Neutral Citation Number: [2019] EWHC 1586 (Admin)

Case No: CO/707/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2019

Before :

MRS JUSTICE ELISABETH LAING

- -

Between :

(1) SALEH MOHAMMAD TURANI
(2) HAIFAA MAROUF
(3) ABDULLAH MAHMOUD AHMAD

Claimants

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -
- -

MR RAZA HUSAIN QC, MISS BLINNE NÍ GHRÁLAIGH AND MISS JULIANNE KERR
(instructed by **LEIGH DAY SOLICITORS**) for the **Claimants**
MR JONATHAN HALL QC AND MR DAVID BLUNDELL
(instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

Hearing dates: 8 & 9 May 2019

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Approved Judgment

MRS JUSTICE ELISABETH LAING :

Introduction

1. This is an application for judicial review by the Claimants. Permission to apply for judicial review was given by Stewart-Smith J on 1 December 2017. The Claimants are Palestine Refugees from Syria ('PRS'). They challenge the Vulnerable Persons Resettlement Scheme ('the Scheme').

2. The Claimants were represented by Raza Husain QC, Blinne Ní Ghrálaigh and Julianne Kerr Morrison. The Defendant ('the Secretary of State') was represented by Jonathan Hall QC and David Blundell. I thank counsel for their written and oral arguments.

The issues

3. There are four issues.

   i) What is the territorial reach of sections 29(6) and 149 of the Equality Act 2010 ('the 2010 Act')?

   ii) If section 29(6) applies outside the United Kingdom, does the Scheme unjustifiably discriminate indirectly against the Claimants on the grounds of their race, contrary to section 19 of the 2010 Act, read with section 29(6)?

   iii) If section 149 of the 2010 Act applies outside the United Kingdom, has the Secretary of State complied with section 149?

   iv) Is the Scheme unlawful at common law?

Procedural points

4. Much of the first morning of the hearing was occupied by an application by Mr Husain to adduce evidence which, he accepted, was expert evidence, and by a debate about the pleadings. I refused his application to rely on expert evidence for reasons which I gave at the time.

5. The background to the debate about the pleadings is that after this claim was brought, the Secretary of State amended the terms of the Scheme. In short, the Secretary of State contended that that change made the claim academic. The Claimants did not accept that, as they made clear in their Reply dated 9 October 2017. They now contend that the Scheme, as amended, discriminates indirectly against them on the grounds of their race. There has been much correspondence as the Claimants have tried (with varying degrees of success) to find out information from the Secretary of State (including an application under CPR Part 18).

6. Despite invitations by the Secretary of State to amend their grounds of claim, the Claimants did not do so, although I do not consider that, despite the space devoted to this issue in the Secretary of State's skeleton argument, the Secretary of State has been significantly prejudiced by this. The main issues are (with one exception) clear from the Reply, as the Secretary of State appeared to accept in a letter dated 3 April 2019. The exception is that the Claimants have not expressly defined an essential component of their indirect discrimination claim. That is, the provision, criterion or practice

('PCP') on which they rely. Mr Hall candidly accepted that he knew what the PCP was, but, not unreasonably, wanted Mr Husain to commit it to writing.

7. I resolved the debate about the pleadings by asking Mr Husain to produce a formal document in which he described the PCP. He also helpfully agreed to describe the less intrusive means which he submitted, as part of his case on discrimination, the Secretary of State could have used instead of the PCP. The PCP is that all referrals under the Scheme are to be made exclusively to the United Nations High Commissioner for Refugees ('UNHCR'). The less intrusive means 'c/would include (1) self-referral to the local British Embassy or to the Home Office directly and (2) referral by one of the non-governmental organisations ('NGOs') active in the region'.

Background

8. The Scheme was launched on 29 January 2014 by an oral statement to Parliament by the then Secretary of State. At first the Scheme applied only to Syrian nationals. The statement is set out in full in the Defendant's skeleton argument. I will summarise the main points in the statement. The Secretary of State described the 'staggering' number of people affected, and the 'immense' scale of the refugee crisis. She pointed out that the United Kingdom was the second largest bilateral donor. She then described the material help which the United Kingdom was providing on the ground. She said that the greatest need was in the region and that that was where the United Kingdom could make the biggest impact. She referred to a 'proud tradition' of protecting those in need, and said that the United Kingdom was 'ready to look at' cases 'where there are particularly vulnerable refugees who are at grave risk'. After consultations with UNHCR, the Government was launching a programme to give 'emergency sanctuary' to 'displaced Syrians who are particularly vulnerable'.

9. The Scheme would be based on three principles.

   i) Help should be targeted where it could have 'the most impact on the refugees at the greatest risk', where evacuation was the only option. Priority would be given to survivors of torture and violence, women and children at risk or in need of medical care 'who are recommended to us for relocation by UNHCR'. She gave, as an example, victims of sexual violence.

   ii) The Scheme would be run in addition to two other resettlement schemes which the Government ran 'in partnership with UNHCR', the Vulnerable Children Resettlement Scheme ('the VCRS'), and the Mandate Resettlement Scheme.

   iii) Because the Government wanted to help the most vulnerable people, there would be no quota. The Government would work 'in close consultation' with UNHCR's offices in London, Geneva and the region. The Government had a 'deep and strong working relationship with UNHCR built up over many years.' £61m of the United Kingdom humanitarian help to Syria was being given through UNHCR programmes. 'Our approach is entirely consistent with the wider UNHCR programme, is supported by them and will allow us the control to make the best use of our capability to help these cases'.

10. On 13 March 2014, a Minister of State in the Home Office signed a document headed 'Equality Act 2010 Paragraph 17(4) of Schedule 3 to the Equality Act 2010 Ministerial

Authorisation Equality (Syria – Entry Clearance outside the immigration rules Authorisation 2014 ('the Authorisation'). The Minister authorised the grant of entry clearance outside the immigration rules to Syrian nationals under the Scheme.

11. A written ministerial statement was made on 25 March 2014. This said, among other things:

> *'We have launched [the Scheme] to provide protection in this country to particularly vulnerable refugees who are at grave risk. Since that point, we have been working closely with the United Nations High Commissioner for Refugees (UNHCR) to identify those who are most vulnerable.*
>
> *…we expect the first group of Syrians to arrive as part of [the Scheme] today, just eight weeks after the Home Secretary's announcement. During this time, we have been working in close collaboration with UNHCR, the International Organisation for Migration and local authority services to ensure that the particular needs of the beneficiaries, with their extreme vulnerabilities, will be met. Given the absolute primacy of safeguarding the UK's security, appropriate checks have also been conducted before bringing Syrians displaced by the conflict to the UK. We expect the next arrivals in April.*
>
> *...We believe that the VPR scheme will make a real difference to the lives of some of the most vulnerable Syrians displaced by the conflict by giving them protection and support in the UK.*
>
> *I have agreed a ministerial authorisation (Equality (Syria – Entry clearance outside the immigration rules) Authorisation 2014) to allow differentiation in favour of Syrian nationals whom we want to bring to the UK under the VPR scheme'.*

12. The Scheme was widened somewhat in September 2015. At that stage, it was anticipated that 20,000 refugees would be resettled by 2020; a modest target when compared with the very large number of displaced people.

13. The Claimants' solicitors, Leigh Day ('LD') sent a pre-action protocol letter to the Secretary of State on 22 November 2016. In its response to that letter, the Government Legal Service ('GLD') suggested that the Claimants could apply for resettlement under the VCRS, applications for which were determined by UNHCR. GLD suggested that it was up to the Claimants to approach UNHCR (letter of 22 November 2016).

14. On 6 January 2017 the Claimants brought this claim. They argued that the Scheme discriminated against them directly on grounds of race, that the Secretary of State had not complied with section 149 of the 2010 Act, and that the Scheme was irrational and unlawful because no reasons had been given for it. There was, at that stage, no reason for the pre-action protocol letter, or the grounds of claim, to refer to the mutually exclusive mandates of the United Nations Works and Relief Agency ('UNRWA') and of UNHCR and they did not do so.

15. The Secretary of State lodged her summary grounds of defence two working days before the announcement that the Scheme was to be widened (Claimants' Reply, paragraph 1.b). I say more about that announcement below. The Secretary of State submitted that the Authorisation was an answer to the claim under the 2010 Act. The Scheme was set up under common law powers, but was operated by the grant of entry clearance. It was artificial to separate the establishment of the Scheme from the decision to grant entry clearance (paragraph 30).

16. The Secretary of State argued that the claim under the 2010 Act was in any event misconceived because the 2010 Act does not extend beyond the territory of the United Kingdom. The Secretary of State referred to section 29(9) and 29(10) of the 2010 Act, and to the decision of the Court of Appeal in *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA (Civ) 438; [2016] 1 WLR 3791.

17. The Secretary of State had 'confirmed that she gave consideration to the PSED at the time the Scheme was formulated'. The Secretary of State also argued, in reliance on the decision of the Court of Appeal in *Hottak*, that section 149(1)(b) did not apply to entry clearance and that section 149(1)(a) was not engaged.

18. The reasons challenge was resisted.

19. The Secretary of State also contended that delay and a suitable alternative remedy barred the claim. On the second of those points, the Secretary of State argued that the Claimants had not 'attempted to approach UNHCR for acceptance onto one of the alternative settlement schemes that exist' (paragraphs 23-15). The Secretary of State referred to the VCRS and to the Gateway Scheme. The Secretary of State asserted the Claimants could have approached UNHCR under both schemes, and that 'Neither programme has any nationality exclusion'.

20. On 29 June 2017, the Secretary of State produced a document headed 'Annex A: Policy Equalities Statement' ('the PES'). The PES was not, however, disclosed to the Claimants until shortly before the substantive hearing of this claim. It was attached to the fourth witness statement of Ms King-Fisher, dated 25 April 2019. Mr Hall apologised for that late disclosure at the hearing. The title of the PES referred to the Scheme. The review date for the PES was stated to be 30 July 2017. There is no document in the bundle recording any such review. While it is clear that the author of the PES expected there to be a review, the Secretary of State has not suggested that there was one. That being so, I consider that I can assume that there was not. It is likely, given the date and the heading of the PES, that it was prepared as part of a ministerial submission about the widening of the Scheme. At the foot of the second page of the PES is a box headed 'Summary of the evidence considered in demonstrating due regard to the Public Sector Equality Duty'. The evidence appears to be mainly statistical.

21. The first sentence of the PES said that through the Scheme, the Home Office worked 'with [UNHCR] to identify those most at risk and bring them to the UK. The scheme was launched in January 2014 and has helped those in greatest need, including people requiring urgent medical treatment, survivors of violence and torture, and women and children at risk'. The Scheme was to be widened from July 2017 to include those who had fled the conflict in Syria but did not have Syrian nationality. A premise of the PES is that UNHCR will be closely involved in the operation of the Scheme on the ground.

The PES considers the impact of widening the Scheme under each of the protected characteristics. One conclusion of the PSE is that expanding the reach of the Scheme will advance equality of opportunity between 'Syrian nationals and nationals of other countries who are based in Syria, as the latter group will now also be able to access the Scheme'.

22. The PES does not refer to the mutual exclusivity of the mandates of UNHCR and of UNRWA.

23. On 3 July 2017, in a written statement to Parliament the Secretary of State announced that the Scheme would no longer be limited to Syrian nationals. She said the Syrian crisis was entering its seventh year. Thousands of refugees were being driven towards Europe's borders. The United Kingdom had pledged £2.46 billion to help. Direct support had reached hundreds of thousands of people in Syria, Jordan, Lebanon, Turkey, Iraq and Egypt. The aim was to help Syrians build a life in neighbouring countries.

24. She referred to the Scheme. Its focus so far had been Syrian nationals because 'they formed an easily identifiable cohort of refugees who have fled the conflict and whose needs are clearly evident'. That focus had led to a 'quick and efficient response to the crisis'. The Government worked 'closely with UNHCR to identify the individuals who are most at risk in the region and whose particular needs can only be met in countries like the UK'. Up to the end of March 2017, 7,307 Syrians had been resettled in the United Kingdom. Half were children. The Government was 'on track to meet' the commitment to resettle 20,000 refugees by 2020. Further, the VCRS, launched the previous year, would 'see us resettle up to 3000' of the most vulnerable children and their families from the Middle East and from North Africa by 2020.

25. The Scheme was aimed at 'the most vulnerable Syrians' but there were 'additional groups in the region who have fled Syria and are also extremely vulnerable' but might not have access to one of the resettlement schemes. UNHCR's advice was that 'a diversified resettlement quota' was needed to address 'the needs of the most vulnerable refugees from all refugee populations in the region'. In the light of that, the Secretary of State was immediately opening the Scheme to 'enable UNHCR to refer the most vulnerable refugees in the MENA region who have fled the Syrian conflict and cannot safely return to their country of origin, whatever their nationality'.

26. The Government was committed to 'an effective response in the affected regions and to resettling the most vulnerable; this includes those who had sought refuge within Syria prior to the conflict and been recognised as refugees. We will continue to rely on UNHCR to identify and refer the most vulnerable refugees but will no longer limit the scheme solely to those with Syrian nationality. UNHCR will only refer to us those who are genuine refugees, in that they cannot seek the protection of their home country'.

27. Mixed family groups would be eligible and the change might open the Scheme to other groups, such as Iraqi minorities, who sought refuge in Syria but had to flee again as a result of the Syria conflict. The change recognised that other nationalities who had lived in Syria had been affected by the conflict. The approach was said to be 'based on targeting our support so that it delivers the most impact, helps those who need it most, and avoids unintended consequences.' The change would help the Government to 'continue to support the most vulnerable refugees fleeing Syria.'

28. On 4 July 2017, LD wrote to GLD. The letter asked GLD to confirm, 'by return', that all the Claimants would be eligible for resettlement under the Scheme; if they were then able to apply, how they could do that, since they were unable to register with UNHCR as they were PRS; and that the Secretary of State was no longer resisting the application for judicial review. LD wrote to the Court on 24 July 2017.

29. On 6 July 2017, GLD wrote to LD. GLD referred to, and quoted, the 3 July 2017 statement. GLD asserted that the Claimants' claim was now academic. GLD also asserted, 'They can approach UNHCR for referral to the United Kingdom'. GLD asked the Claimants to withdraw their claim.

30. On 12 July, LD emailed GLD. LD asked for an up-date, and asked, 'How can our clients apply to the Scheme as Palestinians, given they cannot register with UNHCR?' On 12 July 2017, GLD replied. The author of the email said, 'I am told by my client that they are already aware of the issue and already discussing this with UNHCR'. On 13 July LD emailed GLD asking whether the Secretary of State was setting up a bespoke arrangement with UNHCR in Beirut through which the Claimants could apply. The Claimants were 'extremely anxious' to get clarification as they wanted to apply to the Scheme.

31. On 1 August 2017, GLD replied to LD's email of 13 July. It is clear from that email that the Secretary of State still did not have an answer to the questions LD had asked on 4 July 2017. The email said, 'the practical issues regarding registration on the Scheme [were] particularly sensitive'. The Secretary of State had been 'in discussions about how the Scheme will operate…'. The email made it clear that the Secretary of State would continue to 'rely on UNHCR to identify and refer the most vulnerable refugees…regardless of their nationality'. The Secretary of State, it was said, was working urgently with 'international partners to identify referral pathways for [PRS]'. PRS in Jordan and Lebanon should register with UNRWA 'and relevant authorities. On a case-by-case basis and after a thorough and joint assessment [PRS] may be considered for resettlement and other pathways of admission to third countries, as applicable'.

32. LD replied on 22 August 2017. They reminded the Secretary of State that the Claimants were already registered with UNRWA. LD asked eight questions about how the Claimants could be considered under the Scheme. GLD replied on 30 August 2017. The Secretary of State had 'picked this up with UNHCR' but would need more time. GLD sent a further email on 14 September 2017. GLD apologised (again) for the delay, which, 'at first blush…appears inexplicable' in the light of the announcement that the Scheme would be expanded. In this email, GLD replied to the questions which LD had asked in their email of 22 August 2017. GLD said, among other things, that 'All UK resettlement schemes operate through UNHCR referrals.' The schemes operated in such a way that 'we resettle solely on the basis of needs as identified by UNHCR'. The Secretary of State could not advise on how to progress a resettlement application 'unless the case is referred by UNHCR'. Palestinian nationals who live in Lebanon and Jordan (where UNRWA operates) have to register with UNRWA. The Secretary of State could not treat the Claimants' letters as applications. The Claimants had to register with UNRWA (or UNHCR, depending on where they were living). Individuals could not apply for resettlement. UNHCR would only make a referral for resettlement once it had determined that a person was a refugee. Assessments could only be arranged with UNHCR or UNRWA, not by the Secretary of State. The email ended by asking whether

any of the Claimants were registered with UNRWA or with UNHCR. This is an odd question, given what GLD had been told by LD in LD's email of 22 August 2017.

33. On 29 September 2017, LD wrote to the Court. GLD was copied in. LD said they had been trying get the Secretary of State to clarify the July statement. Despite that announcement, PRS, including the Claimants, were still not able to get access to the Scheme. The Secretary of State had still not given details of any way in which PRS could have access to the Scheme.

34. On 9 October 2017, counsel for the Claimants signed a 'Reply/Update to the Court'. Paragraph 1.a. referred to the 3 July 2017 statement. The Claimants said that it had become clear that 'in practice the Claimants, and [PRS] in general, remain excluded from [the Scheme] because there is no process in place through which they can apply, or be referred, to the UK Government for resettlement'. The Reply would deal with the implications of the 3 July statement for the claim. Paragraph 6 explained that the Secretary of State's decision to continue to rely on UNHCR meant that PRS who were receiving help from UNRWA were excluded from the Scheme in practice because such PRS are outside UNHCR's mandate. The Claimants referred to article 1D of the Refugee Convention and articles 6-7 of the Statute of the UNCHR 1950. PRS in UNRWA's areas of operation could not register with UNHCR in such areas and UNHCR had no mandate to refer PRS to the Scheme. The Reply then summarised the exchange of correspondence which I have already described. Paragraph 15 of the Reply said that the Secretary of State had not explained how PRS registered with UNRWA and not UNHCR could be referred to the Scheme, when UNRWA has no resettlement mandate, and UNHCR, no mandate over PRS. As far as the Claimants could tell, UNHCR was the only gateway to the Scheme.

35. In paragraph 22, the Claimants said that to argue that the opportunity to resettle in the United Kingdom, with all the benefits it entails, as 'merely the residue of an initial decision on entry clearance was and is unsustainable'. In paragraph 23, they characterised the de facto exclusion of PRS from the Scheme as indirect discrimination, contrary to section 19 of the 2010 Act. It was not justified. Rather than justifying the discrimination, the Secretary of State continued to assert that PRS were eligible for the Scheme, without explaining how.

36. There was no rational reason for excluding PRS from the Scheme. The Secretary of State's reliance on other schemes showed that she had failed to understand that the Claimants could not get access to any scheme via UNHCR (paragraph 26). On the jurisdiction issue, the Claimants attempted to distinguish *Hottak*. The Court of Appeal's reasoning about a Part 3 claim was obiter, and wrong. The Claimants asserted that it was inconsistent with the conclusion of the House of Lords in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 AC 1. They quoted paragraph 76 of the speech of Baroness Hale in that case.

37. In paragraph 36, the Claimants said, 'If, as it appears, the Secretary of State has failed to appreciate that PRS cannot register with and/or access a scheme run exclusively by UNHCR…this is likely a result of her continuing failure to carry out a compliant assessment pursuant to her PSED'. The Claimants also said that the Secretary of State's reliance on access to other schemes as an alternative remedy showed 'the Secretary of State's persistent failure to understand and address the impact of her reliance on

UNHCR alone for referring refugees to [the Scheme]', because they could not 'approach UNHCR' (paragraph 40; see also paragraph 41).

38. As I have said, Stuart-Smith J granted permission to apply for judicial review on 1 December 2017. He ordered the Secretary of State to explain in a document how a PRS 'can apply to and be accepted as eligible for [the Scheme]' so as to enable a potentially eligible PRS to 'make an effective application and be effectively included in [the Scheme]'. If the Secretary of State accepted that a PRS could 'not make an effective application and/or cannot be effectively included in [the Scheme] the document should say so'. GLD asked for an extension of time in a letter dated 22 December 2017. '[D]ue to the particular sensitivities of this matter any response requires approval by the Defendant's international partners'.

39. In a letter also dated 22 December, GLD responded to the order of 1 December 2017. The Secretary of State's response was that she could not 'indicate how a [PRS] can apply and be accepted as eligible under [the Scheme]…there is no application process for any resettlement scheme. However, that is not to say that a PRS cannot be resettled in the UK under [the Scheme]'. While refugees cannot apply for resettlement, 'vulnerable refugees who have fled the Syrian conflict are identified and considered for referral to the UK by UNHCR in the process set out in the following paragraph'.

40. The next paragraph says that people being referred for resettlement have to be registered with UNHCR or, in the case of PRS living in Lebanon or Jordan, with UNRWA. It was understood that the Claimants were registered with UNRWA. They must then meet 'the preconditions for resettlement consideration; and fall under one of UNHCR's resettlement submission categories.' The preconditions are that a person has been 'determined to be a refugee by UNHCR', that the person's 'prospects for all durable solutions' had been assessed and that 'resettlement is identified as the most appropriate solution'.

41. The letter said that PRS in Lebanon and Jordan are required to be registered with UNRWA. UNRWA will consider whether it is able to provide the support needed by PRS under UNRWA's mandate in the place where the PRS is living. If they cannot, the person is 'flagged up to one of its partner organisations to consider them for the provision of services; depending on the service required, this could be UNHCR. For those individuals raised with them by partner organisations, UNHCR will consider vulnerability and assess what support services are required. This assessment includes whether resettlement may be the best option for a person, as set out in the above paragraph'.

42. In the final paragraph, GLD said that the Secretary of State was 'unable to guarantee the suitability of a referral for resettlement for a [PRS]. To do so would prejudice the established processes, as set out above, which operated according to the humanitarian principles of impartiality and neutrality. In accordance with those principles 'each individual is assessed by the relevant agency and their success in respect of resettlement is dependant [sic] upon a number of factors, which are not assessed by the Defendant but either by UNRWA or UNHCR, depending on the area of displacement. Therefore there is every possibility that a [PRS] could be included in [the Scheme], provided they are registered. However, their individual circumstances will be assessed and processed in accordance with the above. The Defendant is not involved in these processes until a person or family is referred to the UK for resettlement under one of its schemes.'

43. The Secretary of State's detailed grounds of defence were signed by counsel on 22 February 2018. The Secretary of State's summary of the position was still that the claim was academic. The Secretary of State did not accept that the Scheme was unlawful in its original form, but it was now open to all nationalities, including Palestinians. The Secretary of State had explained in the letter dated 22 December 2017 that there was 'an established process for PRS in Lebanon or Jordan (ie under the mandate of UNRWA) to be identified by UNRWA 'as requiring services from partner organisations, including UNHCR, to address exceptional protection needs or vulnerabilities on an exceptional basis'. UNHCR could then consider whether resettlement, including in the United Kingdom, would be appropriate for them'. PRS were therefore able in practice to get access to the Scheme.

44. There was no 'application process' for anyone, even Syrians. 'Instead, the Scheme operates on the basis of referrals from UNHCR. PRS are in no different position to refugees of other nationalities in that respect. Owing to the inability of UNRWA to identify suitable persons falling under their mandate for the provision of further services from partner organisations, including UNRWA, PRS can, in practice, be referred by UNHCR, in suitable cases, for acceptance onto the Scheme'.

45. The first witness statement of Ms King-Fisher is said to confirm this. I quote from it below; I do not consider that it does. The witness statement is also said to show in 'considerable detail' how a PRS can in practice have access to the Scheme 'if referred from UNRWA to UNHCR', and to show the considerable efforts made by the Secretary of State, in meetings with both organisations, to ensure that PRS are able in practice to have access to the Scheme. The conclusion is that 'the Claimants are no longer excluded from the Scheme'. The claim was said to be academic, as the Claimants had got what they wanted.

46. That witness statement is also dated 22 February 2018. Ms King-Fisher is the official who was responsible for 'developing the criteria to expand [the Scheme]' (paragraph 2). She refers to four resettlement schemes in paragraph 4. Their purpose is to 'target those in greatest need of assistance, including people requiring urgent medical treatment, survivors of violence and torture, and women and children at risk'. That is why the Secretary of State works closely with UNHCR. It has a global presence and over 60 years of experience (paragraph 6). UNHCR 'identifies and proposes refugees for [the Scheme]' (paragraph 7). It has well-established procedures and criteria (paragraph 8). It refers to the United Kingdom the refugees it has identified as meeting its criteria and those for whom resettlement is 'the most appropriate durable solution'. The United Kingdom government does not intervene in the process of identification and referral 'as set out in the Resettlement Handbook' (paragraph 9). Page 216 is quoted. Resettlement is based on 'objective need'. Consistently with that, people cannot apply directly to the United Kingdom for resettlement. There is no application process to the United Kingdom schemes. Referrals can only be made by UNHCR after they have assessed the need for resettlement in accordance with their vulnerability criteria (paragraph 10). Once UNHCR has made a referral, the Home Office do checks, including security screening, and assess whether the case should be accepted.

47. Ms King-Fisher says in paragraph 12 that the expansion of the Scheme could include Palestinian nationals. Before and after 3 July 2017, the Home Office had been 'working with our international partners to plan for and implement the widened criteria'. Since

3 July 2017, 64 non-Syrian nationals have been referred to the United Kingdom for consideration (paragraph 15).

48. In paragraph 17, she explains that there are two ways in which a PRS could be considered for resettlement.

    i) If they are not registered with UNRWA, or registered with UNRWA but present in Turkey, Iraq or Egypt, they can be identified by UNHCR in the same way as Syria nationals.

    ii) If they are registered with UNRWA and are in Lebanon or Jordan, where UNRWA is 'mandated' to help, she says that they can be helped.

        1) UNRWA may, in the course of carrying out its mandate, identify PRS 'on an exceptional basis with exceptional protection needs or vulnerabilities'.

        2) UNRWA does not have a resettlement mandate. It is not able to identify PRS for resettlement specifically.

        3) 'In accordance with its mandate, for cases requiring additional support due to the individual's exceptional needs and vulnerability, UNRWA, on a strictly humanitarian and case-by-case basis, may refer the case to its partners for consideration for additional assistance that they may offer, including UNHCR, given the humanitarian imperative and in deference to the individual's freedom to seek and pursue assistance that best responds to their needs'.

        4) On a case-by-case basis, after a thorough assessment by UNHCR, PRS 'may be considered for resettlement and other pathways of admission to third countries, as appropriate'.

49. In paragraph 18, she accepts that PRS in Jordan and Lebanon cannot register with UNHCR directly. UNRWA has no mandate itself to consider resettlement. She exhibits the UNHCR Statute and a summary of UNRWA's mandate. She says that UNRWA may 'on a strictly humanitarian and case-by-case basis' ask for help from other partners, including UNHCR, when an individual is experiencing exceptional vulnerabilities requiring additional assistance given the humanitarian imperative and in deference to an individual's freedom to seek and pursue assistance that best responds to their needs'. In paragraph 19, Ms King-Fisher says that the description in paragraph 17 'has been confirmed by both UNRWA and UNHCR to be accurate'.

50. She describes work with UNHCR 'and international partners' (not identified) to 'put in place the operational arrangements.' She describes a meeting on 19 September 2017 in Jordan to 'discuss the potential process' for PRS from Lebanon and Jordan. She repeats almost word for word the language of the second part of paragraph 18. There was a further meeting in Jordan on 30 October 2017. She and representatives of UNRWA and UNHCR were present. The purpose of the meeting was to confirm the process described in paragraph 17 and to identify and resolve other practical issues. The Home Office is continuing to work with partners in the region, 'subject to their mandates to ensure the successful resettlement of those eligible under the expanded criteria'. At

paragraph 24, she says that UNRWA and UNHCR have confirmed that that is an accurate summary of the meeting, and, at paragraph 25, that they have seen a copy of the witness statement and have confirmed 'so far as it describes their processes, that it is true'.

51. The detailed grounds provoked, on 19 April 2018, a request by the Claimants for further information and disclosure. GLD replied on 5 June 2018. A table was attached to that response, covering the period between 1 January 2011 and 10 May 2018. It showed that 10 Palestine refugees had been referred under the Scheme to the Secretary of State by UNHCR, including one from Lebanon. There were none from Jordan. 112 had been referred from Iraq under the VCRS, and 140 from Iraq under the Gateway Scheme.

52. On 19 June 2018, a substantive hearing listed for 3 July 2018 was adjourned by consent. A further hearing was listed for December 2018. The Claimants applied to rely on further evidence, which showed that their attempts individually to approach UNHCR and UNRWA (on the basis outlined in the Secretary of State's detailed grounds and in the witness statement of Ms King-Fisher) had been rebuffed by both organisations. That application was resisted by the Secretary of State. In a letter dated 31 October 2018, LD asked the Court to take into account their further representations in support of that application. LD also explained that UNRWA had emailed LD. It said that it had no resettlement mandate and confirmed the exceptional criteria it applies when deciding whether to refer people to UNHCR, but had offered to meet the Claimants in Lebanon. LD said it was not clear that the meetings would provide appropriate relief, but were prepared for the December hearing to be re-listed, since the Secretary of State needed more time to respond to the new evidence.

53. On 2 November 2018 Lang J gave the Claimants permission to rely on four new witness statements. She observed that the contents of the witness statements were relevant to the Secretary of State's defence, and that they were 'a cause for concern'. LD explained in a witness statement dated 4 September 2018 that they were not asking UNHCR or UNRWA to change their mandates, but were asking 'the British authorities, in recognition of UNHCR's and UNRWA's limited jurisdiction over Palestine refugees and resettlement respectively, to provide an alternative means by which they could apply for resettlement under [the Scheme]'.

54. On 3 December 2018, Ms King-Fisher signed a witness statement described as her third witness statement; it was, in fact, her second. She had tried to investigate whether the Claimants' account of their contacts with UNRWA and UNHCR in Beirut were accurate. UNRWA had confirmed that the Claimants were told that UNRWA could not refer them to UNHCR. UNRWA have 'subsequently reached out to the individuals to understand whether there are any obstacles to them receiving UNRWA assistance and whether there is anything further that UNRWA can do in this regard'. UNHCR would not respond to the witness statements.

55. She repeated, in paragraph 10, what she said the Secretary of State's position was. UNRWA has a 'general process' by which 'it may refer Palestine refugees experiencing exceptional protection needs or vulnerabilities, and requiring additional assistance, in one of its areas of operation to other partners. This is done on a strictly humanitarian and case-by-case basis, in view of the humanitarian imperative and in deference to an individual's freedom to seek and pursue assistance that best responds to their needs. In this context, referrals may be to UNHCR. It is for UNHCR, in such cases, to decide

what additional assistance, if any, to provide. Any such additional assistance may include consideration for resettlement under a scheme operated by the United Kingdom or another state, or it may not'. UNRWA did not, therefore, specifically refer people to UNHCR for resettlement. UNRWA's and UNHCR's different mandates meant that 'considerable care' was needed 'about the assistance that each can give in a particular case'. She added that 'the particular political context' heightened the sensitivity of both parties to the interpretation of their respective roles, which are distinct'. She mentions that UNRWA have referred two families (not the Claimants) to UNHCR Lebanon who are being considered for resettlement.

56. On 3 April GLD wrote to LD. GLD maintained the legal position set out in the summary grounds, but considered that the court need not be troubled by all those issues, 'for example the ministerial authorisation point, which no longer bear on the points which are in dispute'. Those points are said to 'remain the Claimants'' ability to access the scheme in practical terms given UNRWA's involvement and their suggestion, as we understand it, that the UK ought to amend the scheme to enable them to access it'. Now that the issues had narrowed, they planned to serve a further witness statement from Ms King-Fisher updating the court and to explain why 'the UK does not accept direct applications for resettlement'.

57. On 4 April 2019, UNRWA's Department of Legal Affairs produced a note. The note described UNRWA's limited mandate and its provision of services in five fields of operation, including Lebanon. In the course of carrying out its mandate, UNRWA 'may identify Palestine refugees (including Palestine refugees from Syria, within Jordan or Lebanon) as high-risk cases with exceptional protection needs which it is unable to address directly'.

58. UNRWA does not process applications for referrals. But, if in the course of carrying out its mandate, 'a Palestine refugee is found to be a high-risk case with exceptional protection needs, then UNRWA may consider referral to a relevant partner organization on a strictly humanitarian and case-by-case basis given the humanitarian imperative and in deference to an individual's freedom to seek and pursue assistance that best responds to their needs. It is for the partner organization to decide what further assistance to provide, if any. Given UNRWA's mandate, its limitations and responsibilities, referrals can only exceptionally be instigated and it is not possible for Palestine refugees to apply for referrals, including to UNHCR, through UNRWA'.

59. The note then describes external referrals to partners and external service providers, for example, for specialist medical care. Apart from referrals for service provision, UNRWA may 'in exceptional cases also consider referrals to UN partner agencies, such as UNHCR…The ability and extent of services these agencies can provide will be dependent on and determined by their mandate and capacities'.

60. The note continues that where a Palestine refugee is identified by UNRWA as a high-risk case with exceptional protection needs and UNRWA does not have the capacity to address the concern and avert the imminent harm (e.g. a Palestine refugee faces a real and credible threat to his/her life) then UNRWA will consider all possible options in view of the exigency of the situation. This will include an assessment of possible referrals to UN entities or other organizations with a protection mandate'.

61. On 5 April 2019, LD wrote to GLD. One of the Claimants had emailed UNHCR in Lebanon. The email had bounced back, with a message that registration for Syrians with UNHCR had been suspended from 5 May 2015 because of instructions from the government of Lebanon. LD asked GLD some questions about that. I note that the email also encouraged its recipient to call UNHCR to schedule a meeting.

62. On 25 April 2019, LD wrote to GLD about the meeting between the Claimants and UNRWA. LD understood that UNRWA had told GLD, as it had told LD, that they had assessed each Claimant and had concluded that they could not give them any more help. They said that the difficulties faced by the Claimants were common to many Palestine refugees fleeing the conflict in Syria, or more generally. They sent a note, which GLD understood the Home Office also had. LD's understanding was that UNRWA would not be referring the Claimants to UNHCR. GLD was asked to confirm that it had been told the result of the assessment and had the note. They asked why it had not already been disclosed by GLD, pursuant to its duty of candour.

63. That prompted a letter dated 25 April 2019 from GLD. GLD said that it understood that the Claimants had had a meeting with UNRWA in January 2019. That meeting was not referred to in LD's letter of 5 April. UNRWA's process was set out in a note dated 4 April 2019 from UNRWA Department of Legal Affairs. That note is said to show that 'the process of possible referrals from UNRWA is entirely consistent with the process we have previously described in our evidence'. It seemed obvious that the Claimants' meeting with UNRWA should be before the court.

64. GLD's letter also attached Ms King-Fisher's 'fourth' witness statement, dated 25 April 2019, and dealt with the suspension of registrations. The Secretary of State was said to have been 'well aware' of that. The suspension of registration related to Syrian refugees who arrived in Lebanon after 5 May 2015. It did not mean that those already registered by that date could not be processed. UNHCR was still processing refugees who were registered in Lebanon, and referring them, where appropriate, to resettlement states. Since the Claimants were not Syrians, the suspension did not affect them at all. In any event, the Secretary of State had not suggested that they should register directly with UNHCR.

65. In paragraph 2 of her further witness statement, Ms King-Fisher refers to GLD's letter dated 25 April 2019. That letter accurately reflected her understanding. She said that the Government does not accept direct applications for resettlement under the Scheme but relies on 'identification of suitable cases by [UNHCR] in accordance with established criteria'. In paragraph 4, she said that the United Kingdom has a 'well-established relationship with the UNHCR in identifying' people in camps, informal settlements and host communities who would benefit most from resettlement in the United Kingdom. The work UNHCR can do is described in a briefing paper dated 7 March 2016 and in another document in the Claimants' bundle. In paragraph 5 she says that UNHCR is 'better able' to do this, but does not identify the implicit comparator. She describes UNHCR's 'very large number of locally engaged and international staff throughout the regions where it operates and is able to engage with' many people 'in a way that simply is not open to United Kingdom officials'. It uses its 'operational expertise' to support the United Kingdom's resettlement schemes and those of other states. That is why the Government does not accept direct applications.

66. In paragraph 7 she says that there was no 'formal Public Sector Equality Duty consideration' when the Scheme was introduced and then 'ramped up' in 2015. 'This was because of the speed at which the scheme had to be developed and then rolled out. However, some consideration was given to it at the time'. When the Scheme was expanded in 2017, a PES was created. She attaches it. I have already described it.

67. There was further correspondence between solicitors. On 1 May 2019, GLD sent LD an email. It attached figures about referrals between 1 January 2011 and January or April 2019. It showed that one Palestinian had been referred by UNHCR under the Scheme, and three from Jordan. The referral from Lebanon was not registered with UNRWA. 18 referrals in all had been made; five from Egypt, eight from Iraq, and one from Turkey. More had been referred under the VCRS and Gateway Scheme, but they were all from Iraq (apart from 11 from Syria).

Indirect discrimination

68. Part 2 of the 2010 Act is entitled 'Equality: Key Concepts'. Chapter 1 is headed 'Protected Characteristics'. Section 4 lists the protected characteristics. They include race. Section 9(1)(b) provides that race includes nationality. The 2010 Act does not create any hierarchy of protected characteristics. The language and structure of the 2010 Act suggest, rather, that each ranks equally with the others.

69. Chapter 2 is headed 'Prohibited Conduct'. Section 13 defines direct discrimination. Section 19 defines indirect discrimination. It provides:

> *'(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.'*

Section 19(3) provides that the relevant protected characteristics include race, among others.

70. Section 23 is headed 'Comparison by reference to circumstances'. Section 23(1) provides 'On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case'.

71. Part 3 is entitled 'Services and Public Functions'. So far as is relevant, section 29 provides:

> '*….(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation...*
>
> *(9) In the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the meaning of the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom.*
>
> *(10) Subsection (9) does not affect the application of any other provision of this Act to conduct outside England and Wales or Scotland.*'

Section 31(4) explains that a 'public function' is 'a function that is a function of a public nature for the purposes of the Human Rights Act 1998'.

72. Section 30 provides:

> '*30 Ships and hovercraft*
>
> *(1) This Part (subject to subsection (2)) applies only in such circumstances as are prescribed in relation to—*
>
> *(a) transporting people by ship or hovercraft;*
>
> *(b) a service provided on a ship or hovercraft.*
>
> *(2) Section 29(6) applies in relation to the matters referred to in paragraphs (a) and (b) of subsection (1); but in so far as it relates to disability discrimination, section 29(6) applies to those matters only in such circumstances as are prescribed.*
>
> *(3) It does not matter whether the ship or hovercraft is within or outside the United Kingdom…*
>
> *(6) Nothing in this section affects the application of any other provision of this Act to conduct outside England and Wales or Scotland.*'

73. There are provisions similar to section 29(10) and 30(6) in sections 81(6) and 82(7). I do not know if there are others.

74. One of the statutory predecessors of the 2010 Act was the Race Relations Act 1976 ('the RRA'). When the RRA was first enacted, Part III dealt with discrimination in fields other than employment. Section 20 dealt with the provision of goods and services. Section 27 contained a territorial limit on Part III.

> '*Extent of 27.-*

(1) Sections 17 to 19 do not apply to benefits, facilities or Part III. services outside Great Britain except-

(a) travel on a ship registered at a port of registry in Great Britain; and

(b) benefits, facilities or services provided on a ship so registered.

(2) Section 20(1)-

(a) does not apply to goods, facilities or services outside Great Britain except as provided in subsections (3) and (4); and

(b) does not apply to facilities by way of banking or insurance or for grants, loans, credit or finance, where the facilities are for a purpose to be carried out, or in connection with risks wholly or mainly arising, outside Great Britain.

(3) Section 20(1) applies to the provision of facilities for travel outside Great Britain where the refusal or omission occurs in Great Britain or on a ship, aircraft or hovercraft within subsection (4).

(4) Section 20(1) applies on and in relation to-

(a) any ship registered at a port of registry in Great Britain;

(b) any aircraft or hovercraft registered in the United Kingdom and operated by a person who has his principal place of business, or is ordinarily resident, in Great Britain, even if the ship, aircraft or hovercraft is outside Great Britain.

(5) This section shall not render unlawful an act done in or over a country outside the United Kingdom, or in or over that country's territorial waters, for the purpose of complying with the laws of that country.'

75. Part III was amended in 2001 by the enactment, among other things, of section 19B, which made it unlawful for a public authority to discriminate when carrying out its functions. Section 19D enacted an exception for certain acts in immigration and nationality cases. Section 19D was amended in 2002 and in 2004. Section 27 of the RRA was also amended in 2001 by the insertion of section 27(1A). That provided, 'In its application in relation to granting entry clearance (within the meaning of the Immigration Act 1971), section 19B applies in relation to acts done outside the United Kingdom, as well as those done within Great Britain.' Section 27(1A) is the clear statutory predecessor of section 29(9).

Section 149 of the Equality Act 2010

76. Section 149(1) of the 2010 Act obliges a public authority, 'in the exercise of its functions', to have 'due regard' to the equality needs listed in section 149(1)(a), (b) and (c). Those are the needs to:

> *'(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it'.*

77. Section 149(3) explains that having due regard to the need described in paragraph (b)

> *'involves having due regard, in particular, to the need to -*
>
> *(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
>
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
>
> *(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.'*

78. Section 149(5) explains that having due regard to the need described in paragraph (c)

> *'involves having due regard, in particular, to the need to -*
>
> *(a) tackle prejudice, and*
>
> *(b) promote understanding.'*

79. There have been many decisions about the scope of section 149. Some were cited in counsels' skeleton arguments. There was no disagreement about the relevant principles. There are five key features of those decisions which are relevant to this case.

ii. Section 149 does not require a substantive result.

iii. It implies a duty to make reasonable inquiry into the obvious equality impacts of a decision.

iv. It requires a decision maker to understand the obvious equality impacts of a decision before adopting a policy.

v. Complying with it is not a box-ticking exercise.

vi. It is a continuing duty.

80. Section 217(1) of the 2010 Act provides that the 2010 Act 'forms part of the law of England and Wales'.

81. Schedule 3 is enacted by section 31. Paragraph 17 of Schedule 3 applies to discrimination on grounds of nationality, or ethnic or national origins (paragraph 17(1)). Paragraph 17(2) provides that section 29 does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment. 'Relevant person' and 'relevant enactment' are defined in paragraph 17(3) and 17(5). 'Relevant person' includes a person acting in accordance with a relevant authorisation (defined in paragraph 17(4)). These provisions are the source of the power to make the Authorisation.

82. Section 149(9) enacts Schedule 18. Paragraph 2(1) provides that, in relation to the exercise of immigration and nationality functions, section 1491(b) has effect as if it did not apply to the protected characteristic of race. 'Immigration and nationality' functions are defined in paragraph 2(2). The phrase means, in effects, functions which are exercisable 'by virtue of' the statutes there listed.

Decisions about territorial reach of the Equality Act 2010

(a) Part 3

83. The territorial reach of Part 3 was considered by the Divisional Court in *Hottak v Secretary of State for the Home Department* [2015] EWHC 1953 (Admin), and by the Court of Appeal [2016] EWCA (Civ) 438; [2016] 1 WLR 3791. The claimants, Afghan interpreters who had served with the British forces in Afghanistan, complained that the Government's scheme for compensating former interpreters in Iraq was more generous than the Afghan scheme, and that this amounted to discrimination on grounds of race. They relied on section 39(2) of the 2010 Act (employee benefits), or on section 29(6) (public functions). They also argued that the Secretary of State had breached section 149.

84. The claimants accepted that the 'immigration aspects of the Afghan Scheme would fall outside the scope of section 29 by virtue of the exception…in paragraph 17 of Schedule 3'. That was 'a significant restriction', because the most significant aspect of a comparison between the schemes that applied to Iraq and Afghanistan was that the opportunities to settle in the United Kingdom under the Afghan scheme were more limited (judgment, paragraph 27).

85. Burnett LJ (as he then was), giving the judgment of the Court, referred in paragraph 30 to a line of employment cases in which the House of Lords and the Supreme Court have considered the territorial reach of employment rights, such as the right not to be unfairly dismissed. He said that the analysis was based on the nature of the connection between the employment in question and the United Kingdom. Counsel 'at least tacitly' accepted that the same approach should be taken to section 39 of the 2010 Act (paragraph 31), although the claimants' counsel hinted in his reply that section 29 might have a greater territorial reach than employment rights.

86. In paragraphs 33-41, Burnett LJ summarised the reasoning of the House of Lords in *Lawson v Serco Limited* [2006] UKHL 6; [2006] ICR 250 and of the Supreme Court in *Duncombe v Secretary of State for Children Schools and Families (No 2)* [2011] UKSC36; [2011] ICR 1312 and in *Ravat v Halliburton Manufacturing Service Limited* [2012] UKSC 1; [2012] ICR 389. He held that the only connection between the claimants' employment and Great Britain was the identity of their employer (paragraph

44). He rejected the argument that Parliament can have intended the territorial reach of discrimination law to be wider than that of employment rights (paragraph 45).

87. In paragraph 47, he considered the relationship between Parts 3 and 5. Section 28(2)(a) provides that Part 3 does not apply to discrimination, victimisation, harassment which are prohibited by Part 5, or which would be prohibited but for an express exception. He said that a fundamental difficulty with the Part 3 claim was that the purpose of section 28 is to ensure that no claim can be brought under Part 3 if there is, or, but for an express exception, would be, a claim under Part 5. If his conclusion about the territorial reach of section 39(2) was correct, the claimants had not failed because of an express statutory exception, but because of the territorial argument. He asked, rhetorically, whether Parliament could have intended a claim which is an employment claim, but which is outside the territorial reach of Part 5 nevertheless to be within the territorial reach of Part 3. That, he thought, would be an anomalous result, and 'cannot have been within the contemplation of Parliament'.

88. There are two distinct issues here; first, the territorial reach of Part 5, and second, the scope of the exclusion in section 28(2)(a). The answer to the Divisional Court's rhetorical question may be that its conclusion on the territorial question meant that the claimants' complaint did not concern discrimination which was prohibited under Part 5. Section 28(2)(a) is an exclusion and should be construed strictly. The consequence of that is that the words of section 28(2)(a) did not in limine prevent the Divisional Court from considering the Part 3 claim. There is nothing in the language of section 28, however, to stop the conclusion on the territorial reach of Part 5 being read across to Part 3. The better view, however, may simply be that of Sir Colin Rimer in the Court of Appeal. It is that the effect of section 28 is that a work-related discrimination claim can only be brought under Part 5, and cannot be brought under Part 3 (see paragraph 69 of his judgment in the Court of Appeal).

89. In paragraph 48, the Divisional Court considered the territorial reach of section 29. It did not express a clear view on this point in paragraph 48. In paragraph 49, it said that it was clear that Parliament cannot have intended that employment-related issues, which are not subject to Part 5 on territorial grounds could nevertheless fall within section 29(6). 'The contrary conclusion would produce a nonsense'.

90. The Divisional Court dismissed the application for judicial review apart from declaring that the Secretary of State had failed to have due regard to section 149(b) and (c) when formulating the scheme.

91. Sir Colin Rimer (giving a judgment with which the other members of the Court of Appeal agreed), considered, as had the Divisional Court, the authorities on unfair dismissal (paragraphs 21-33). In paragraph 46, Sir Colin Rimer said that he was not persuaded that 'the claimants' case is one that shows a sufficiently strong connection between Great Britain and the claimants' employment relationship to justify a presumption that Parliament must have intended Part 5 of the 2010 Act to apply to [it].' He expressly rejected a submission that discrimination claims should have a wider territorial reach than employment claims (paragraphs 47-48). Sir Colin Rimer held that the fact that the claimants' employer was based in Britain was a sine qua non for their claim, but not enough to establish the necessary connection (paragraphs 49-57). A claimant who lived and was based abroad, worked exclusively abroad, was not a British citizen, was recruited abroad, whose contract was not governed by the law of England

and Wales, and did not pay tax in the United Kingdom bore 'the heaviest burden' in showing a sufficient connection with Great Britain (paragraph 54).

92. In paragraph 69, he said that a work-related discrimination claim can only be brought under Part 5, and not under Part 3. If the claimants could not invoke Part 5 (because Parliament did not intend Part 5 to extend to their employment in Afghanistan), he would have thought it surprising that Parliament could nevertheless had intended that they could bring a claim under Part 3. If that was 'to put the matter too broadly', he would 'accept anyway Mr Swift's submission that section 29(6) should not be interpreted as extending to claim other than in respect of the exercise of public functions in Great Britain. I would not accept that there is any warrant for imputing to Parliament an intention to extend it to claims based on the extra-territorial effect of the exercise of public functions.'

93. I should also mention *Roma Rights*, on which Mr Husain relied. In that case the claimant challenged the operation in practice by immigration officers at Prague Airport of paragraph 17A of the Immigration Rules (HC 395 as amended). Paragraph 17A permitted, but did not oblige, immigration officers who were outside the United Kingdom to grant leave to enter to a person who was outside the United Kingdom. The claimant's case was that Roma applicants were questioned for longer, and more intrusively, than non-Roma applicants, and that far more applications from Roma applicants were refused than applications from non-Roma applicants.

94. One of the claimant's arguments was that this breached section 19B of the RRA. The House of Lords held that the operation created a significant risk that immigration officers, consciously, or subconsciously, would treat Roma applicants less favourably than non-Roma applicants, because Roma were more likely to make an application for asylum and therefore more likely to make a false application for asylum. Specific instructions were required to avert that risk and had not been given. The operation therefore discriminated directly against Roma.

95. It is clear from paragraph 72 of Baroness Hale's speech that the claimant's complaint concerned the process of questioning which led directly to the refusal or grant of entry clearance by immigration officers at Prague Airport.

96. In paragraph 76, she said that 'It is now unlawful for a public authority to discriminate on racial grounds in carrying out any of its functions'.

(a) Section 149

97. The Divisional Court considered a claim about section 149 in paragraphs 57-61 of *Hottak*. Two factors limited the scope of section 149 on the facts. First, if neither section 39(2) or 29(6) was in play, section 149(1)(a) was not relevant. Second, section 149(1)(b) could have no application to the immigration aspects of the policy (as the claimants accepted). The reason for this (as it is summarised in paragraph 24 of the judgment) was that paragraph 17 of Schedule 3 'has the effect of authorising the discrimination on the grounds of nationality' when that is required by 'the Immigration Act and the Immigration Rules', and (as summarised in paragraph 57) 'Schedule 18 provides, in relation to the exercise of immigration functions, that section 149(1)(a) is also not engaged in relation to immigration decisions dictated by legislation and the rules'.

98. Burnett LJ held in paragraph 60 that the scheme of section 149 was that it applied 'by reference to the functions of the relevant body'. He had quoted, in paragraph 59, section 150(3) and (4). He said that 'it did not matter…that the policy may have an impact wholly or partly outside Great Britain.'

99. In *Hoareau v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) the Divisional Court considered a challenge to the defendant's decision not to support the resettlement of the Chagossians in the British Indian Ocean Territory, but to offer them further compensation instead. One of the claimants' arguments was that the defendant had not complied with section 149. The defendant accepted that section 149 applied to the decision to offer support because that decision was taken in the United Kingdom even though it applied to people and territory outside the United Kingdom (paragraph 153). The Defendant argued, however, that section 149 did not apply to the resettlement decision.

100. It was common ground that section 149(1)(a) did not apply because 'that part of the Equality Act is confined to the United Kingdom' (paragraph 154). The Divisional Court said that section 117 did not 'govern the geographical scope of the functions which may be covered by [the 2010 Act], in particular the public functions…in section 149'. In paragraph 159, the Divisional Court said that the functions in the current case did not fall in any of the exceptions. That view was said to be supported to some extent by paragraph 60 of the judgment in *Hottak* in the Divisional Court (see paragraph 89 above).

Discussion

The territorial reach of the sections 29(6) and 149 of the Equality Act 2010

(a) Section 29

101. Mr Husain had two main submissions. First, section 29(10) was a very unusual provision. Its effect was neutral. It was to 'leave the field open' so that the court could decide, on the facts of any case, whether a particular claim under section 29(6) was within the territorial reach of the 2010 Act. He also went further, as I understood them, in his oral submissions, and submitted that section 29(10) displaces the normal presumption about the territorial reach of a statutory provision. Second, the question was decided by *Roma Rights*. The conclusion of that case was that any act of direct discrimination in the exercise of a public function done outside the territory of the United Kingdom was unlawful. He relied on paragraph 76 of the speech of Baroness Hale.

102. He also submitted that there was no territorial limit on section 29(6) where discrimination because of the protected characteristic of race was alleged, but that there might be such a limit when the allegation was of discrimination because of another protected characteristic.

103. I reject all three submissions.

104. First, section 29(10) is not a very unusual provision. My relatively superficial examination of the 2010 Act showed that three other provisions of the 2010 Act dealing with territoriality are in similar terms to section 29(10) (see paragraphs 72 and 73, above). They are all found next to provisions which apparently (and modestly) extend

the territorial reach of the Act. I interpret the similar provisions, and section 29(10), as showing three things. First, Parliament adopted the normal presumption, which is that Acts of Parliament are not intended to extend to things which happen outside the United Kingdom. Second, Parliament made some modest express exceptions to that presumption. Third, Parliament did not intend those exceptions to undermine the normal presumption about extra-territorial effect, other than to the extent expressly stated in those exceptions.

105. Mr Husain's argument about *Roma Rights* was initially based on an apparently unresearched assertion that when the events in that case happened, section 19B was not affected by any provision which was the equivalent of section 29(9) of the 2010 Act. That is not so: see section 27(1A) of the RRA, inserted in 2001. Mr Husain corrected that assertion on the morning of the second day of the hearing.

106. There is no suggestion in the detailed report of counsel's arguments in *Roma Rights*, or in the reasoning of any member of the Appellate Committee, that there was any issue in that case about the territorial reach of section 19B of the RRA. I infer that the reason for this was the clear terms of section 27(1A), and the fact that the intrusive questioning and refusals of leave to enter of which the claimants complained were, unarguably, for the purposes of section 27(1A), acts within the scope of section 19B. But even if that is wrong, I do not see how I can be bound by an unexplained assumption, apparently shared by the parties and by the House of Lords, about the law which applied to the decision in that case. Nor can I see how Baroness Hale can be said to have decided, when there seems to have been no argument on the point, and no reasoning is addressed to it, that every act of discrimination committed anywhere in the world in the performance of a public function is unlawful.

107. I consider that I am bound by the decision in *Hottak* in the Court of Appeal to hold that the territorial reach of Part 3 is to be decided in accordance with the reasoning of the House of Lords and of the Supreme Court which applies in claims under the Employment Rights Act 1996 ('the ERA'). Even if I am not bound to do so (Mr Husain submitted that the reasoning about Part 3 was obiter), that reasoning is strongly persuasive. There is no reason in principle or logic why Parliament can possibly be taken to have intended that a Part 3 claim should have a territorial reach which is different from, and wider than, that of a Part 5 claim. Where the claimant is not a British citizen, does not live or work here, and has no other link at all with the United Kingdom, other than a wish to benefit from a policy of the Secretary of State, the very exceptional connection with the United Kingdom which is required is absent.

108. Third, there is no suggestion in any provision of the 2010 Act that there is a hierarchy of protected characteristics. A clear purpose of the 2010 Act is to discourage adverse treatment which is based on any of the listed protected characteristics. The suggestion that the territorial limits of section 29(6) could depend on which protected characteristic was at issue has no basis in the language of the 2010 Act, and is unprincipled. A legislative scheme which produced such a consequence would be irrational. In the absence of any words in the 2010 Act which support this interpretation, I cannot attribute to Parliament an intention to produce such an irrational result.

109. The parties advanced, it seemed to me, internally inconsistent arguments about the relationship between the Authorisation and the effect of section 29(9).

110. Paragraph 5A of the grounds of claim argued that the Authorisation did not authorise discrimination in the exercise of the common law powers to make the Scheme, but only discrimination in the actual grant of entry clearance (a specific immigration function under the Immigration Act 1971) (see further the detailed and cogent analysis at paragraphs 40-43 and 63-67 of the Claimants' grounds). Yet in his oral argument, Mr Husain submitted that it was artificial to distinguish between the grant of entry clearance and the establishment of the Scheme, and that section 29(9) applied to both.

111. The Secretary of State, on the other hand, argued that the Authorisation applied both the grant of entry clearance and to the Scheme (see paragraph 30 summary grounds), but that section 29(9) only applied to the grant of entry clearance (paragraph 35).

112. I consider that the correct approach is that the Authorisation could not authorise acts of discrimination done under common law powers, but only a discriminatory grant of entry clearance (because that is the exercise of a specific immigration function under statute). I also consider that it would be illogical to have a different approach to the interpretation of section 29(9). It too applies only to the grant of entry clearance and not to the exercise of common law powers.

(b) Section 149

113. I respectfully disagree with the reasoning of the Divisional Court in *Hottak* and *Hoareau* about the territorial reach of section 149. Section 29 of the 2010 Act adopts, if anything, a more powerfully 'functional' approach than that which applies to section 149. Section 29(6) applies to any person when he exercises a public function, while section 149 applies only to those public authorities which are listed in Schedule 19 to the 2010 Act. Section 149 applies to some listed authorities when they exercise all of their functions (section 150(3)), unless they are bodies in respect of which only certain functions are specified in Schedule 19 (section 150(4)).

114. Even if I am wrong about that, and both provisions apply a functional approach (whatever that means), that tells us nothing about Parliament's intention in relation to territoriality. The functions to which a provision applies and its intended territorial reach are conceptually distinct. All the reasons which suggest that Parliament did not intend Part 3 to have other than very exceptional extra-territorial effect apply with as much force to section 149. The approach of the Divisional Court means that even though a public authority cannot breach the substantive provisions of the 2010 Act in the exercise of a particular public function which has only extra-territorial effects, it is nonetheless required, when exercising it, to have due regard to the listed equality needs as respects people who are outside the jurisdiction and whose equality of opportunity, and whose good relations with others, it will, necessarily, have a limited, if any, scope, to influence. A legislative scheme with that effect is incoherent.

115. In *R v Manchester Coroner ex p Tal* [1985] QB 67 the Divisional Court held, at pages 79E-81D that, on an application for judicial review, a Divisional Court is free to depart from an earlier decision of a Divisional Court, but that it will only do so 'in rare cases.' The Divisional Court added '…we find it difficult to imagine that a single judge exercising this jurisdiction would ever depart from a decision of a divisional court.' If the question of such a departure should arise, it should be listed before a Divisional Court. In the circumstances of this case, therefore, I must follow the approach of the

Divisional Court in *Hottak* and *Hoareau* and hold that section 149 has extra-territorial effect.

The substantive claims

(1) Indirect discrimination

116. My conclusion that section 29(6) does not have extra-territorial effect means that the indirect discrimination claim cannot succeed. I will, nevertheless, briefly consider it. I have no doubt that the PCP does have the effect described in section 19(2), and that the only live issue, therefore, is justification.

117. Mr Husain accepted that this is an objective question, but also submitted that if there is no evidence that the Secretary of State realised that the PCP was discriminatory, no margin of appreciation could be given to any ex post facto justification which he might advance. Mr Hall accepted that if the Secretary of State had not thought about the question of justification, it was harder to show that the PCP was justified. Mr Husain submitted that there was no possible justification for the disadvantage which use of UNHCR as a gatekeeper for the Scheme imposed on the Claimants.

118. The scope of the mandates of UNRWA and of UNHCR is at the heart of this issue. Mr Husain submitted that they were, in law, exclusive. Refugees from Palestine are excluded as a class from UNHCR's mandate. They are the only such class. They are also the only people who are recognised, as a class, as refugees. UNHCR could only deal with somebody who was under UNRWA's mandate in very strictly limited circumstances, circumstances which would not apply to the general run of PRS. The exceptional cases were only those were certain 'non-refugee stateless persons' and 'the resettlement of certain non-refugee dependent family members to retain family unity'. Mr Husain referred principally to article 1D of the Refugee Convention and to article 7(c) of UNHCR's Statute. He also supported his argument by reference to various passages in UNHCR's Resettlement Handbook (skeleton argument, paragraphs 50.a-g).

119. Mr Hall accepted that there is a strict separation between the two mandates but did not accept all Mr Husain's arguments. He submitted, in particular, that the UNRWA note showed that PRS who were under UNRWA's mandate could be referred to UNHCR and that UNHCR might, in turn having assessed their needs, refer them to the Scheme.

120. I accept that the mandates are mutually exclusive, as Mr Husain submits. I see no reason, however, to doubt that UNRWA's note is accurate. It shows that there may be very limited circumstances in which it might refer a PRS to UNHCR, and that these circumstances are different from, for example, the mixed marriage cases to which Mr Husain referred, because those cases are not expressly referred to in the Note. I also accept that, on its face, the note shows that the criteria UNRWA applies for referring a PRS to UNHCR are considerably more stringent than the express criteria of the Scheme. I also accept that the effect of the note is that even if UNRWA were to refer a PRS to UNHCR, the services UNHCR could provide would 'depend on and be determined by their mandate and capacities'. This at least creates a doubt whether, even if a PRS passed UNRWA's stringent criteria, and UNRWA referred him or her to UNHCR, UNHCR, would, given the terms of its mandate, which excludes PRS, in fact

refer a PRS to the Scheme. The available statistics do not resolve this question, although Mr Husain urged me to find that they did.

121. Although Mr Husain emphasised this submission, I do not consider that it matters, for the purpose of justification, whether a PRS has no chance of being referred to the Scheme, or a very small chance indeed. The point is that, on any view, UNRWA applies different and more stringent criteria than the criteria of the Scheme in deciding whether or not to refer a PRS to UNHCR, the Scheme's gatekeeper. It is therefore much harder for a PRS to get near the gatekeeper than it is for people who were displaced by the same conflict, but are not PRS. I do not consider that I need to decide what the gatekeeper would do if a PRS were to be presented at the gate.

122. Mr Hall made four submissions on justification, following the four-stage test described by Lord Reed in *Bank Mellat v HM Treasury* [2013] 1 AC 39; [2014] AC 700, at paragraph 74, and applied in the context of an indirect discrimination argument in a public law case by the Court of Appeal in paragraph 91 of *R (Ward) v Hillingdon London Borough Council* [2019] EWCA (Civ) 692. He submitted that the test at stages one and two (and possibly at stage three) was whether the approach was manifestly without reasonable foundation. The question at stage four was a question for the court (see *Ward*, paragraph 95).

i. The objective of the PCP was to get help, as soon as possible, to people who had been displaced by the Syrian conflict. That was sufficiently important potentially to justify any indirect discrimination.

ii. The PCP was rationally connected to the objective. UNHCR is the world's foremost resettlement expert. Its capabilities are second to none. It is in a position accurately to identify who has come from Syria; no-one else is. It can do valuable preparatory work, such as collecting bio-data, and carry out checks and assessments on the ground. It can screen out former combatants, and those guilty of war crimes. A comparison is inherent in the Scheme, which is designed to help the neediest and most vulnerable displaced people, from a large cohort of people all of whom are needy and vulnerable. The comparison requires a close understanding of the position of applicants and of those in a similar position. A consistent approach is desirable, which can be achieved if the same entity choses the applicants. UNHCR has the staff in the relevant regions to do this. It was untenable to suggest that the United Kingdom Government should send officials out to the Middle East to do this. UNHCR's extensive capacity on the ground also made it untenable to suggest that the Home Office should do the necessary checks and assessments from the United Kingdom. UNHCR exists, and is present; it could administer the Scheme immediately.

iii. There were no less intrusive means which could be used without unacceptably compromising the objective of the Scheme. Direct access to officials in the United Kingdom would not work (see the previous sub-paragraph). There was very limited evidence about the capacity of any identified NGO to refer cases to the Secretary of State. It was inconsistent with the objective of the Scheme for the Government to accept applicants without any intervening assessment and investigation of the depth and

quality of that done by UNHCR, in particular having regard to the comparative nature of the exercise. It would not be easy to identify suitable NGOs. They would need to be found, funded, and trained. That was not consistent with the objective of giving help as quickly as possible. None of the materials in the bundle suggested that any other country was co-operating with other NGOs on the scale that would be needed.

iv. The impact of any infringement of the Claimants' rights was not disproportionate to the likely benefit of the PCP. The PCP ensured the Scheme could be operated as quickly and effectively as possible. The United Kingdom does not occupy the relevant territories. The Secretary of State has to accept the unchangeable features of the facts on the ground, in particular the different mandates of UNHCR and of UNRWA. To ignore that would mean either creating a wholly new scheme, or creating different schemes for PRS and for other people displaced by the Syria conflict.

123. I do not accept Mr Husain's submission that a 'core' or exclusive purpose of 'helping vulnerable refugees from Syria' can be extracted from the Government's statements about the Scheme. The purpose of the Scheme is broader than that. It is to help vulnerable refugees in Syria as candidates for resettlement in the United Kingdom as quickly and effectively as possible. The partnership with UNHCR, the body which is to assess and chose the candidates in the region, is essential to that purpose. UNHCR has been chosen because of the Government's long relationship with it, because it is present in the relevant regions and because it has the necessary expertise. Mr Husain accepted that UNHCR was a good choice. It was clear, right from the start, that UNHCR was integral to the aims and operation of the Scheme; it is mentioned in each of the three principles on which, when the Scheme was announced, the Scheme was said to be based. The use of UNHCR is closely and rationally connected to the achievement of the Scheme's purpose.

124. Nor do I accept that other less intrusive means were available. It is suggested that NGOs could be used, or that PRS could refer themselves to the Home Office or to British embassies in the region. None of these methods could have achieved the security, reliability, speed, and consistency which flow from using UNHCR as a gatekeeper. There was little, if any, evidence, that any specific NGO had the necessary capacity.

125. I accept Mr Hall's submissions on justification. The severity of the impact of the PCP on the Claimants is mitigated, to some extent, by the very thing which means that in practice they have such limited access to the Scheme. That is, that they are within the scope of UNRWA's mandate. As Mr Husain submitted, the PRS are part of a larger, unique group. The UN has only two refugee organisations; UNHCR and UNRWA. UNRWA's mandate, and its material help, are solely focused on refugees from Palestine. Unlike other people displaced by the Syrian conflict, PRS already have their own relief organisation; and for historical reasons over which the Secretary of State has no control, UNRWA's mandate excludes resettlement and UNHCR's mandate excludes those who are subject to UNRWA's mandate. The fact that UNRWA's resources, and its capacity to help PSR are limited, is nothing to the point. I note, nevertheless, that when UNRWA assessed the Claimants, it concluded that the difficulties faced by the Claimants were common to many PRS (see paragraph 62, above).

126. I take into account that the Secretary of State put forward no justification in July 2017 for the disparate impact of the PCP on PRS. I also take into account that PRS are in practice wholly excluded from the Scheme, or very nearly so. But PRS are not the only vulnerable refugees in the region. It cannot be assumed that they are in fact the most vulnerable, contrary to Mr Husain's submissions. It is impossible to make a judgment about the comparative vulnerability of groups of people, or of individuals, from the comfort of a London court room. On the figures in the Secretary of State's skeleton argument, more than ten times more Syrian people were displaced from Syria by the Syrian conflict than were Palestinians. There are millions of refugees. I consider that, given the aim of the Scheme, to which UNHCR was integral (see above), and given the fact that UNRWA is responsible for PRS, the impact of the PCP on the Claimants was proportionate. Proportionality is for the court, but the design of a scheme such as this is not.

Section 149

127. I have already held that I am bound by the authorities to decide that section 149 has extra-territorial effect. I agree with the reasoning of the Divisional Court in *Hottak*, accepted by the parties in *Hoareau*, that section 149(1)(a) is not engaged on the facts of this case, because, I have held, no conduct which is prohibited by the 2010 Act can be committed in this context. I do not see how the equality need listed in section 149(c), as explained in section 149(5), is engaged on the facts of this case, as regards the Claimants, or PRS more generally, any more than it is in the case of others who might benefit from the Scheme. If it is not, I do not see, either, how the Secretary of State can be faulted for not having any regard to it; I note it was considered in the PES, in any event, in relation to fostering good relations between those were eventually to be settled in the United Kingdom under the Scheme, and the host community. That, in my judgment, is the sole extent to which consideration of this equality need could be 'due' on the facts.

128. Section 149(1)(b) does cause me concern, however. Mr Hall was right to concede that an immigration context is not enough to attract the exception in paragraph 2 of Schedule 18. No statutory, or derivative, power was exercised in this case. The key problem with the Scheme, from the Claimants' point of view, is that the combination of the Secretary of State's decision to use UNHCR as the gatekeeper for the scheme, and of the exclusive mandates of UNHCR and of UNRWA, is that the Scheme is in practice not available to PRS generally, but only available, if at all, in the most exceptional circumstances (see UNRWA's recent note).

129. I simply do not know what approach the Secretary of State adopted to this question in relation to the Scheme. There is no evidence that the Secretary of State thought about it before the Scheme was introduced (see paragraph 66, above). Nor is there is anything about it in the PES (see paragraphs 21 and 22, above), so there is no evidence that the Secretary of State thought about it when the Scheme was widened. It is unlikely that the Secretary of State did not always know that UNHCR and UNRWA have exclusive mandates; but if she did not, she could, by making reasonable inquiries, have found out that that was so. The timing of the widening of the Scheme suggests that the widening, was, in part, at least, prompted by the direct discrimination claim brought by PRS. In the circumstances, section 149(1)(b) required the Secretary of State to confront the way in which, in its proposed form, the Scheme would, despite its widening, still not increase, or not materially increase, equality of opportunity for PRS. If the Secretary

of State knew about the exclusive mandates, the fact that the issue had not been raised by the Claimants before the Scheme was widened is irrelevant; but if she did not, very soon after that, as I have described, LD were asking questions about this issue. There is no evidence that the PES was revised, either on its advertised revision date, or later, to show that the Secretary of State had made reasonable inquiries about this issue, and had confronted it.

130. Moreover, once the issue was clearly explained, for example in the Claimants' Reply, the Secretary of State showed, and has continued to show, a puzzling obtuseness about the consequences of the exclusive mandates of UNRWA and UNHCR. Since the widening of the Scheme, the Secretary of State has continued to maintain in the proceedings that there really is no problem, and PRS can get access the Scheme. Indeed, on that account, she/he argued, the claim was academic.

131. I do not say that, had the Secretary of State grasped the nettle, she/he would have been obliged to change the Scheme. But there is just no evidence that the Secretary of State ever thought about the issue. I reject Mr Hall's submission that the fact that the Secretary of State had meetings with UNRWA and UNHCR was a sufficient compliance with section 149. I asked him in the course of his submissions whether there was any document which showed that the Secretary of State had faced up to the problem which had been flagged up by LD. His answer was that he would have to reflect on that; no such document was produced.

132. In that situation, in my judgment, the Secretary of State has not had due regard to the equality need listed in section 149(1)(b). The question is not whether the Scheme in its current form is justified. The questions, rather, are whether it ever occurred to the Secretary of State that the widening of the Scheme, as respects PRS, was theoretical rather than real, and whether it crossed his mind that he should consider whether or not to widen the equality of opportunity for PRS by changing the Scheme so as to enable another gatekeeper to refer their cases to him, and whether he faced up to the fact that if he did widen the Scheme in the way which he did, PRS would be excluded, or virtually excluded from it.

Is the Scheme unlawful at common law?

133. The arrangement of the Claimants' skeleton argument suggests that there is a common law principle of equality which aligns with the claim under the 2010 Act, and that the Scheme is unlawful both because it breaches that principle, and, distinctly, because the Scheme is illogical and irrational and frustrates its own purpose. In the light of the recent decision of the Supreme Court in *R (Gallaher Group Limited) v Competition and Markets Authority* [2018] UKSC 25; [2019] AC 96 I doubt whether there is a free-standing common law principle of equality. The real question in most cases is whether a decision governed by public law is a rational decision (see per Lord Carnwath, giving the leading judgment, at paragraph 26, page 109F and per Lord Sumption at paragraph 50, page 115G). I do not understand, in any event, how a principle which is said to align with a statutory scheme can add anything to an analysis of whether the Scheme is lawful.

134. In case that overall approach is wrong, I will consider Mr Husain's argument based on the common law principle of equality. He relies on *Matadeen v Pointu* [1999] 1 AC 98. At page 109 C-D, Lord Hoffmann said that 'treating like cases alike and unlike

cases differently is a general axiom of rational behaviour'. Mr Husain did not rely on the passage which immediately follows. The Secretary of State did (see paragraph 88 of the Secretary of State's skeleton argument). Lord Hoffmann said:

> *'…the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is a valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly may involve, as they do in this case, questions of social policy on which views may differ…In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the judiciary, the legislature and the executive in deciding how that principle is to be applied'.*

135. Mr Husain also relied on dicta similar to the first passage from *Matadeen*. He relies, for example, on *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin). In that case McCombe J (as he then was) held that the exclusion of Nepalese nationals from an ex gratia compensation scheme amounted to 'de facto discrimination' against the claimants on the grounds of their race. He referred to 'the principle of equality which is the cornerstone of our law'. Although the judgment in *Gurung* does not refer to the RRA, it was, on the facts, a direct discrimination case (see paragraphs 54-58 of the judgment). There is no direct discrimination claim in this case, and *Gurung* is distinguishable on that ground alone. The Claimants are not excluded in practice from the Scheme 'because' of their nationality, but because the Secretary of State has chosen UNHCR as the gatekeeper for the Scheme and because the mandates of UNHCR and of UNRWA are mutually exclusive. That is why Mr Husain relies, not on section 13 of the 2010 Act read with section 29(6), but on section 19 read with section 29(6).

136. He also relied on *Limbu v Secretary of State for the Home Department* [2008] EWHC 226 (Admin); [2008] HRLR 48. I do not get much help from this decision. Although the claim succeeded, Blake J dismissed the arguments based on the RRA, article 14 and the common law principle of equal treatment (judgment paragraph 53). As I read them, paragraphs 50-51 of *Limbu* are not, in any event, authority for the proposition that (as Mr Husain submitted) the common law principle of equal treatment 'asks essentially asks the same questions as …section 19 of [the 2010 Act]'. That is an inherently surprising proposition, in any event. If there were a common law principle of equality which mirrored the detailed scheme of the provisions of the RRA (now the 2010 Act), it is not clear why Parliament needed to enact the RRA (or the 2010 Act). But if I were to suppose that this submission is right, it must fail, because I have held that the PCP is justified.

137. I now consider Mr Husain's other irrationality arguments. He relies on paragraphs 55 and 56 of Blake J's judgment in *Gurung* for the proposition that 'where [a] Minister has explained why [a] policy has been brought into being and what it is intended to achieve, the court's scrutiny may extend to consider whether its terms as understood and applied by officials have illogically and irrationally frustrated its purpose'. In that case Blake J detected a gap between the policy announced by the Secretary of State and the way in which it was implemented in practice in a discretionary policy. There is no similar gap in this case, as the PCP was integral to the Scheme as announced publicly

to Parliament. I have already described the purpose of the Scheme, as I see it (see paragraph 122, above). I do not consider that the purpose of the Scheme is solely to help the most vulnerable refugees from Syria. It is to set up a way of identifying vulnerable refugees for resettlement which is as efficient, reliable and consistent as possible, by relying on UNHCR as a gatekeeper. If the purpose of the Scheme is seen in that way, the PCP does not frustrate, but supports, it.

138. I reject Mr Husain's argument that this is a case like *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591. The Claimants' underlying predicament has not been brought about by any decision of the Secretary of State. The Secretary of State has not decided to deprive them of an existing right. I have explained the purpose of the Scheme, and have decided that the PCP is justifiable, applying the four-stage test I have already described. I do not consider that any further scrutiny, anxious or otherwise, is required.

Conclusion

139. For these reasons, the claim for judicial review fails on all but the section 149(1)(b) ground. I will consider submissions on relief and any other consequential matters in writing, unless I am persuaded that a further hearing is necessary.