State for the Home Department* [2019] EWCA Civ 13, at para [18].

[39] In *R (AB) v Secretary of State for the Home Department* [2018] EWCA Civ 383 the "outside the rules" discretion issue featured in a rather different context. The provisions of the Rules in play were those relating to the processing and determination of asylum claims. One of the arguments canvassed was that the Secretary of State had failed to recognise that she had a discretion to make a decision on the asylum application "outside the immigration rules" (see para 41). As the ensuing passages demonstrate, the existence of this discretion was not questioned by the Court of Appeal. Leggatt LJ, delivering the unanimous judgement of the court, adopted a classic *British Oxygen* analysis: see para [44]. At para [45] he cited with approval the earlier decision of the court in *Sayaniya* (*supra*). It is clear from paras [46]–[48] that, following *Behary*, the court considered that the Secretary of State is

under no obligation to consider whether to act "outside the Rules" in the absence of a request to do so.

The Fetter of Discretion Ground: Conclusion

[40] Our first conclusion is that the Secretary of State's decision maker's assessment that the appellant's case did not fall within the compass of paragraph 359 of the Immigration Rules is unassailably correct. It was based on a proper construction of this provision and is harmonious with this court's analysis of this rule and the appellant's status in the United Kingdom at the material time: see paras [18]–[22] above.

[41] It is abundantly clear that when the Secretary of State's decision maker refused the appellant's application no consideration was given to the existence or exercise of a discretion. Rather a rigid, black letter law approach was adopted. It is equally clear that the Secretary of State was not asked to exercise discretion in the appellant's favour: see our analysis of the evidence and submissions at paras [7]–[16] above.

[42] If this court were to apply the trilogy of decisions of the English Court of Appeal considered in paras [33]–[39] above the aforementioned failure would be fatal to the appellant's first ground of challenge. The doctrine of precedent does not require this court to follow those decisions: *Re Steponaviciene's Application* [2018] NIQB 90 at paras [22] ff and [74]. The question is whether we should as a matter of choice do so.

[43] The three English cases under scrutiny constitute a clear and consistent line of authority. Furthermore, we consider that they are harmonious with the leading authority, namely *British Oxygen*. In the memorable words of Lord Reid, the essence of the non-fettering of discretion principle is that the public authority concerned must not "shut his ears" or "refuse to listen" to anyone "with something new to say." As a matter of common sense and reality – both ingrained characteristics of the common law - the public authority concerned must be made aware by the claimant of that which is purportedly "new." In short, in the language of para [12] of this judgment, the claimant must advance their reasons and supporting material for inviting the authority to disapply or modify the legal rule in play. The pre-requisite to the duty to consider whether to exercise discretion in the kind of context under scrutiny is, in essence, that of notice. As an aside, while it may be that in a case where the Secretary of State is in possession of such notice from a source other than the claimant, the duty is triggered – an issue which we are not required to determine - that is not this case.

[44] We can identify no inconsistency between the three English Court of Appeal decisions and those of the House of Lords and Supreme Court considered above. No contrary argument was formulated. The appellant's further submissions did not incorporate any contention that this court should, jurisprudentially, adopt any other

course. We consider that these decisions should be followed in this jurisdiction, for the reasons given. The conclusion that the notice requirement is not satisfied in this case is incontestable. This is fatal to the appellant's case.

[45] We further consider that insofar as the appellant seeks to establish the existence of a discretion from the Secretary of State's Guidance this too must be rejected. The appellant relies particularly on the second, third and fourth of the bullet points in the passage reproduced in para [4] above. The immediate riposte must be that these have no connection with either article 6 of the Reception Directive or paragraph 349 of the Rules. Indeed they may be said to constitute a mis-statement. An ARC is not issued for any of the three purposes specified. It is, rather, issued (in the language of article 6 of the Reception Directive) for the sole purpose of:

> "… certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined."

The argument based on these passages in the Guidance has no traction in consequence.

[46] It follows from all of the foregoing that the appellant's first ground of challenge must be rejected.

The Effect of the Reception Directive

[47] Furthermore, and in any event, we are unable to spell out of the context under scrutiny the discretion for which the appellant contends. Article 6(1) of the Reception Directive is couched in the language of bright line rules. Paragraph 349 of the Rules follows suit. Article 6 in our view does not contemplate the possibility of the Secretary of State issuing an ARC to the appellant or anyone in his position. The reason is simple. The Reception Directive applies only to asylum applicants. It does not apply to a person whose application for asylum has been refused, irrespective of whether they are seeking to take advantage of the further representations regime of paragraph 353 or some comparable mechanism in other EU Member States. Article 4 of the Directive enshrines a familiar "more favourable provisions" mechanism. This provision, contrary to Mr Larkin's submission, cannot avail the appellant as it is directed to the reception conditions of "asylum seekers and other close relatives" only. As our analysis in paras [18]–[22] above demonstrates, the appellant did not have the status of "asylum seeker" at the material time.

[48] Furthermore, we agree with Mr McGleenan's submission which was, in substance, that there cannot be a discretion to equip the appellant with something which would misrepresent his true status. Focusing on the single concrete situation identified in the appellant's affidavit, had he possessed an ARC in the supermarket

on the occasion in question this would have conveyed to shop staff, security personnel and police officers that he was an asylum applicant with an undetermined asylum application, with all the legal and practical consequences flowing therefrom. This would have fundamentally misrepresented his true legal status. This would not be harmonious with the rule of law. Furthermore, it would be antithetical to legal and other administrative certainty and predictability.

The Article 8 ECHR Ground

[49] It is trite that the question of whether a person's right to respect for their private life, guaranteed by article 8(1) ECHR via section 6 of the Human Rights Act, has been, or may be, infringed is intrinsically fact and context sensitive. The associated, and logically anterior, question, is whether the subject matter of a person's complaint constitutes something which this limb of article 8(1) is designed to protect.

[50] We have in paras [9]–[16] above subjected to scrutiny the evidence which the appellant, who of course owes a duty of candour, has chosen to place before the court. This has two elements, which we shall address in reverse order. First, there are his averments relating to education. These belong to the outer realms of vagueness. They are singularly devoid of particularity and specificity. Furthermore, they conflate the two quite separate contexts of the two periods during which the appellant had the status of asylum applicant and the period when he did not. It is unnecessary to determine whether, if satisfactorily evidenced, these vague assertions relating to the appellant's education would qualify for the respect for private life dimension of article 8(1). We consider the requisite evidential foundation to be manifestly inadequate.

[51] The second evidential ingredient of the appellant's article 8 case concern his description of events during a shopping visit to a Tesco store on one occasion. In a sentence: he went shopping, he utilised his Aspen card to make a purchase, he forgot to repossess his card, returned to get it and succeeded in doing so following exchanges with store staff and police officers which focused on whether he could prove his identity. In short, the appellant was involved in a normal daily activity involving members of the public in a public place.

[52] We remind ourselves of the decision of the House of Lords in *R (Countryside Alliance) v HM Attorney General and Another* [2007] UKHL 52 and Lord Bingham's concise exposition of the private life element of Article 8(1) at para [10]:

> "… the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."

The House decided unanimously that the activity of fox hunting did not fall within the scope of this Convention right *inter alia* because of its public character and the lack of analogy with any of the categories summarised in para [53] *infra.* We refer also to the analysis of Lord Hope at para [54] and that of Lord Rodger of Earlsferry at paras [90]-[109].

Baroness Hale, for her part, evaluated article 8 at para [116] thus:

> "Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity."

[53] A detailed essay on article 8 jurisprudence is unnecessary. It suffices to say that the supermarket incident of which the appellant complains and its asserted impact on him are remote from the themes and concepts which have habitually featured in the article 8 jurisprudence: the person's inner circle; one's inner sanctum; how to live one's personal life; establishing and developing relationships with others; freedom from unjustified State intrusion; unjustified prohibitions on working; protection of the physical and moral integrity of the person; one's personal sexuality; personal identity; and social life. This is not designed to be an exhaustive list. Furthermore, this court is mindful of the elasticity in the concept of respect for one's private life and the potential for expansion of established categories. None of this points in the direction of any conclusion other than that article 8 ECHR is inapplicable.

[54] We are prepared to accept that the incident of which the appellant complains was unpleasant and stressful. However, every Convention right is of very specific orientation and reach. We are satisfied that the private life dimension of article 8(1) was not designed to insulate the appellant against the unpleasantness and stress which he probably suffered in his encounter with shop workers and public servants, all presumptively acting in good faith and within the scope of their respective functions and duties on this isolated occasion. However, as the House of Lords has emphasised, the Convention is "dealing with the realities of life " and does not offer relied to the citizen against "the heart-ache and the thousand natural shocks that flesh is heir to": *Procurator Fiscal v Brown* [2003] 1 AC 681, per Lord Clyde at 727 and Lord Bingham at 703d. These observations appear apposite in the present context.

[55] On the premise that our primary conclusion about the appellant's article 8 case is incorrect, the question to be addressed is whether an interference with his right to respect for private life has been established. The detriment which the appellant suffered was, taking his case at its zenith, a short-lived unpleasant and stressful experience. Its duration seems more likely to have been minutes than hours. He recovered his Aspen card. He incurred no financial loss and required no medical or other treatment or support. We are disposed, in his favour, to assume that in consequence of this incident he has become more apprehensive in certain situations. If, contrary to our primary conclusion, all or any of the foregoing falls within the scope of the right to respect for the appellant's private life under article 8(1), we consider that it falls well short of constituting an interference therewith. The notional threshold is not overcome. Furthermore, if our rejection of the appellant's case relating to education accessibility and banking facilities on evidentially inadequate grounds is incorrect, and assuming in his favour that article 8(1) is engaged, we make the same alternative conclusion.

Article 8 with Article 14 ECHR

[56] It falls to the court to apply a series of well-established tests The question of whether the "ambit" test is satisfied falls to be determined by reference to our primary conclusion about the appellant's article 8 case. In the course of argument both parties referred to the decision of this court in *Re Allister's Application* [2022] NICA 15. There it was suggested at para [494] that:

> "… The application of the ambit test will normally require the court to consider the proximity of the subject matter of the complaint to the core of what the relevant Convention right protects."

We have concluded that the subject matter of this appellant's complaint is far removed from the scope of what is protected by the right to respect for his private life under article 8(1). It follows logically that he fails to satisfy the ambit test.

[57] On the premise that the immediately preceding conclusion is incorrect, we turn to consider whether he satisfies the requirement of "other status." This issue was addressed at paras [496]–[533] of *Allister*. Neither party took issue with these passages. It suffices to reproduce one short passage, at para [533]:

> "Ultimately, I consider the issue to be one of proximity, or nexus. There must be some reasonable, discernible connection between the 'other status' asserted and one or more of the characteristics contained in the defined category. A precise analogy is not required. But there must be some linkage. In cases where there is no such connection, the status advanced will not suffice. Equally, I consider that it cannot have been intended that in cases where the connection is remote, distant or tenuous, when juxtaposed with the members of the defined category, this will be sufficient."

[58] We refer to, without repeating, our assessment of the appellant's "status" in paras [18]–[22] above. In a nutshell, at the time when the impugned decision was made the appellant's status was that of a third country national who had made two applications for refugee status unsuccessfully, whose status in consequence was that of unsuccessful asylum applicant and who was endeavouring to re-acquire this status via the regime in paragraph 353 of the Rules. We are unable to identify <u>any</u> connection, however remote, between this status and those belonging to the defined category in article 14. We are unaware of any principle to be derived from the article 14 jurisprudence, European or domestic, which supports this discrete aspect of the appellant's case. We conclude that he does not possess an "other status" within the embrace of article 14.

[59] If each of the immediately preceding conclusions is incorrect it becomes necessary to consider the issue of analogous situation. The various traits of the appellant and elements of his situation have been rehearsed above. His chosen comparator is an asylum applicant. Is there a sufficient analogy between the two?

[60] Every asylum applicant enjoys the protections conferred by the Refugee Convention, the Reception Directive and several related provisions of domestic UK law. These various protections include the following: a right to determination of one's application for refugee status; the protection against non-refoulement pending such determination; a right to certain facilities and support in the formulation and processing of the asylum application: in particular rights to be interviewed, to have the services of an interpreter at public expense, to receive a copy of interview records, to have an effective opportunity to consult a lawyer, to assistance in the ascertainment of all relevant facts and the provision of supporting evidence, to have their asylum applications processed and determined by suitably trained Home Office Officials, to have their application determined within a reasonable time, to receive a reasoned determination and to receive information about how to challenge

the decision. Many of these rights are enshrined in the Rules: specifically paragraphs 333, 336, 339HA, 339NA, 339NB, 339NC, 339ND, 339 HA and 357A. Asylum applicants also have the benefit of the policy protection that their claims shall be assessed in accordance with the UNHCR Handbook on Procedures and Criteria for the Determination of Refugee Status. In addition, there is a right of access to the UN High Commissioner for Refugees.

[61] The consideration which fundamentally differentiates asylum applicants and persons in the appellant's situation ie, unsuccessful asylum applicants who are attempting to re-acquire the status of asylum applicant is self-evident. This differentiation becomes more acute when one conducts the exercise outlined in the immediately preceding paragraph. Having regard to the foregoing we are impelled to the conclusion, without hesitation, that the appellant's situation differs markedly from that of an asylum applicant.

[62] It follow that no issue of justification either under article 8(2) or article 14 arises. Given the uncompromising nature of the conclusions which we have made it would be illogical to conduct a detailed justification exercise. It will suffice to say that we accept Mr McGleenan's submission that any interference with the appellant's right to respect for private life flowing from paragraph 349 of the Rules is justified by the terms of the Reception Directive which, in turn, has in-built proportionality having regard to its express adoption of the EU Charter of Fundamental Rights. Paragraph 349, in establishing bright, luminous lines, mirrors precisely the measure of supreme EU law on which it is founded. Finally, as emphasised by Mr McGleenan, paragraph 349 is a measure of socio-economic policy and the interference alleged by the appellant is not based on any of the so-called "suspect" grounds, with the result that light touch review on the part of this court is appropriate.

Delay

[63] The court accepts the Secretary of State's argument rehearsed in para [11] above. The justiciable decision was incontestably made in the form of the Secretary of State's letter dated 28 January 2022. The contention that the justiciable decision is contained in the later PAP response letter is manifestly untenable. The indelible essence of every PAP letter is that the justiciable decision/act/measure has crystallised, as here. The response is a pre-litigation act which is generated in this context, something incontestably ancillary to the anterior act or decision.

[64] Proceedings were commenced on 4 July 2022, out of time by some two months. These being public law proceedings, the failure of the respondent to raise the issue of delay at first instance is of minimal moment. The appellant having refused to recognise the preceding analysis, there is no application to extend time before the court. This court can identify no grounds for doing so. While there is no respondent's notice formally raising this issue, this court is empowered.to consider it and exercises its discretion accordingly: see Orders 2, R1(1), 53, R 4 and 59, R6 1(b) of

the Rules of the Court of Judicature. Importantly, the appellant has taken the opportunity to address this issue fully before this court, with the result that no unfairness to him arises. It follows that this judicial review application should have been dismissed on this further ground at first instance and this appeal fails on this additional basis.

Conclusion

[65] For the reasons given, we affirm the order of Humphreys J, and dismiss the appeal.