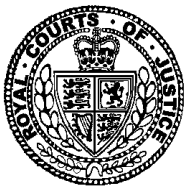

Neutral Citation Number: [2022] EWHC 3230 (Admin)

Case Nos: CO/2032/2022, CO/2104/2022, CO/2077/2022, CO/2080/2022, CO/2098/2022, CO/2072/2022, CO/2094/222, and CO/2056/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2022

Before

LORD JUSTICE LEWIS
AND MR JUSTICE SWIFT

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Between

THE KING
on the application of

AAA (Syria)
AHA (Syria)
AT (Iran)
THE PUBLIC AND COMMERCIAL SERVICES UNION
DETENTION ACTION
CARE4CALAIS
AAM (Syria)
NSK (Iraq) **Claimants**

- and –

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES **Intervener**

Raza Husain KC, Phillippa Kaufmann KC, Sam Grodzinski KC, Alex Grigg, Christopher Knight, Paul Luckhurst, Tim Johnston, Jason Pobjoy, Ali Bandegani, Raza Halim, Grace Capel, Emma Mockford, Anirudh Mathur, Allan Cerim, Emmeline Plews, Will Bordell, and Rayan Fakhoury (instructed by **Duncan Lewis**) for the **Claimants**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

Angus McCullough KC, Laura Dubinsky KC, David Chirico, Benjamin Bundock, Jennifer MacLeod, and Agata Patyna (instructed by **Baker McKenzie**) for the **Intervener**

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THE KING
on the application of

HTN (Vietnam) **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Sam Grodzinski KC and Alex Grigg (instructed by **Duncan Lewis**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

RM (Iran) **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Richard Drabble KC, Alasdair Mackenzie, David Sellwood, and Rosa Polaschek

(instructed by **Wilson Solicitors LLP**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

ASM (Iraq) **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Richard Drabble KC, Leonie Hirst, and Angelina Nicolaou (instructed by **Wilson Solicitors LLP**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

AS (Iran) **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Sonali Naik KC, Amanda Weston KC, Mark Symes, Eva Doerr, Isaac Ricca-Richardson (instructed by **Barnes, Harrild, and Dyer Solicitors**) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

AB (Albania) **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Sharaz Ahmed, Darryl Balroop, and Arman Alam (direct access) for the **Claimant**

Lord Pannick KC, Sir James Eadie KC, Rory Dunlop KC, Edward Brown KC, Colin Thomann, Simon Murray, Mark Vinall, Jack Anderson, Sian Reeves, and Natasha Barnes (instructed by **Government Legal Department**) for the **Defendant**

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THE KING
on the application of

SAA (Sudan) **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Manjit S. Gill KC, Ramby de Mello, Tony Muman, and Harjot Singh (instructed by **Twinwood Law Practice Limited**) for the **Claimant**

Zane Malik KC, Colin Thomann, and Robin Hopkins (instructed by **Government Legal Department**) for the **Defendant**

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THE KING

on the application of

ASYLUM AID **Claimant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Charlotte Kilroy KC, Michelle Knorr, Harry Adamson, and Sarah Dobbie (instructed by **Leigh Day**) for the **Claimant**

Edward Brown KC and Jack Anderson (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 5 – 9 September 2022, and 12 – 14 October 2022

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JUDGMENT APPROVED SUBJECT TO EDITORIAL CORRECTIONS

LORD JUSTICE LEWIS and MR JUSTICE SWIFT handed down the following judgment of the court:

A. Introduction

(1) General

1. These claims challenge decisions made by the Home Secretary that asylum claims made in the United Kingdom should not be determined here and that instead the persons who have made those claims should be removed to Rwanda to have their asylum claims determined there. Removal from the United Kingdom in these circumstances involves two decisions: first, a decision that the asylum claim is inadmissible – i.e., that the asylum claim should not be decided on its merits in the United Kingdom; and second a decision to remove the asylum claimant to a safe third country which in these cases is Rwanda. For any asylum claim made on or before 27 June 2022, the power to make these inadmissibility and removal decisions is in paragraph 345A to 345D of the Immigration Rules[1].

2. Paragraphs 345A – D of the Immigration Rules set out conditions that must be met before the Home Secretary can decide that an asylum claim is inadmissible in the United Kingdom and whether she can remove the person who has made the asylum claim to a safe third country. For present purposes (putting the matter in very general terms), the relevant condition for an inadmissibility decision is whether, before making the asylum claim in the United Kingdom, the asylum claimant had the opportunity to claim asylum in a safe third country but did not do so. If the Home Secretary decides that an asylum claim is inadmissible, she is permitted to remove the person who has made the claim either to the safe third country where the opportunity to make the asylum claim arose, or to any other safe third country that agrees to accept the asylum claimant.

3. The inadmissibility and removal decisions before the court in these proceedings were taken by the then Home Secretary in pursuance of criteria contained in guidance published by her in May 2022. Among other matters, those criteria explain how arrangements made between the governments of the United Kingdom and the Republic of Rwanda for the transfer of asylum claimants would be used. Those arrangements are the Migration and Economic Development Partnership ("the MEDP"). The arrangements provide for transfer of asylum claimants from the United Kingdom to Rwanda, the determination of asylum claims by the Rwandan authorities, and related matters. The premise of these decisions has been that by reason of the arrangements made in the MEDP, Rwanda is a safe third country to which asylum claimants may be removed. One set of inadmissibility and removal decisions was taken in late May and early June 2022. On 5 July 2022, following further representations and consideration of evidence filed in these proceedings (which were

[1] For all decisions made on or after 28 June 2022 the source of the power has now moved and is in sections 80B and 80C of the Nationality, Immigration and Asylum Act 2022. Sections 80B and 80C were inserted into the 2002 Act by section 16 of the Nationality and Borders Act 2022. Transitional provisions made by the Nationality and Borders Act 2022 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2022, SI/2022/590 provide that asylum claims made before 28 June 2022 (i.e. all the cases before the court in these proceedings) remain subject to paragraphs 345A – D of the Immigration Rules.

all commenced on or after 8 June 2022), the Home Secretary made further inadmissibility and removal decisions for each of the individual Claimants now before us.

4. The claims raise many grounds of challenge to these decisions. Some matters raised are generic; they do not depend on the facts of any individual case but are instead to the effect that the Home Secretary's decisions are flawed for reasons that will apply whenever it is proposed to decide that an asylum claim is inadmissible and/or to remove the asylum claimant to Rwanda. Other grounds of challenge raised depend on the facts of the individual cases and how the Home Secretary has addressed those facts when taking her decisions. The Claimants also challenge further decisions taken by the Home Secretary on claims they have made that their removal from the United Kingdom would be in breach of their rights derived from the European Convention on the Protection of Human Rights and Fundamental Freedoms ("the ECHR"). The Home Secretary has rejected these claims and concluded that these human rights claims were clearly unfounded.

5. The government's proposal to relocate asylum seekers to Rwanda has been the subject of considerable public debate. It is, therefore, important to have the role of the court well in mind. In judicial review claims the court resolves questions of law. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the legal principles governing the exercise of their decision-making functions. In addition, Parliament requires that public bodies act consistently with the rights and freedoms guaranteed by the ECHR: see section 6 of the Human Rights Act 1998). The court is not responsible for making political, social or economic choices – for example to determine how best to respond to the challenges presented by asylum seekers seeking to cross the Channel in small boats or by other means. Those decisions, and those choices, are ones that Parliament has entrusted to ministers. The approach of ministers is a matter of legitimate public interest and debate and, in this instance, has stirred public controversy about whether the relocation of asylum seekers to a third country such as Rwanda is an appropriate response to the problems that the government has identified. But those matters are not for the court. The role of the court is only to ensure that the law is properly understood and observed, and that the rights guaranteed by Parliament are respected

(2) A short history of the proceedings

6. In late May and early June 2022, the Home Secretary took 47 decisions declaring asylum claims made in the United Kingdom to be inadmissible and deciding that the claimants should be removed to Rwanda. Her intention was that those concerned would be removed to Rwanda by charter flight on 14 June 2022. Each inadmissibility and removal decision came with removal directions to that effect. The decisions prompted more than 20 claims, filed between 8 June 2022 14 June 2022[2]. Claim CO/2032/2022 was issued on 8 June 2022. On 10 June 2022 the Administrative Court heard and refused an application for an interim injunction to prevent the individual Claimants in that claim being removed on the charter flight. On 13 June 2022 the Court of Appeal dismissed an appeal against that decision. On 14 June 2022

[2] More claims have been filed since. Presently there are 32 claims. The claims not addressed in this judgment have been stayed.

the Supreme Court dismissed an application for permission to appeal against the decision of the Court of Appeal. On 13 and 14 June 2022 further applications for interim relief in other claims were heard and refused by the Administrative Court. The cases considered then were CO/2103/2022, CO/2111/2022, CO/2112/2022, CO/2113/2022, CO/2125/2022, CO/2126/2022, and CO/2129/2022. The litigation caused the Home Secretary to reconsider some of the decisions she had taken. This led to the cancellation of some removal directions.

7. On 14 June 2022 three Claimants made applications to the European Court of Human Rights for interim measures. On the application of NSK, one of the Claimants in CO/2032/2022, the European Court of Human Rights granted an interim measure preventing him from being removed to Rwanda "until 3 weeks after delivery of the final domestic decision in [the] ongoing judicial review proceedings". In the two other applications (*RM*, the Claimant in CO/2077/2022; and *HTN*, the Claimant in CO/2104/2022), the Court granted an interim measure preventing removal until 20 June 2022. The practical consequence of the grant of interim measures has been that no removals to Rwanda have taken place either on 14 June 2022 or since.

8. The order made at the 10 June 2022 hearing for interim relief also gave directions in case CO/2032/2022 with a view to a rolled-up hearing at the end of July 2022 so that permission to apply for judicial review would be considered at the same hearing as the substantive challenges. Since 14 June 2022, all the claims before the Administrative Court have been the subject of extensive case management to ensure that they were heard together and as soon as reasonably possible given the need to ensure fairness for all the parties. The original directions envisaged that the claims would be heard in week commencing 18 July 2022. Those directions were revised when, on 5 July 2022, the Home Secretary re-took the inadmissibility and removal decisions and some of the decisions on the human rights claims. It was clear that fairness to the Claimants required that they be given the opportunity to respond to the new decisions. At a directions hearing 20 July 2022, the court fixed the hearing of some claims for week commencing 5 September 2022 and others for week commencing 10 October 2022. Yet further claims were stayed. Annex A to this judgment lists the claims filed with the court challenging admissibility decisions and the status of each claim.

9. This judgment is in respect of all the cases heard in September and October, i.e., claims CO/2023/2022; CO/2104/2022; CO/2077/2022; CO/2080/2022; CO/2098/2022; CO/2072/2022; CO/2094/222; and CO/2056/2022. Most of the Claimants are persons who have made asylum claims that the Home Secretary has decided are inadmissible. In addition, some Claimants have claimed that removal would involve a breach of their rights derived from the ECHR and challenged decisions certifying their human rights claims as manifestly unfounded. The Claimants were (save in one case) the subject of removal directions. There are 11 individual claimants: *AAA*, *AHA*, *AT*, *AAM*, and *NSK*, all parties to claim CO/2032/2022; *HTN*, claim CO/2104/2022; *RM*, claim CO/2077/2022; *ASM*, claim CO/2080/2022; *AS*, claim CO/2098/2022; *AB*, claim CO/2072/2022; and *SAA*, claim CO/2094/2022. Four organisations also bring claims: the Public and Commercial Services Union, Detention Action, and Care4Calais (all in claim CO/2032/2022), and Asylum Aid (in claim CO/2056/2022).

10. By the order made following the interim relief hearing on 10 June 2022, the court permitted the United Nations High Commissioner for Refugees to intervene in case

CO/2032/2022. The High Commissioner has filed evidence in the form of witness statements made by Lawrence Bottinick, the High Commissioner's Senior Legal Officer in the United Kingdom; has filed written observations settled by leading counsel; and has supplemented those observations orally at the hearing.

(3) Legal framework

11. The inadmissibility and removal decisions were made in the exercise of the power in paragraphs 345A to 345D of the Immigration Rules:

> "**Inadmissibility of non-EU applications for asylum**
>
> 345A. An asylum application may be treated as inadmissible and not substantively considered if the Secretary of State determines that:
>
> (i) the applicant has been recognised as a refugee in a safe third country and they can still avail themselves of that protection; or
>
> (ii) the applicant otherwise enjoys sufficient protection in a safe third country, including benefiting from the principle of non-refoulement; or
>
> (iii) the applicant could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because:
>
> > (a) they have already made an application for protection to that country; or
> >
> > (b) they could have made an application for protection to that country but did not do so and there were no exceptional circumstances preventing such an application being made, or
> >
> > (c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection.
>
> **Safe Third Country of Asylum**
>
> 345B. A country is a safe third country for a particular applicant, if:
>
> (i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;
>
> (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;

> (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected in that country; and
>
> (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country.
>
> 345C. When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry.
>
> **Exceptions for admission of inadmissible claims to UK asylum process**
>
> 345D. When an application has been treated as inadmissible and either
>
> (i) removal to a safe third country within a reasonable period of time is unlikely; or
>
> (ii) upon consideration of a claimant's particular circumstances the Secretary of State determines that removal to a safe third country is inappropriate
>
> the Secretary of State will admit the applicant for consideration of the claim in the UK."

For the purposes of the cases before the court the following points are material. *First*, that to treat a claim as inadmissible the Home Secretary had to decide that the requirements at paragraph 345A(iii)(b) were met, including that the country in which the opportunity to make a protection claim arose was a safe third country as defined at paragraph 345B. *Second,* that if an inadmissibility decision was made, the Home Secretary could decide the remove the asylum claimant to Rwanda only if she could decide that Rwanda was a safe third country, again as defined at paragraph 345B[3].

[3] In this judgment we are not concerned with section 80B and 80C of the 2002 Act, which apply to asylum claims made on or after 28 June 2022 for this reason we state no conclusions on the effect of the provisions now contained in the 2022 Act save to observed while differently formulated, those sections are largely similar in effect to their predecessors in the Immigration Rules. One difference that may exist is between paragraph 345A(iii)(b) and section 80C(4)(b): the former stating "that there were no exceptional circumstances preventing [an asylum claim] being made in a safe third country reached by the claimant before he arrived in the United Kingdom; the latter referring instead, to a failure to make such a claim when "it would have been reasonable to expect [the claimant] to make such a claim". The significance attaching to this reformulation is not a matter for this judgment.

12. When taking the inadmissibility and removal decisions, the Home Secretary also certified the claims in exercise of the power at paragraph 17 in Part 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act"). Paragraph 17 is as follows:

> "17. This Part applies to a person who has made an asylum claim if the Secretary of State certifies that–
>
> (a) it is proposed to remove the person to a specified State,
>
> (b) in the Secretary of State's opinion, the person is not a national or citizen of the specified State, and
>
> (c) in the Secretary of State's opinion, the specified State is a place –
>
> (i) where the person's life and liberty will not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
>
> (ii) from which the person will not be sent to another State otherwise than in accordance with the Refugee Convention."

Certification under paragraph 17 is an integral part of the Home Secretary's decisions to remove asylum claimants to Rwanda. If a certificate is made, paragraph 18 of Schedule 3 applies with the consequence that the prohibition in section 77 of the 2002 Act on removing persons with extant asylum claims from the United Kingdom is disapplied.

13. Further, if a claim is certified, the restriction on appeal rights at paragraph 19 of Schedule 4 will also apply. Since 8 June 2022 paragraph 19 has been in the following terms:

> "19. Where this Part applies to a person–
>
> (b) he may not bring an immigration appeal in reliance on an asylum claim which asserts that to remove the person to the State specified under paragraph 17 would breach the United Kingdom's obligations under the Refugee Convention,
>
> (c) he may not bring an immigration appeal in reliance on a human rights claim if the Secretary of State certifies that the claim is clearly unfounded."

14. In addition, many of those who were the subject of inadmissibility and removal decisions further contended that removal to Rwanda would be in breach of their

ECHR rights. By section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") the Home Secretary may certify a human-rights claim as "clearly unfounded" if

> (7) …
>
> > (a) it is proposed to remove the person to a country of which he is not a national or citizen, and
> > (b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.
>
> (8) In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as—
>
> > (a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
> > (b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention or with the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection."

Certification removes the claimant's rights of appeal through the Tribunal system. The decision to certify may be challenged in judicial review proceedings.

(4) The Home Secretary's policy

15. The Home Secretary's policy on use of the power to make inadmissibility decisions is apparent from guidance to Home Office case workers published on 9 May 2022: "*Inadmissibility: safe third country cases, version 6.0*" ("the Inadmissibility Guidance"). On 28 June 2022 the Home Secretary published version 7.0 of this guidance. Version 7.0 takes account of the new sections 80B and 80C of the 2002 Act and applies only to asylum claims made on or after 28 June 2022. While it is common ground between all counsel in these proceedings that there are no differences between version 6.0 and version 7.0 that are material to the issues in these cases, for the purposes of the decisions in issue before this court version 6.0 of the inadmissibility guidance remains the operative document.

16. The Home Secretary's policy on use of the power to make inadmissibility decisions is to the following effect. The purpose pursued is to encourage *"… asylum seekers to claim asylum in the first safe country they reach and [to deter] them from making unnecessary and dangerous onward journeys to the UK*". The guidance goes on to state *"… removals of individuals from the UK in accordance with the MEDP are intended to deter people from making dangerous journeys to the UK to claim asylum, which are facilitated by criminal smugglers, when they have already travelled through safe third countries. In particular, but not exclusively, this is aimed at deterring arrivals by small boats.*" The policy excludes certain categories of asylum claimant: inadmissibility decisions are not to be made in respect of claims made by unaccompanied children; the policy does not apply to families – they are to be treated

in accordance with the Home Secretary's guidance on family returns; and decisions are not to be made in respect of EU nationals – because they too are the subject of different provisions.

17. The final aspect to the policy is the possibility that a person whose claim has been held to be inadmissible may be removed to Rwanda. The material part of the Inadmissibility Guidance states as follows:

> "If a case assessed as suitable for inadmissibility action appears to stand a greater chance of being promptly removed if referred to Rwanda (a country with which the UK has a Migration and Economic Development Partnership (MEDP), rather than to the country to which they have a connection, TCU should consider referring the case to Rwanda. An asylum claimant may be eligible for removal to Rwanda if their claim is inadmissible under this policy and (a) that claimant's journey to the UK can be described as having been dangerous and (b) was made on or after 1 January 2022. A dangerous journey is one able or likely to cause harm or injury.
>
> …
>
> Those progressed for consideration for relocation to Rwanda under the MEDP will be taken from the detained and non-detained cohort and be identified in line with processing capacity. Priority will be given to those who arrived in the UK after 9 May 2022.
>
> …
>
> Decision makers must take into account country information of the potential country/countries to where removal may occur in deciding whether referral into a particular route is appropriate in the particular circumstances of that claimant."

In this judgment, for sake of convenience, we will refer to the policy as "the Rwanda policy".

(5) The Migration and Economic Development Partnership

18. The MEDP made between the United Kingdom and the Republic of Rwanda is set out in a Memorandum of Understanding made on 13 April 2022 ("the MOU") and two *Notes Verbales* that supplement the MOU. Unless the parties agree otherwise, the MOU will remain in force for 5 years, and may be renewed. The first *Note Verbale* is "… on guarantees of the Government of Rwanda regarding the asylum process of transferred individuals" ("the Asylum Process NV"); the second is "… on guarantees of the Government of Rwanda regarding the reception and accommodation of transferred individuals" ("the Support NV"). So far as the Home Secretary is concerned, the MOU and the *Notes Verbales* are important underpinning for a

conclusion that Rwanda is a safe third country for the purposes of paragraph 345B of the Immigration Rules.

19. Paragraph 2 of the MOU sets out the objectives of the arrangements:

> "2.1 The objective of this Arrangement is to create a mechanism for the relocation of asylum seekers who's claims are not being considered by the United Kingdom, to Rwanda, which will process their claims and settle or remove (as appropriate) individuals after their claim is decided, in accordance with Rwanda domestic law, the Refugee Convention, current international standards, including in accordance with international human rights law and including the assurances given under this Arrangement.
>
> 2.2 For the avoidance of doubt, the commitments set out in this Memorandum are made by the United Kingdom to Rwanda and vice versa and do not create or confer any right on any individual, nor shall compliance with this Arrangement be justiciable in any court of law by third parties or individuals."

20. The arrangements then set out in MOU are, in summary, to the following effect. A person may be transferred to Rwanda only with the agreement of the Government of Rwanda. In reaching such agreement account will be taken of Rwanda's "capacity to receive" persons and "administrative needs associated with their transfer". When a transfer request is made, the United Kingdom agrees to provide certain information on the person it is proposed will transfer (the information to be provided is listed at paragraph 5 of the MOU). Rwanda agrees to "give access to its territory … in accordance with its international commitments and asylum and immigration laws" to all persons transferred under the MOU. Persons transferred will also be provided with accommodation and support "… adequate to ensure [their] health, security and wellbeing …" (MOU at paragraph 8). Paragraph 14 of the MOU further provides "Rwanda will have regard for information provided about a Relocated Individual relating to any special needs that may arise as a result of their being a victim of modern slavery and human trafficking and will take all necessary steps to ensure these needs are accommodated."

21. Paragraph 9 of the MOU sets out the arrangements made for processing asylum claims raised in Rwanda:

> "9.1 Rwanda will ensure that:
>
> 9.1.1 At all times it will treat each Relocated Individual, and process their claim for asylum, in accordance with the Refugee Convention, Rwandan immigration laws and international and Rwandan standards, including under international and Rwandan human rights law, and including but not limited to ensuring their protection from inhuman and degrading treatment and refoulement;

> 9.1.2 Each Relocated Individual will have access to an interpreter and to procedural or legal assistance at every stage of their asylum claim, including if they wish to appeal a decision made on their case;
>
> 9.1.3 If a Relocated Individual's claim for asylum is refused, that Relocated Individual will have access to independent and impartial due process of appeal in accordance with Rwandan laws.
>
> 9.1.4 If a Relocated Individual does not apply for asylum, Rwanda will access the individual's resident status on other grounds in accordance with Rwandan immigration laws."

If a person is recognised as a refugee, he will receive support and accommodation at the same level as while his claim was pending and "… will be treated in accordance with the Refugee Convention and International and Rwandan standards" (MOU, paragraph 12). Provision is also made for persons whose asylum claims are refused.

> "10.2 For those who are not recognised as refugees Rwanda will consider whether the Relocated Individual has another humanitarian protection need, such that return to their country of origin would result in a real risk of their being subject to inhuman, degrading treatment or torture or a real risk to their life. Where such a protection needs exists, Rwanda will provide treatment consistent with that offered to those as refugees … and permission to remain in Rwanda. Such persons shall be awarded equivalent rights and treatment to those recognised as refugees and will be treated in accordance with international and Rwandan standards.
>
> 10.3 For those Relocated Individuals who are neither recognised as refugees nor to have protection needs in accordance with paragraph 10.2, Rwanda will:
>
> 10.3.1 Offer an opportunity for Relocated Individual to apply for permission to remain in Rwanda on any other basis in accordance with its domestic immigration laws and ensure the Relocated Individual is provided with the relevant information needed to make such an application:
>
> 10.3.2 Provide adequate support and accommodation for the Relocated Individual's health and security until such time as their status is regularised or they leave or are removed from Rwanda.
>
> 10.4 For those Relocated Individuals who are neither recognised as refugees nor to have a protection need or other basis upon which to remain in Rwanda, Rwanda only remove such a person to a country in which they have a right to reside. If there is no prospect of such removal occurring for any reason

> Rwanda will regularise that person's immigration status in Rwanda.
>
> 10.5 Relocated Individuals who have been refused asylum and do not have a humanitarian protection need will have the same rights as other individuals making an application under Rwandan immigration laws."

Paragraph 17 of the MOU provides, that as far as concerns any person transferred, the obligations arising under the MOU will remain in force even after the expiry or termination of the MOU.

22. By paragraph 21 of the MOU, a Joint Committee of representatives of the United Kingdom government and the Rwandan government is to be formed. The Joint Committee is to meet at least every six months. The remit of the Joint Committee is as follows:

> "21.2 The role of the Joint Committee will be to:
>
> 21.2.1 Monitor and review the application and implementation of this Arrangement and to make non-binding recommendations in respect there of; and
>
> 21.2.2 Provide a forum for the Participants to exchange information, discuss best practise including relevant guidance from external state holders, and resolve issues of a technical or administrative character."

23. The governments also agree to establish a Monitoring Committee comprising persons independent of the two governments. It is intended that the Monitoring Committee will "*monitor the entire relocation process from the beginning …*"; report on conditions in Rwanda including reception conditions, accommodation, how asylum claims are processed, the treatment and support and given to those who are transferred, and generally, on the implementation of the terms of the MOU: see generally, paragraph 15 of the MOU.

24. Under the terms of the MOU the United Kingdom has agreed that "*a proportion of Rwanda's most vulnerable refugees*" will be settled in the United Kingdom (see paragraph 16).

25. Financial arrangements have also been made between the two governments. These are referred to but not set out, at paragraph 19 of the MOU. In a statement made for these proceedings, Kristian Armstrong, Head of the Third Countries Asylum Partnerships Task Force at the Home Office states that the United Kingdom paid £20 million to Rwanda on 29 April 2022 in respect to preparations to receive the first group of asylum claimants. He states that under the terms referred to in the MOU the United Kingdom will also make payments to meet the costs of processing claims, ensuring the safety and wellbeing of claimants while their claims are pending, and to meet the cost of long-term welfare and integration needs of all those who stay in

Rwanda. For those who are granted refugee status or who qualify for humanitarian protection the funding will be for 5 years. For those who do not so qualify but who remain in Rwanda the funding will cover a 3-year period.

26. Mr Armstrong also states that in April 2022 the United Kingdom paid £120 million as an initial contribution to an Economic Transformation and Integration Fund that intended to promote economic development in Rwanda. Further payments to this fund are conditional on Rwanda's compliance with the terms of the MOU.

27. The MOU also makes provision for management and protection of personal data transferred between the governments during the operation of MOU: see at Annex A to the MOU.

(6) The Home Secretary's assessment of Rwanda

28. On 9 May 2022 the Home Secretary published four documents comprising her "Review of Asylum Processing" in Rwanda. The Home Secretary's overall assessment of the situation was set out in the document "Rwanda: assessment". The conclusions in this document were supported by information in the further documents: "Rwanda: Country Information on the Asylum System"; and "Rwanda: Country Information on General Human Rights in Rwanda". The fourth document "Rwanda: Interview Notes (Annex A) contained notes made by Home Office officials during two visits to Rwanda in January 2022 and March 2022. The Home Secretary also relies on these documents for the purposes of any decision that Rwanda is a safe third country as defined at paragraph 345B of the Immigration Rules.

(7) An outline of the decision-making process

29. In each of the claims before us the sequence of events has been similar and has followed the Home Secretary's general approach to taking decisions under paragraphs 345A – D of the Immigration Rules, and Schedule 3 to the 2004 Act, set out in the Inadmissibility Guidance.

30. Each Claimant was detained shortly after arrival in the United Kingdom, and was subject to the usual steps applied to all newly-detained persons as described in the Home Secretary's guidance "Detention: general instructions" (version 2.0, January 2022), and Detention Services Order 06/2013 (as revised in August 2021). Among other matters, each person detained is: (a) subject to an assessment of his language skills to determine proficiency in English; (b) assessed by healthcare staff (with a view to deciding if further healthcare provision is required; (c) issued with a mobile phone and given information about IT facilities at the detention centre; (d) given information about the centre's welfare officer; and (e) given information on how to obtain legal representation, if he does not already have it, including information on the free duty solicitor scheme.

31. Each Claimant made an asylum claim. Shortly after the claim was made (usually within a day or so), each Claimant attended an asylum screening interview. Every asylum claimant attends such an interview. The purpose of the interview is to obtain basic information about the claimant, his personal circumstances, where he comes

from, whether he has any particular health or other special needs, whether he has been subject to forms of exploitation (such as forced work), how he came to the United Kingdom, and to give the claimant an initial opportunity to explain the reasons why he cannot return to his home country. Every asylum screening interview is conducted by reference to a standard script. The questions put and the answers given are recorded on the standard form. Once completed, a copy of the completed form is given to the asylum claimant.

32. Each case was then considered by the Home Office National Asylum Allocations Unit ("the NAAU"). The Inadmissibility Guidance provides that if the NAAU suspects that the claimant "… may [in the course of travelling to the United Kingdom] have spent time in or have a connection to a safe third country …" the case must be referred to the Third Country Unit ("the TCU") for consideration of whether an inadmissibility decision should be taken. In the present cases, each Claimant's asylum claim was referred to the TCU. The TCU then reviewed claims referred to it to determine whether they "… [appear] to satisfy paragraphs 345A and 345B of the Immigration Rules". If a case falls into this category, the TCU issues the asylum claimant with a Notice of Intent.

33. The Inadmissibility Guidance sets out a standard form of the Notice of Intent. The standard wording includes the following"

> "We have evidence that before you claimed asylum in the United Kingdom, you were present in or had a connection to [name the safe country or countries]. This may have consequences for whether your claim is admitted to the UK asylum system.
>
> We will review your particular circumstances and the evidence in your case, and consider whether it is reasonable to have expected you to have claimed protection in [country or countries] (or to have remained there if you had already claimed or been granted protection), and whether we should consider removing you there or elsewhere.
>
> If your claim is declared inadmissible, we will not ask you about your reasons for claiming protection or make a decision on the facts of your protection claim.
>
> We may, if inadmissibility action appears appropriate, make enquiries with one or more of the safe countries mentioned above to verify evidence or to ask if, in principle, they would admit you.
>
> (Optional paragraph below, to be used only if case is in scope for possible removal to Rwanda; remove brackets if including paragraph:
>
> We may also ask Rwanda, another country we consider to be safe, whether it would admit you, under the terms of the Migration and Economic Development Partnership between Rwanda and the UK.)"

Each of the individual Claimants in these proceedings was issued with a Notice of Intent. In most cases, this notice was served on them very shortly after the asylum screening interview (within a day or so of the interview). The Notice of Intent also gives the asylum claimant the opportunity to make representations. The standard wording (in the Inadmissibility Guidance) is in the following terms

> "If you wish to submit reasons not already notified to the Home Office why your protection claim should not be treated as inadmissible, or why you should not be required to leave the UK and be removed to the country or countries we may ask to admit you (as mentioned above), you should provide those reasons in writing within 7 calendar days [for detained cases] or 14 calendar days [for non-detained cases] of the date of this letter. After this period ends, we may make an inadmissibility decision on your case, based on the evidence available to us at that time."

34. After the 7- or 14-day period (which the Home Secretary has stated could, in her discretion, be extended on request) the Home Secretary then proceeded to take decisions on inadmissibility (under §345A of the Immigration Rules), on removal (under §345C of the Rules), and on certification under paragraph 17 of Schedule 3 to the 2004 Act. Those decisions were made on the Home Secretary's behalf by the TCU. If representations made by an asylum claimant raised further matters, for example, that removal from the United Kingdom would involve a breach of ECHR Convention rights, those claims were also considered. The Home Secretary's practice was to issue two decision letters: one setting out the decision on inadmissibility and removal; the other setting out the decision on any ECHR rights claim, including on whether such claim had been certified in exercise of the power at paragraph 19(c) of Schedule 3 to the 2004 Act. The different decisions were taken by different Home Office teams: the TCU (based in Glasgow) took the inadmissibility removal decisions; while the Detained Barrier Casework Team (based in Croydon) took decisions on the human rights claims. The Home Secretary's practice was, at or around the same time as the decision letters, also to issue removal directions. In the present cases, those directions provided that unless the Claimant left the United Kingdom voluntarily he would be removed to Rwanda on 14 June 2022 (by plane to Kigali Airport).

35. As events turned out, there were two rounds of decisions. The first round of inadmissibility and removal and human rights decisions were made at the end of May and beginning of June 2022. However, after the commencement of these proceedings, the Home Secretary (of her own motion) decided to reconsider each case, to take account of further representations received since the May/June 2022 decisions, and matters contained in the witness statements filed in these proceedings by the United Nations High Commissioner for Refugees. These further decisions (on inadmissibility, removal and on the human rights claims) were set out in decision letters dated 5 July 2022.

(8) The issues

36. The pleadings in these proceedings are not models of good practice. Practice Direction 54A requires Statements of Facts and Grounds to be clear and concise. None of the pleadings meets this requirement, even though many if not all have been revised one or more times since the proceedings were issued. On the Claimants' side the pleading in claim CO/2032/2022 (*AAA and others*) has taken pole position, setting out various generic grounds of challenge as well as grounds specific to the facts of the cases of the individual claimants in that case. Seven generic grounds of challenge are pleaded (Grounds 1, 1A – 1C, 2A and 3-6). However, these grounds tend to overlap or circle back on one another. Other claims brought by other Claimants have adopted these generic grounds of challenge or formulated variations on them, as well as pleading complaints based on their own circumstances. The pleading in CO/2056/2022 (the *Asylum Aid* case) raises complaints about the Home Secretary's decision-making procedure. What is said about procedural fairness in this case largely overlap with the complaints on procedural fairness raised in CO/2023/2022 and other claims. Asylum Aid contends that these matters demonstrate there is systemic unfairness in the procedure adopted to deal with the inadmissibility and removal decisions. The Home Secretary pleading is a response in kind. The Amended Detailed Grounds of Defence (to all claims) runs to some 215 pages.

37. At the court's request the parties prepared an agreed list of issues. However, that exercise failed to simplify the position: the list identifies 29 generic issues, many of which are repetitive or overlapping; and many more issues specific to each claim.

38. The same approach has been repeated in the Skeleton Arguments. Mention should be made of the Skeleton Argument in CO/2032/2022 and CO/2104/2022 (262 pages), and the Skeleton Argument in CO/2094/2022 (63 pages). Each comfortably exceeds the maximum length permitted by Practice Direction 54A (25 pages). Permission to file skeleton arguments longer than the maximum permitted was not requested in advance; each document was presented to the court as a *fait accompli*. The length of these documents has not served to clarify the way in which the various complaints are put. The documents meander and repeat themselves. We have no doubt that these failings made it significantly more difficult for counsel to present their cases clearly and effectively. Overall, it has become very easy to miss the wood for the trees.

39. As we see it, on a fair reading of the claim forms, the written skeleton arguments and the oral submissions the generic issues raised in these proceedings come to this.

> (1) The Home Secretary's conclusion that Rwanda is a safe third country is legally flawed. The Claimants' primary contention is that this assessment is contrary to article 3 of the ECHR. This rests on: (a) the decision of the European Court of Human Rights in *Ilias and Ahmed v Hungary* (2020) 71 EHRR 6 that a state cannot remove an individual asylum-seeker without determining his asylum claim unless it has established that there are adequate procedures in place in the country to which he is to be removed which will ensure that the individual's asylum claim is properly determined and he does not face a risk of refoulment to his country of origin; (b) the submission that removal of the individual Claimants to Rwanda will put them at real risk of article 3 ill-treatment (in breach of the principle recognised in *Soering:* see judgment of the European Court of Human Rights (1989) 11 EHRR 439) and (c) the contention that, systemically, it is inevitable that the policy to remove asylum claimants to Rwanda will lead to occasions when a person will be subjected to article 3 ill-treatment. Essentially

the same submission is also put on the basis that the conclusion that Rwanda is a safe third country has not taken account of relevant matters, is the result of insufficient enquiry, rests on material errors of fact, and/or is irrational.

(2) One matter that is central to the Claimants' case, regardless of the legal basis on which the claim is put, is the contention that the asylum claims of those relocated to Rwanda will not be determined effectively in Rwanda thereby running the risk that asylum seekers will be refouled from Rwanda – i.e., removed from Rwanda either directly to their country of origin (the place where they allege they were and would be the subject of treatment contrary to the Refugee Convention), or removed from Rwanda to some other country from where they could be removed to the country of origin. A range of criticisms is made of the scope of protection available under Rwandan law which is said not to be consistent with the requirements of the Refugee Convention, of the practices of the Rwandan authorities dealing with asylum claims, and the capacity of the Rwandan authorities (including the Rwandan courts) to decide asylum claims in accordance with the requirements of the Refugee Convention. In addition, complaint is made of the way in which asylum seekers relocated to Rwanda will be treated. Overall, the Claimants contend that the Home Secretary is not entitled to have confidence that the Rwandan government will honour its obligations under the MOU and the *Notes Verbales* which would ensure proper consideration of an asylum claim and which would prevent such treatment occurring. That submission is supported by the High Commissioner.

(3) The Home Secretary has used the power of certification under paragraph 17 of Schedule 3 to the 2004 Act improperly. That power was only intended to be used on an *ad hoc* basis in individual cases. It is not appropriate to use paragraph 17 in support of a general scheme such as the Rwanda policy. Rather than use paragraph 17 (which is in Part 5 of Schedule 3 to the 2004 Act), the Home Secretary should have had resort to Part 2 of the Schedule, with the consequence that her policy of removal to Rwanda would have required Parliamentary consideration and approval.

(4) The inadmissibility decisions rest on a misunderstanding or misapplication of the Immigration Rules because the requirements in paragraph 345A of the Immigration Rules are only met if an asylum seeker had a relevant connection with the safe third country to which he is being returned, in this case Rwanda. Removal to Rwanda cannot be the consequence of failure to make an asylum claim in another safe third country such as France or another European country whilst on the way to the United Kingdom. Further, the Home Secretary's practice of seeking Rwanda's agreement to a transfer before making decisions under paragraph 345A is in breach of paragraph 345C of the Immigration Rules.;

(5) The Home Secretary's Inadmissibility Guidance is unlawful because: (a) it does not include guidance for decision-makers on how to exercise the discretion to treat a claim as inadmissible; and/or (b) because it contains rules that on a proper application of section 3 of the Immigration Act 1971, should have formed part of the Immigration Rules and be approved by Parliament. The Claimants also contend that the Inadmissibility Guidance is not complete such that, at least in part, the Home Secretary's inadmissibility decisions have been taken in furtherance of an "unpublished policy";

(6) The decisions to remove asylum claimants to Rwanda are contrary to retained EU law, specifically, the provisions in Directive 205/85/EC "On minimum standards on procedures in Member States for granting and withdrawing refugee status".

(7) Removal of an asylum seeker to Rwanda is inconsistent with article 33, or constitutes the imposition of a penalty contrary to article 31, of the Refugee Convention and so would involve a breach of section 2 of the Asylum and Immigration Appeals Act 1993 ("1993 Act"). Further, it is said that is inherent in article 33 of the Refugee Convention that the United Kingdom must determine a claim for asylum made in the United Kingdom and cannot relocate an asylum seeker to a third country for that country to determine his asylum claim. Generally, the Claimants submit that the Home Secretary's use of powers under the Immigration Rules to give effect to the Rwanda policy amounts to a breach of the obligation in section 2 of the 1993 Act not to adopt any practice in the Immigration Rules that is contrary to the Refugee Convention.

(8) In the course of deciding whether to remove persons to Rwanda, the Home Secretary has acted contrary to the Data Protection Act 2018 and the UK GDPR.

(9) The Inadmissibility Guidance is the cause of discrimination on grounds of nationality, age, sex, and disability. It also promotes discrimination against persons who make claims for asylum, as opposed to those who seek leave to enter the United Kingdom on other grounds.

(10) The Home Secretary's decision to adopt the Inadmissibility Guidance was irrational because she ought first to have sought either (a) parliamentary approval for the policy; and/or (b) the approval of HM Treasury.

(11) When formulating her Rwanda policy, the Home Secretary failed to comply with the requirements of section 149(1) of the Equality Act 2010 ("the 2010 Act") (the public sector equality duty).

(12) The process by which inadmissibility decisions are taken is unfair. The principal target of this complaint is that the Notice of Intent served by the Home Secretary before any inadmissibility or removal decision is taken, allows only seven days for representations to be made that no such decision should be made. Other complaints are also made about the procedure followed when decisions are taken.

The Home Secretary disputes each of the grounds of challenge. She further contends that the organisations that are Claimants in CO/2032/2022, i.e., the PCSU, Care4Calais and Detention Action, do not have standing to bring the challenges raised in that case. All these issues are addressed in the next section of the judgment save for issue (12) which is considered in Section D of the judgment.

40. Further, each of the Claimants who has been the subject of decisions and removal directions, challenges those decisions by reference to his own facts and circumstances. These matters are addressed at Section C of this judgment, together with the further claims (made by some of the individual Claimants) that the Home

Secretary acted unlawfully in refusing their human rights claims and certifying those claims as clearly unfounded.

(9) Which decisions are operative decisions?

41. During the hearing questions arose as to which decisions were or ought to be the subject of the Claimants' challenges and the court's consideration. We do not consider this is an issue that affects any question going to the legality of decisions taken by the Home Secretary. Rather, it goes only to the correct analysis of the sequence of decisions going back to May 2022. There are two matters to consider. The first concerns the documents published by the Home Secretary on 9 May 2022: the four Rwanda assessment documents and the Inadmissibility Guidance. The former four documents contain assessments relevant to the Home Secretary's conclusion that Rwanda is a safe third country; the latter one contains statements of the Home Secretary's approach to use of the powers under the Immigration Rules to declare asylum claims inadmissible and remove asylum claimants to safe third countries, and also a statement of the procedure to be used to take decisions on inadmissibility. Ought any issue that goes to the legality of decisions contained in any of these documents be assessed as at the date of publication or at the date of the inadmissibility decisions? We consider the latter approach is correct. As at the date they were published, no decision contained in any of these documents affected any of the Claimants. The May 2022 Rwanda assessment documents set out the Home Secretary's opinion on a range of matters relevant to whether Rwanda is a safe third country. They were, and are, matters the Home Secretary intended to rely on when taking decisions under the Immigration Rules, specifically any decision under paragraph 345C. However, these matters were preparatory. Any decision under paragraph 345C of the Immigration Rules to remove a person to Rwanda would require consideration of both general matters (such as those at paragraph 345B(ii) to (iv)) and matters specific to the person concerned (see paragraph 345B(i)), and those matters whether general or specific would have to be addressed by the Home Secretary at the time of the decisions to remove to Rwanda. Thus, nothing is to be gained by considering the May 2022 documents in isolation from the use to which they were put when the decisions under the Immigration Rules were taken.

42. The second matter concerns the inadmissibility and removal decisions. There were two rounds of decisions, the first at the end of May and beginning of June, the second on 5 July 2022. Do the July 2022 decisions supersede the May and June decisions? Each of the July decision letters states that it is "… to be read in conjunction with …" the earlier decision letter. We do not consider that this form of words requires us to assess the legality of the May and June decisions discreetly from the July decisions. The form of words was probably included out of an abundance of caution. In all other respects it is apparent that the July decision letters are free-standing and are intended to be comprehensive statements of the Home Secretary's reasons for the decisions concerned. All this being so, the correct focus is on the July 2022 decision letters. Below, in Section C of this judgment where the challenges specific to the facts of each of the individual Claimants are addressed, we have considered both the earlier (May and June 2022) decisions and the 5 July 2022 decisions. In claims where we have decided to quash the 5 July 2022 decision we have also quashed the earlier

decision. But that is simply to make it clear that in those cases the Home Secretary must consider afresh all decisions (whether under the Immigration Rules, or the 2004 Act, or decisions on human rights claims).

B. Decision on the generic grounds of challenge

(1) The first and second issues. Was the assessment that Rwanda is a safe third country legally flawed?

43. The Claimants' primary submission is that the Home Secretary's decisions under paragraph 345C of the Immigration Rules to remove the individual Claimants to Rwanda were unlawful because the conclusion that Rwanda is a "safe third country" (as defined in paragraph 345B of the Rules) is legally flawed. This same contention is put in a number of different ways: that the conclusion that Rwanda meets the criteria at 345B: (a) amounts to a breach of article 3 of the ECHR for the reasons explained by the European Court of Human Rights in *Ilias and Ahmed v Hungary* (2020) 71 EHRR 6 namely that the asylum claims of those relocated to Rwanda would not be effectively determined in Rwanda and the asylum claimants run a risk that they will be refouled directly or indirectly to the country where they experienced treatment contrary to the Refugee Convention ; (b) rests on material errors of fact, or a failure to comply with the obligation in *Tameside v Secretary of State for Education and Science* [1977] AC 1014 (the obligation to ensure the decision rests on a sufficient factual basis by taking reasonable steps to obtain relevant information); (c) is an irrational conclusion; and/or (d) is part of a policy which is unlawful in the sense explained in *Gillick v West Norfolk and Wisbech AHA* [1986] AC 997 in that it positively authorises or approves removals that would be in breach of article 3 of the ECHR (i.e. exposes persons to a real risk of article 3 ill-treatment)..

44. For the purposes of these submissions, the relevant decision is one which concerns whether, generally, Rwanda (a) complies with its obligations under the Refugee Convention of non-refoulement (the criterion at paragraph 345B(ii)); (b) will meet the related requirement (at paragraph 345B(iii)) not to remove persons if that would put them at risk of ill-treatment contrary to ECHR article 3; and (c) would permit the person the Home Secretary wishes to remove, to make a claim for asylum, effectively to determine that claim, and provide protection as required by the Refugee Convention if the claim is upheld (the criterion at paragraph 345B (iv)). The Claimants also submit that removal to Rwanda would be in breach of article 3 of the ECHR in the sense of the *Soering* principle because there are reasonable grounds for believing that if a person is removed to Rwanda that will expose him to a real risk of article 3 ill-treatment because of the conditions in Rwanda

45. Although the legal argument is put on various different bases, all converge on two issues: the first is whether the Home Secretary's conclusion, absent considerations of any matter arising from the particular circumstances of a specific claimant, that Rwanda meets the criteria for being a "safe third country" as defined at paragraph 345B(ii) to (iv) of the Immigration Rules, was a conclusion based on sufficient evidence and thorough assessment; the second is whether the Home Secretary could lawfully reach the conclusion that the arrangements governing relocation to Rwanda would not give rise to a real risk of refoulment or other ill-treatment contrary to article 3 of the ECHR.

Thorough Examination and Reasonable Inquiries

46. The information available to the Home Secretary for this purpose has expanded during the life of this litigation. As at the time of the original removal decisions (May and June 2022), the information available to the Home Secretary was set out in the Rwanda assessment documents published on 9 May 2022, referred to at paragraph 28 above ("the 9 May assessment documents"). Those documents rested on a range of sources including information obtained by Home Office officials during visits to Rwanda in January and March 2022, and information published by the US State Department, the UNHCR, the Committee against Torture (the committee established under article 17 of the UN Convention against Torture and other Inhuman or Degrading Treatment or Punishment – "UNCAT"), and non-governmental organisations such as Human Rights Watch.

47. The United Nations High Commissioner for Refugees ("the UNHCR") has filed three witness statements. For present purposes the most significant is the statement of Lawrence Bottinick made on 26 June 2022. That sets out, in some detail, the UNHCR's evidence and opinion on the asylum system in Rwanda. The information in that statement both goes beyond, and is a little different from, information previously published by the UNHCR on Rwanda (for example in its "Universal Periodic Review" document on Rwanda dated July 2020). Generally, Mr Bottinick is critical of the scope of Rwandan law, and the competence and the capacity of the Rwandan asylum system effectively to determine asylum claims. Further, we have seen documents prepared by the Rwandan authorities that respond to the matters raised by Mr Bottinick. All this additional information was considered by Home Office officials for the purposes of the further removal decisions made for each of the individual Claimants on 5 July 2022.

48. The Claimants' submission rested heavily on the judgment of the European Court of Human Rights in *Ilias and Ahmed v Hungary*. As we see it, *Ilias* is an example of the application of the principle in *Soering* in the context of a decision to remove an asylum claimant whose asylum claim has not been determined on its merits. In *Ilias* the circumstances were as follows. In July 2015 the Hungarian asylum authority determined in exercise of powers under Hungarian law that, presumptively, Serbia was a "safe third country". In September 2015, the claimants, who were nationals of Bangladesh, entered Hungary via Serbia. They remained in a transit zone on the border between the two countries. They claimed asylum in Hungary, but those claims were rejected as inadmissible because the claimants had arrived in Hungary from Serbia. On 8 October they were escorted back to Serbia.

49. The European Court of Human Rights concluded the removal decisions were in breach of article 3. The Court stated that removal of an asylum claimant whose claim had not been determined on its merits, would amount to a breach of article 3 if "adequate asylum procedures protecting [the claimant] against refoulement" were not in place in the receiving state (see the judgment at paragraph 134). The Court further concluded that if a state wished, consistently with article 3 of the ECHR, to remove an asylum claimant without first determining his asylum claim on its merits, it should "examine thoroughly whether [the receiving country's] asylum system could deal adequately with those claims. At paragraph 139 – 141 the court said as follows:

> "139. … On the basis of the well-established principles underlying its case-law under art.3 of the Convention in relation to expulsion of asylum-seekers, the Court considers that the above-mentioned duty requires from the national authorities apply the "safe third country" concept to conduct a thorough examination of the relevant conditions in the third country concerned and, in particular the accessibility and reliability of its asylum system.
>
> …
>
> 140. Furthermore, a number of the principles developed in the Court's case-law regarding the assessment of risks in the asylum-seeker's country of origin also apply, mutatis mutandis, to the national authorities' examination of the question whether a third country from which the asylum-seeker came is "safe".
>
> 141. In particular, while it is for the persons seeking asylum to rely on and to substantiate their individual circumstances that the national authorities cannot be aware of, those authorities must carry out of their own motion an up-to-date assessment, notably, the of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. The assessment must be conducted primarily with reference to the facts which were known to the national authorities at the time of expulsion, but it is the duty of those authorities to seek all relevant generally available information to that effect. Generally, deficiencies well documented in authoritative reports, notably of the UNHCR, Council of Europe and EU bodies, are in principle considered to have been known. The expelling state cannot merely assume that the asylum-seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how authorities of that country apply their legislation on asylum in practice."

The court accepted that its task was to consider whether as the claimants contended, there were "clear indications that [persons removed] would not have access in Serbia to an adequate asylum procedure capable of protecting them against refoulment" (see the judgment at paragraph 144).

50. On the facts of that case, the Court concluded that the July 2015 decision that Serbia was, presumptively, a safe third country, had not rested on the required thorough assessment.

> "153. The presumption at issue in the present case was put in place in July 2015, when Hungary changed its previous decision and declared Serbia to be a safe third country. The Government's submissions before the Grand Chamber

> appeared to confirm that the grounds for this change consisted exclusively of the following: Serbia was bound by the relevant national conventions; as a candidate to become an EU Member State it benefitted from assistance in improving its asylum system; and there was an unprecedented wave of migration and measures had to be taken.
>
> 154. The Court notes, however, that in their submission to the Court the respondent Government have not mentioned any facts demonstrating that the decision-making process leading to the adoption of the presumption in 2015 involved a thorough assessment of the risk of lack of effective access to asylum proceedings in Serbia, including the risk of refoulement.
>
> …
>
> 158. The Court is not convinced, however, by the respondent Government's argument that the administrative authorities and national court thoroughly examined the available general information concerning the risk of the applicants' automatic removal from Serbia without effective access to an asylum procedure. In particular, it does not appear that the authorities took sufficient account of consistent general information that at the relevant time asylum-seekers returned to Serbia ran a real risk of summary removal the Republic of North Macedonia and then to Greece and therefore, of being subjected to conditions incompatible with Art.3 in Greece."

Thus, held the Court, there was an insufficient basis for the decision to establish a general presumption that Serbia was a safe third country (see the judgment at paragraph 163).

51. For present purposes, a relatively brief description of the Rwandan asylum procedure will suffice. Rwanda is a signatory to the Refugee Convention. Rwanda has a significant history of providing asylum to refugees fleeing local conflict. In July 2020, the UNHCR reported that since 1990, Rwanda had maintained a "open door" policy to refugees from neighbouring countries, and that there were nearly 149,000 refugees in Rwanda. The overwhelming majority were from the Democratic Republic of Congo and the Republic of Burundi. Rwanda has also supported the UNHCR "emergency transport mechanism" which, since 2019, has assisted a little over 1,000 asylum seekers to be removed from Libya to Rwanda. Once in Rwanda, their claims are processed by the UNHCR and claimants have, to date, been resettled by the UNHCR in third countries. Mr Bottinick's evidence was that at present, some 440 asylum claimants are in Rwanda under this scheme.

52. Persons who have fled to Rwanda from neighbouring countries have been permitted to remain in Rwanda without going through any formal asylum determination process. The Rwandan system for determining asylum claims has only been used to determine claims made by those coming from further afield. This is a small number of cases. The UNHCR estimated that in the last 3 years there have been approximately 300

cases. Asylum claims must be registered with the Directorate General of Immigration and Emigration ("the DGIE"). The DGIE will interview the claimant, issue him with a residence permit and forward the case to the Refugee Status Determination Committee ("the RSDC"). The RSDC comprises 11 members drawn from 11 ministries and government departments. Each holds his position ex-officio; membership of the RSDC will be only one part of the person's overall responsibilities. The RSDC determines the asylum claim. There is a right of appeal to the Minister for the Ministry in Charge of Emergency Management, the government department with responsibility for, among other matters, refugee affairs. There is a further appeal from the Minister to the High Court of Rwanda. That is an appeal in the way of re-hearing.

53. The Claimants' submission as to the position in Rwanda relies heavily on the information contained in the statements made by Mr Bottinick. The Claimants contend as follows.

(1) There are instances where the Rwandan authorities have refused to register claims for asylum. To the UNHCR's knowledge there have been 5 occasions (involving claimants from Libya, Syria and Afghanistan) where a person has made an asylum claim to the DGIE, but the DGIE refused to accept the claim as a valid claim. Those claims were made at Kigali Airport in Rwanda and the asylum claimants were refused entry to and, ultimately were removed from Rwanda. Generally, Mr Bottinick is critical of the DGIE not just in terms of its approach to registering asylum claims but also when it comes to interviewing asylum claimants. He says the airport cases are an indication that the DGIE discriminates against those who are not nationals of neighbouring states and, especially, against persons from middle eastern countries. He says the DGIE has on other occasions refused to interview asylum claimants. He suggests the DGIE may discriminate against asylum claimants who are lesbian, gay, bisexual, trans-sexual or inter-sex. He says the UNHCR is aware of two such cases. Mr Bottinick also says that when the DGIE refuses to refer a claim to the RSDC it does not give reasons for its decision. When interviews do occur, he says no record of the interview is provided to the asylum claimant.

(2) Mr Bottinick also considers the process before the RSDC is inadequate. The members of the RSDC are not expert or trained in asylum law. He gives examples of three occasions when the RSDC refused to see the asylum claimant. When hearings have taken place, they are too short to give claimants a fair chance to make their case, and hearings tend to lack focus because of the size of the RSDC. There are no interpreters at RSDC hearings which significantly prejudices claimants who speak neither French nor English. The RSDC does not allow claimants to be represented by lawyers. The RSDC does not provide proper reasons for decisions; decisions tend to be all in a standard form that simply informs the claimant of the outcome.

(3) Mr Bottinick is sceptical about the value of the appeal to the Minister. He says the UNHCR is not aware of any case where the Minister has reversed a decision of the RSDC. He also points out that legal representatives are not available for appeals to the Minister. Ministerial decisions are also in standard form and are not properly reasoned.

(4) Mr Bottinick also says that the lack of reasoned decisions from the RSDC and the Minister impedes effective use of the right of appeal to the High Court. This right of appeal was introduced in 2018. There is no evidence that such appeals have been filed with or heard by the High Court.

(5) Rwandan asylum law is said to be defective. Mr Bottinick refers to a "protection gap". He says that the definition of "political opinion" in article 7 of Rwanda's 2014 Law on Asylum does not cover the possibility of protection against persecution on grounds of imputed political opinion or from the risk of ill treatment by non-state actors.

(6) Mr Bottinick's opinion is that the Rwandan asylum system lacks the capacity and expertise necessary to deal effectively with asylum claims. This is material in two ways. Important aspects of asylum law may not be properly understood and properly applied. As an example, Mr Bottinick says that "it can be difficult for decision-makers to understand" that asylum claims should not be denied on the premise that the claimant could hide a characteristic protected under the Refugee Convention, such as his political opinion or sexual orientation. Further, the Rwandan system will not be able to cope with the volume of claims generated by the MEDP. Mr Bottinick comments that claimants in the Rwandan asylum system have insufficient access to legal assistance and interpretation services are not available. He also raises a concern that details of asylum claimants and their claims may not have been treated as confidential and information may have been passed to the asylum claimants' countries of origin.

54. The overall submission made by all Claimants is that the Rwandan asylum system is not adequate to prevent the risk of refoulement. In this context, refoulement is the term the Claimants use to cover a range of different scenarios. One example is that Mr Bottinick referred to the 5 cases where the DGIE refused to register claims made at airports as "airport refoulement". The use of the same word to describe so many different matters risks confusion. But, however the term is used, the point of substance is the contention that asylum claims raised in Rwanda either will not be considered at all, or will not be properly determined on their merits. Either scenario raises the risk that an asylum claimant who ought to receive protection from Rwanda, will not do so, and that even though Rwanda is a signatory to the Refugee Convention it will not ensure there will be no breach of article 33 of the Refugee Convention, whether directly or indirectly, in any case.

55. In her response, the Home Secretary takes issue with the details in Mr Bottinick's statement. Much of what he says is disputed by the Rwandan authorities. It is not necessary for the purposes of this judgment to address every such point. We note only two matters. The first concerns the state of Rwandan asylum law. The Home Secretary observes that in the July 2020 "Universal Periodic Review" the UNHCR described the 2014 Law relating to Refugees" as "fully compliant with international standards". There was no suggestion of any "protection gap". Further, as enacted, article 7 of the 2014 Law exactly follows the language of article 1 of the Refugee Convention. The protections given in respect of matters such as imputed opinion or persecution at the hands of non-state actors, have all been derived from article 1 of the Refugee Convention and there is no reason to think that article 7 of the Rwandan Law is not and will not be interpreted and applied to the same effect. Forensically (by

reference to the UNHCR July 2020 document), and as a matter of language (comparing article 1 of the Refugee Convention and article 7 of the Rwandan Law) that submission is correct. However, since no party advanced evidence on Rwandan law the matter cannot be taken any further.

56. The other point concerns whether the Rwandan authorities have maintained the confidentiality of asylum claimants and their claims. This arose from one of the responses provided by the Rwandan authorities in response to Mr Bottinick's evidence. One email refers to the fact that when considering an asylum claim, the RSDC may seek information "about a specific event/situation in the asylum seeker's country of origin". Considered in context, we are satisfied this is a reference to the RSDC asking the relevant Rwandan embassy or High Commission abroad for information, and not a reference to questions being asked with the authorities in the asylum seeker's country of origin.

57. The Home Secretary's primary response to this part of the claim and to the legal issues referred at paragraph 43 above is reliance on the MOU and the *Notes Verbales* made under it. We have referred to these already at paragraph 18 – 27 above. For present purposes the material matters arising are as follows:

(1) The purpose of the MOU is to establish a mechanism for the asylum claims to be decided in Rwanda (MOU, paragraph 2.1).

(2) The numbers of persons to be removed to Rwanda under the terms of MOU is to be agreed and will take account of Rwanda's capacity to receive them and comply with the obligations under the MOU in respect of that group (MOU, paragraph 3.3).

(3) Rwanda has agreed to give persons transferred access to its territory "in accordance with its international commitments and Rwandan asylum and immigration laws" (MOU, paragraph 7.1).

(4) Rwanda has agreed to process the asylum claims in accordance with the Refugee Convention and Rwandan national law and in accordance with international human rights standards (MOU, paragraph 9.1.1); and has agreed claimants will have access to "independent and impartial due process of appeal" in accordance with Rwandan law (MOU, paragraph 9.1.3).

(5) Rwanda has agreed to provide support to transferred asylum claimants both before and after their claims are decided (MOU, paragraph 5; and MOU, paragraph 20), and the Support NV including to those whose asylum claims are refused.

(6) The Asylum Process NV contains a range of further promises on access to the asylum process (paragraph 3); that decisions will be taken within a reasonable time by decision makers who are appropriately trained and who have appropriate support of officials or "external experts if necessary" (paragraph 4.2); that claimants will be appropriately interviewed so as to establish their claims (paragraph 4.3); that interpretation services will be provided and a record made of the interview (paragraph 4.4); that claims will be decided on their merits (paragraph 4.5 and 4.6); that decisions will be recorded and

> supported by reasons (paragraph 4.7 and 4.9); that on appeal to the Minister, written and oral submissions may be made, and legal representatives will have the opportunity to make representations (paragraph 5.1 to 5.2); that appeals to the High Court will be by way of "full re-examination" and will permit representations to be made by the asylum claimant and their legal representatives (paragraph 5.4 and 5.5); that interpretation services will be provided free of charge both at all stages of the process and to permit claimants to communicate with their legal representatives (paragraph 9); and that claimants will be permitted access to legal advice at each stage of the asylum process and, for appeals to the High Court, will be provided with legal assistance free of charge (paragraph 8).

58. The Home Secretary's submission is that the provision made by the MOU and the *Notes Verbales* is sufficient, when taken together with the steps that she took to investigate the matters covered in the 9 May 2022 Rwanda assessment documents, for the purposes of the obligation identified by the European Court of Human Rights in *Ilias*; is sufficient for the purposes of discharging the *Tameside* obligation; and permitted her rationally to conclude that Rwanda does meet the criteria at paragraph 345B(ii) to (iv) of the Immigration Rules to be a safe third country.

59. We accept that the Home Secretary did comply with the obligations identified in *Ilias*. The 9 May 2022 assessment documents are a "thorough examination" of "all relevant generally available information" of the type envisaged by the European Court of Human Rights in that case. The Claimants submitted that the 9 May 2022 assessment documents had been subject to adverse comment by the Asylum Research Centre which had reviewed the documents at the request of the Independent Advisory Group of Country Information. That report is dated July 2022. The Independent Advisory Group provides advice to the Chief Inspector of the UK Border Agency to allow him to discharge his obligation under section 48(2)(j) of the UK Borders Act 2007, to make recommendations to the Home Secretary on "the content of information on conditions outside the United Kingdom which the [Home Secretary] compiles and makes available for purposes connected with immigration and asylum to immigration officers and other officials". The 9 May 2022 assessment documents comprise such information. The July 2022 report is part of the process which will, in due course, enable the Chief Inspector to make such recommendations in respect of the 9 May 2022 assessment documents as he considers appropriate. That process is not yet complete; the Chief Inspector is yet to decide which aspects of the July 2022 report should form part of his recommendations. Be that as is may, we do not consider that any of the matters highlighted by the July 2022 report (whether considered individually or in the round) are sufficient to demonstrate any breach of the *Ilias* obligation. For example, several of the comments highlighted by the Claimants referred to a lack of explanation of the terms of the MOU and the *Notes Verbales* in the 9 May assessment documents. Even assuming those comments are warranted, they are not relevant to compliance with the *Ilias* obligation since it is beyond argument that the MOU and *Notes Verbales* were considered, together with the 9 May assessment documents, at the time the removal decisions were made.

60. Further, in compliance with the *Ilias* duty, when making the 5 July 2022 removal decisions the Home Secretary also considered the information by then filed in these proceedings by the UNHCR.

61. Next, we are satisfied that the same matters show that the Home Secretary complied with the duty in the *Tameside* case. That duty was formulated by Lord Diplock as follows: "… the question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?" (see [1977] AC 1014 at page 1065A to B, emphasis added). It is for the public body to determine the manner and intensity of the inquired to be undertaken, subject to judicial review on public law principles (see *R (Khatun) v Newham London Borough Council* [2005] QB 37 esp. at paragraph 35). If anything, that obligation, which is an aspect of *Wednesbury* principles, is a less onerous obligation than the *Ilias* obligation. However, in any event and in this case, the exercise of compiling the 9 May 2022 assessment documents, negotiating the MOU and the *Notes Verbales*, and consideration of the further information that became available from the UNHCR and the Rwandan authorities after these proceedings had been commenced, is sufficient to meet the *Tameside* obligation.

Adequacy of Asylum System

62. Next we consider whether the Home Secretary was entitled to conclude that there were sufficient guarantees to ensure that asylum-seekers relocated to Rwanda would have their asylum claims properly determined there and did not run a risk of refoulment in accordance with the obligations in *Ilias* and that Rwanda was a safe third country in accordance with the criteria in paragraph 345B(ii) to (iv) of the Immigration Rules. That raises the question of whether she was entitled to place the reliance that she did on the assurances provided by the Rwandan government in the MOU and the *Notes Verbales*. On their face, the obligations arising from those documents address all significant concerns raised in the UNHCR's evidence including the possibility that asylum claims would not be registered by the DGIE or would not be progressed by the DGIE and the RSDC; and concerns raised as to the nature and conduct of proceedings before the RSDC, the availability of interpretation services, access to legal advice, and provision of reasoned decisions.

63. The Claimants rely on the approach set out by the European Court of Human Rights in *Othman v United Kingdom* (2012) 55 EHRR 1. There, the Court considered the sufficiency of assurances given by the Kingdom of Jordan to the United Kingdom in the context of a contention that deporting Mr Othman to Jordan would put him at real risk of article 3 ill-treatment. At paragraphs 188 to 189 the Court stated as follows:

> "188. In assessing the practical aspect of assurances and determining what weight is to be given to them, the preliminary question is whether the general human-rights situation in the receiving state excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances.
>
> 189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's, practices they can be relied upon. In doing so, the Court will have regard *inter alia* to the following factors:

(1) Whether the terms of the assurances have been disclosed to the Court;

(2) Whether the assurances are specific or are general and vague;

(3) Who has given the assurances and whether that person can bind the receiving state;

(4) If the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;

(5) Whether the assurances concerns treatment that is legal or illegal in the receiving state;

(6) Whether they have been given by a Contracting State;

(7) The length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;

(8) Whether compliance with assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

(9) Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;

(10) Whether the applicant has previously been ill-treated in the receiving state;

(11) Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State."

The Court's list was not intended to be either prescriptive or exhaustive. Rather it is intended to indicate that when (as in the present proceedings) what is in issue is the risk of article 3 ill-treatment, the court's approach must be rigorous and pragmatic notwithstanding that ultimately it is an assessment to be undertaken recognising that the court must afford weight to the Home Secretary's evaluation of the matter. That approach will rest on a recognition of the expertise that resides in the executive to evaluate the worth of promises made by a friendly foreign state.

64. In the present case we consider the Home Secretary is entitled to rely on the assurances contained in the MOU and *Notes Verbales*, for the following reasons. The United Kingdom and the Republic of Rwanda have a well-established relationship. This is explained in the witness statement of Simon Mustard, the Director, Africa (East and Central) at the Foreign, Commonwealth and Development Office. This has comprised a development partnership set out in various agreements (referred to as Development Partnership Agreements) since 1998. The relationship is kept under review. In 2012 it was suspended by the United Kingdom government in response to Rwanda's involvement in the so-called "M23 Rebellion" in the Democratic Republic of Congo, and in 2014 the relationship was further reviewed in response to the assassination in South Africa of a Rwandan dissident. Since then, the United Kingdom has continued to provide Rwanda with financial aid, but this has been tied to specific activities. Thus, while there is a significant history of the two governments working together, the Rwandan government has reason to know that the United Kingdom government places importance on Rwanda's compliance in good faith with the terms on which the relationship is conducted.

65. The terms of the MOU and *Notes Verbales* are specific and detailed. The obligations that Rwanda has undertaken are clear. All, in one sense or another, concern Rwanda's compliance with obligations it already accepts as a signatory to the Refugee Convention. The Claimants have placed particular emphasis on whether the Rwandan asylum system will have the capacity to handle asylum claims made by those who are transferred under the terms of MOU. It is a fair point that, to date, the number of claims handled by the Rwandan asylum system has been small. It is also fair to point out, as Mr Bottinick has, that it will take time and resources to develop the capacity of the Rwandan asylum system. However, significant resources are to be provided under the MEDP, and by paragraph 3.3 of the MOU the number of persons that will be transferred will depend on the consent of the Rwandan government, taking account of its capacity to deal with persons in the way required under the MOU and the *Notes Verbales*. The MOU also contains monitoring mechanisms in the form of the Joint Committee (paragraph 21 of the MOU) and the Monitoring Committee (paragraph 15 of the MOU). For now, at least, there is no reason to believe that these bodies will not prove to be effective. Lastly, the MOU makes provision for significant financial assistance to Rwanda. That is a clear and significant incentive towards compliance with the terms of the arrangement.

66. Moreover, Mr Mustard explains that HM Government is satisfied that Rwanda will honour its obligations. At paragraph 20 of his statement, he says this:

> "The British High Commission in Kigali led initial conversations with the [Government of Rwanda] regarding the [MEDP] and participated in negotiations in support of the Home Office. Since these negotiations began, there has been a renewed focus on our bilateral relationship with an increase in contact at an official and ministerial level. Prior to signing the agreement, Home Office officials visited the Rwanda on many occasions, meeting government and non-governmental interlocutors, and carried out further discussions virtually. The Rwandan Permanent Secretary to the Ministry of Foreign Affairs also led a delegation to London for further talks. These

> negotiations have been conducted transparently and in good faith throughout. In light of the considerations described in this witness statement, and the manner in which the negotiations [with] our Rwandan counterparts were conducted, we are confident that Rwanda will honour its commitments under the MEDP."

We consider that we could go behind this opinion only if there were compelling evidence to the contrary. We do not consider such evidence exists.

67. The UNHCR relied on two matters. The first was the experience of an agreement made between the State of Israel and Rwanda in 2013. We have not been provided with definitive evidence on the nature and terms of that agreement, but we do not consider that is critical for our purposes. It appears that, with the agreement of the Rwandan government, the Israeli government offered asylum seekers in Israel a choice between detention in Israel or removal to Rwanda together with a payment of $3,500 and the opportunity to make an asylum claim in Rwanda. The UNHCR's evidence was that those who were transferred were not provided with support. It appears that many who were transferred soon left Rwanda. The UNHCR also states that some who were transferred to Rwanda were then removed by the Rwandan authorities to Uganda.

68. There is no evidence that during its negotiations with the Rwandan government, the United Kingdom government sought to investigate either the terms of the Rwanda/Israel agreement or the way it had worked in practice. It is also apparent from Mr Mustard's statement that the merits of the MOU and *Notes Verbales* have been assessed on their own terms, not by way of comparison with the Rwanda/Israel agreement. This was a permissible approach; we do not consider it discloses any error of law.

69. The second point advanced by the UNHCR was its own opinion of the likelihood that Rwanda will comply with its obligations under the MOU and the *Notes Verbales*. This was not set out in either of Mr Bottinick's witness statements. Rather, in the course of submissions, and on instructions from Mr Bottinick, Miss Dubinsky KC, counsel appearing for the UNHCR, stated that the UNHCR's opinion was that, in the light of history of refoulment and of defects in its asylum system, Rwanda could not be relied on to comply with its obligations under that Convention and, by extension, would fail to comply with the obligations it had assumed under the MOU and *Notes Verbales*.

70. It was surprising that this opinion was stated through counsel at the hearing rather than in any of the witness statements. For what it is worth, we do not think that the opinion now expressed sits particularly easily with the UNHCR's previously published views: for example, in the July 2020 Universal Periodic Review document. That document did contain some criticism of the Rwandan government and the asylum system and set out specific recommendations for future action. But there is no hint in that document of any concern of the order that might prompt the conclusion that Rwanda could not be relied on to comply with its obligations under the Refugee Convention. Further, although Mr Bottinick's statements deal both with matters that occurred before July 2020 and matters occurring since then, the cumulative effect of

his evidence does not readily support a conclusion that circumstances in Rwanda have changed so dramatically since July 2020 as to make it clear that errors, if they have occurred, are indicative of systemic (or for that matter wilful) failure to comply with these international obligations. However, be that as it may, that is not the question we must address. The question is whether, notwithstanding the opinion the UNHCR has now expressed, the Home Secretary was entitled to hold the contrary opinion, as set out in Mr Mustard's witness statement.

71. There are several authorities that have considered the weight to be attached to evidence and conclusions of fact set out in UNHCR reports and other materials. Those authorities speak with one voice: that evidence carries no special weight, it is to be evaluated in the same manner and against the same principles of any other evidence: see for example per Elias LJ in *HF (Iraq) v Secretary of State for the Home Department* [2014] 1 WLR 1329 at paragraphs 42 to 47; and per Davis LJ *in AS (Afghanistan)* [2021] EWCA Civ 195 at paragraphs 17 to 23. The context here is different, but if anything, that renders the conclusion clearer still. As explained by Mr Mustard, the conclusion that Rwanda will act in accordance with the terms of the MOU and the *Notes Verbales* rests on HM Government's experience of bilateral relations extending over almost 25 years, and the specific experience of negotiating the MOU over a number of months in 2022. The opinion of the UNHCR now expressed on instructions from Mr Bottinick carries no overriding weight. We must consider it together with all the evidence before us and decide whether, on the totality of that evidence, the Home Secretary's opinion is undermined to the extent it can be said to be legally flawed. For the reasons we have already given, the Home Secretary did not act unlawfully when reaching the conclusion that the assurances provided Rwanda in the MOU and *Notes Verbales* could be relied on. That being so, the conclusion that, for the purposes of the criteria at paragraph 345B(ii) to (iv) of the Immigration Rules, Rwanda is a safe third country, was neither irrational, nor a breach of article 3 of the ECHR in the sense explained in *Ilias*.

The Gillick Issue

72. The next matter under this heading is the Claimants' submission that the policy by which persons whose asylum claims are held to be inadmissible may be returned to Rwanda, is *Gillick* unlawful. The meaning of the judgment of the House of Lords in *Gillick* has been considered recently by the Supreme Court in *R(A) v Secretary of State for the Home Department* [2021] 1WLR 3931 (see below at paragraphs 418 to 420). The Supreme Court emphasised that the relevant question is whether the policy under consideration positively authorises or approves unlawful conduct (in the present context, a removal decision in breach of ECHR article 3). Against this standard the Inadmissibility Policy, which includes the possibility of removal to a safe third country, is not unlawful. Removal decisions depend on the application of paragraph 345B of the Immigration Rules, and the conclusion reached against the criteria in that paragraph that the country concerned is a "safe third country for the particular applicant". If the relevant criteria are met (see above at paragraph 11), removal to that country will not, applying the principles in *Ilias* (themselves, a particular application of the principle in *Soering*), give rise to a breach of article 3 of the ECHR. Even if the scope of the policy for this purpose is extended to cover the general conclusion in the 9 May 2022 assessment documents and the conclusion reached following consideration of the further evidence filed in these proceedings by the

UNHCR, the position remains the same. The conclusion, based on all that material, that generally, asylum claims made in Rwanda by persons transferred pursuant to the terms of the MOU would be entertained and effectively determined was a lawful conclusion. And, in any event the final decision on removal would also have to take account of the asylum claimant's personal circumstances – i.e., the criterion at paragraph 345B(i) of the Immigration Rules.

Conditions in Rwanda generally

73. The final matter to consider in respect of these grounds of challenge is the wider *Soering* submission, that persons removed to Rwanda under the terms of the MEDP (i.e., the MOU and the *Notes Verbales*) are exposed to a real risk of article 3 ill-treatment not for any reason connected with the handing of their asylum claim but by reason of conditions in Rwanda, generally. The Claimants point, in particular, to evidence to the effect that the Rwandan authorities are intolerant of criticism. Were any person removed to Rwanda to be critical of their conditions or treatment afforded to them in Rwanda, the response might be an extreme one. The Claimants rely on what happened in 2018 when refugees from neighbouring countries at Kiziba refugee camp protested at the conditions in the camp. It has been reported (for example, by Human Rights Watch) that the police who entered the camp in response to the protests used excessive force. They fired on the refugees and some were killed. The Claimants also point more generally to limits in Rwanda on the freedom to express political opinion if that opinion is critical of the Rwandan authorities.

74. We do not consider that any direct inference can be drawn from the events at Kiziba refugee camp in 2018. The circumstances that led to those protests are unlikely to be repeated for any person transferred to Rwanda under the MEDP. The treatment of transferred persons, both prior to and after determination of their asylum claims is provided for in the MOU (at paragraphs 8 and 10) and in the Support NV. For the reasons already given, we consider the Rwandan authorities will abide by the terms set out in those documents. The Claimants AHA and HTN point to their actions when each was detained at IRC Colnbrook. AHA twice protested at being detained. On one occasion, HTN refused to move from his room. We do not consider that much weight attaches to these matters, *per se*. If transferred to Rwanda, neither AHA or HTN would be detained. The expectation is that each would be treated in accordance with the terms of the MOU and the Support NV. The Support NV includes (at paragraph 17) that a mechanism is to be established to allow complaints about accommodation and support provided under the MOU to be raised and addressed. Provision for those arrangements is strong support for the conclusion that the possibility of complaint on such matters, made by persons transferred under the MEDP does not give rise to any real risk that the consequence of complaint will be article 3 ill-treatment.

75. This still leaves open the wider submission as to whether those transferred to Rwanda under the terms of the MEDP are at real risk of article 3 ill-treatment because of the way the Rwandan authorities might respond to expressions of opinion adverse to them, or acts of political protest. The Claimants refer to AT's record of political activity in Iran – see below at paragraph 240.

76. There is no suggestion that any of the individual Claimants (even AT) holds any political or other opinion that is adverse to the Rwandan authorities. If there were such evidence it would fall to considered under paragraph 345B(i) of the Immigration

Rules. A proper application of that criterion would be sufficient to ensure that were a person to face a real risk of article 3 ill-treatment, he would not be transferred. That being so, the Claimants' case comes to the proposition that, following removal to Rwanda, it is possible that one or more of those transferred might come to hold opinions critical of the Rwandan authorities, and that possibility means that now, the *Soering* threshold is passed.

77. There is evidence that opportunities for political opposition in Rwanda are very limited and closely regulated. The position is set out in the "General Human Rights in Rwanda" assessment document, one of the documents published by the Home Secretary on 9 May 2022. There are restrictions on the right of peaceful assembly, freedom of the press and freedom of speech. The Claimants submitted that this state of affairs might mean that any transfer to Rwanda would entail a breach of article 15 of the Refugee Convention (which provides that refugees must be accorded the most favourable treatment accorded to nationals in respect of non-political and non-profit-making associations and trade unions). However, we do not consider there is any force in this submission at all. Putting to one side the fact that article 15 does not extend to all rights of association, it is, in any event, a non-discrimination provision – i.e., persons protected under the Refugee Convention must not be less favourably treated than the receiving country's own citizens. There is no evidence to that effect in this case. Returning to the material covered in the Home Secretary's assessment document, there is also evidence (from a US State Department report of 2020) that political opponents have been detained in "unofficial" detention centres and that persons so detained have been subjected to torture and article 3 ill-treatment short of torture. Further, there is evidence that prisons in Rwanda are over-crowded and the conditions are very poor. Nevertheless, the Claimants' submission is speculative. It does not rest on any evidence of any presently-held opinion. There is no suggestion that any of the individual Claimants would be required to conceal presently-held political or other views. The Claimants' submission also assumes that the response of the Rwandan authorities to any opinion that may in future be held by any transferred person would (or might) involve article 3 ill-treatment. Given that the person concerned would have been transferred under the terms of the MEDP that possibility is not a real risk. It is to be expected that the treatment to be afforded to those transferred will be kept under the review by the Monitoring Committee and the Joint Committee (each established under the MOU). Further, the advantages that accrue to the Rwandan authorities from the MEDP provide a real incentive against any mis-treatment (whether or not reaching the standard of article 3 ill-treatment) of any transferred person.

(2) The third issue. Has the Home Secretary used the power of certification at paragraph 17 of Schedule 3 to the 2004 Act for an improper purpose?

78. The Claimants' submission is that on a proper construction of the 2004 Act the certification power at paragraph 17 of Schedule 3 (in Part 5 of that Schedule) is intended for use only on an *ad hoc* basis, for individual cases. The power is not to be used in conjunction with or on the premise that there is any form of presumption on the matters to be certified under paragraph 17(c)(i) and (ii) (set out above, at paragraph 12). The Claimants' case is that the Rwanda assessment documents comprise a form of presumption. They contend that relying on such an assessment for

the purpose of making a certificate under paragraph 17 amounts to circumventing provisions in Schedule 3 which would otherwise apply, namely those in Parts 2, 3 and 4 of Schedule 3, each of which requires some form of Parliamentary oversight. The Claimants contend that it is only by relying one or other of Parts 2, 3 or 4 of Schedule 3 that the Home Secretary could avoid the prohibition at section 77 of the 2002 Act which prevents removal from the United Kingdom of any person who has a pending asylum claim.

79. We do not accept this submission. The distinction between the application of Parts 2 to 5 of Schedule 3 does not depend on whether certification is *ad hoc* or part of some general approach or policy maintained by the Home Secretary. Rather, the distinction between each Part reflects a hierarchy of assumptions relating to compliance with the Refugee Convention and respect for rights derived from the ECHR, and different provisions on the approach the Home Secretary is to take when deciding whether to certify any human rights claim and thereby limiting the right of appeal in relation to that claim.

80. Part 2 of Schedule 3 (paragraphs 2 to 6 of the Schedule) applies to the list of countries at paragraph 2 of the Schedule. That list comprises EU and EEA states. Other states (such as Rwanda) could only be added by amendment to the 2004 Act. Part 3 of Schedule 3 (paragraphs 7 to 11 of the Schedule) and Part 4 of the Schedule (paragraphs 12 to 16), apply to any state specified in an order made by statutory instrument and approved by resolution of each House of Parliament. Rwanda has not been specified either in an order under Part 3 or in one made under Part 4.

81. For states listed in Part 2 there is a rebuttable presumption that no person removed to a Part 2 state will either be subject to ill-treatment contrary to article 3 or be removed from such a state in breach of other rights derived from the ECHR. Further, there is an irrebuttable presumption that any person removed to such a state would not be at risk of ill-treatment contrary to the Refugee Convention or of removal to any other state other than in accordance with the requirements of the Refugee Convention. Each presumption applies to all persons, across the board. There is no requirement to look at the circumstances, person by person. Lastly, so far as concerns Part 2, the Home Secretary is required to certify any human rights claim raised "unless satisfied that the claim is not clearly unfounded".

82. For Part 3 states, the position is different. These are states specified in an order made by the Secretary of State. The irrebuttable presumption concerning the Refugee Convention applies and here too that presumption applies across the board, and the requirement to certify human rights claims is in the same form as for Part 2 cases, but there is no presumption relating to ECHR rights. For Part 4 states the position is different again to the extent that there is no requirement on the Home Secretary to certify human rights claims unless satisfied that the claim is not clearly unfounded. Instead, the Home Secretary has a power to certify a human rights claim if it is clearly unfounded.

83. The primary distinction between Parts 2 to 4, and Part 5 of Schedule 3 to the 2004 Act is that a certification under paragraph 17 requires the Home Secretary to be of the opinion both that "the person's …" life or liberty will not be threatened by reason of any of the characteristics specified in the Refugee Convention, and that "the person" will not be further removed from that state other than in accordance with the Refugee

Convention (emphasis added each time). Thus, in a Part 5 case the Home Secretary must, for this purpose, consider the circumstances of each person whose claim is to be certified. This requirement does not prevent the Home Secretary taking account of general information about the state concerned. It only prevents her from relying only on general information; all relevant individual circumstances must also be considered before any certification is made.

84. For these reasons, the Claimants' submission rests on a false analysis of the provisions in Schedule 3 to the 2004 Act. There is no requirement arising from Schedule 3 that the Home Secretary seek Parliamentary approval for a conclusion that Rwanda meets the criteria at paragraph 17(c)(i) and (ii) of the Schedule. The Claimants' assertion that the general assessment that the Home Secretary has made has established a "rebuttable presumption" is wrong. The assessment documents may (and no doubt do) set out matters the Home Secretary will consider when deciding if the paragraph 17(c) criteria are met, but that approach does not change the nature of the paragraph 17 exercise. Put another way, the Home Secretary's general assessment is a means to an end (i.e. part of the process for reaching a conclusion that the conditions for certification under paragraph 17 are met), not any form of end in itself. Rather, the Home Secretary's decision to proceed under Part 5 of the Schedule rather than, for example under either Part 3 or Part 4, only demonstrates her acceptance that decisions on certification are to be made case by case.

(3) The fourth issue. Has there been a misunderstanding of the Immigration Rules, or misapplication of those Rules?

85. This submission was made by the Claimant, SAA (CO/2094/2022). It is in two parts. The first concerns the meaning and effect of paragraph 345A of the Immigration Rules. The submission is that if the Home Secretary wishes to make an inadmissibly decision relying on paragraph 345A(iii)(b) she must be satisfied both that the asylum claimant could have made an asylum claim in a safe third country at some time before the asylum claim was made in the United Kingdom, and that the asylum claimant could still enjoy protection in that same safe third country. SAA is from Sudan. He left Sudan in 2018 and travelled overland to Chad where he stayed 5 days before continuing to Libya. He stayed in Libya for 3 years. In April 2021 he travelled by boat to Italy where he stayed for 2 months. He then travelled by lorry to France and stayed in France for 11 months before travelling (again by lorry) to the United Kingdom, arriving on 23 May 2022. All this information was provided by SAA during an asylum screening interview that took place on 25 May 2022. SAA's asylum claim was considered by the Home Secretary with a view as to whether it should be treated as inadmissible. On 27 May 2022 the Home Secretary sent a Notice of Intent to the effect that she was considering making an inadmissibility decision because "before [SAA] claimed asylum in the United Kingdom, [he was] present or had a connection to Italy and France". In fact, the Home Secretary has not decided whether SAA's claim should be treated as inadmissible. SAA's case was referred to the National Referral Mechanism, the framework for identifying potential victims of modern slavery; on 7 July 2022 a positive reasonable grounds decision was taken – i.e., a decision that there were reasonable grounds to believe that SAA may be a victim of modern slavery. As a result of the positive reasonable grounds decision consideration of whether his asylum claim is inadmissible was put on hold.

86. Nevertheless, it is SAA's case that the Home Secretary could only treat his asylum claim as inadmissible if she concluded that SAA could now obtain protection under the Refugee Convention in either Italy or France. SAA submits no such conclusion could be reached because there is no evidence that either Italy or France would now admit him to make a claim for asylum.

87. We reject this submission. Although the language used in paragraph 345A(iii) is somewhat awkward, the meaning of paragraph 345A, overall, is entirely clear: an asylum claim may be treated as inadmissible if any of the three conditions at (i) to (iii) is met. There is nothing linguistically awkward about either the first or third conditions. The former is that "the applicant could enjoy sufficient protection … because … [he has] already made an application for protection to that country", the latter is that "the applicant could enjoy sufficient protection … because … [he has] a connection to that country such that it would be reasonable for [him] to go there and obtain protection". Condition (b) is awkwardly formulated because of the use of the word "could" in sub-paragraph (iii) and then the use of "could have" in condition (b) itself. Read together, this produces the following:

> "The applicant could enjoy sufficient protection in a safe country … because:
>
> (b) [he] could have made an application for protection to that country but did not do so and there were no exceptional circumstances preventing such an application being made."

If correct, SAA's submission has the consequence that paragraph 345A(iii)(b) would comprise two discrete conditions: first that a claim for protection could have been made (i.e., in paragraph 345A(iii) read with (b)); and second that the claimant could now (at the time of the Home Secretary's decision) enjoy protection in the state where the claim could have been made (i.e. paragraph 345A(iii) read alone). This is incorrect because it fails to give importance to the word "because" at the end of 345A(iii). This makes clear that the Rules intend that the failure to make the claim elsewhere is to be an operative premise for a decision to treat a claim as inadmissible. What is material for the purpose of (b), is that the asylum claimant had the chance there described to make an asylum claim on an earlier occasion. Paragraph 345A might have been clearer if, for the purposes of reading (b), the word "could" in paragraph 345A(iii) had been replaced by the words "had the opportunity to". However, even as formulated, the meaning is obvious. This reading of the provision makes sense of (b) when it is read as a piece with (a) and (c). This reading also avoids creating an overlap between paragraph 345A(iii)(b) and paragraph 345C. On SAA's reading, the further decision identified in paragraph 345C "… whether to remove the applicant to the safe third country in which they were previously present … or to any other safe third country which may agree to their entry" would be pre-empted by the decision already made under paragraph 345A(iii)(b), because for the purpose of that decision the Home Secretary would already have had to conclude that the asylum claimant could be removed to the country he had been in previously. Overall, therefore, SAA's submission does not make sense of the run of provisions between paragraph 345A and paragraph 345D of the Immigration Rules, all of which relate to inadmissibility decisions.

88. The second part of SAA's submission is that paragraphs 345A and 345C assume a sequence of decision-making: first, a decision whether to treat the claim as inadmissible (paragraph 345A); and only then, a decision on whether to remove (paragraph 345C). SAA contends that this means that the Home Secretary cannot take steps relevant to a possible decision under 345C until she has decided (under paragraph 345A) to treat the claim as inadmissible. Thus, in SAA's case the Home Secretary acted unlawfully when on 30 May 2022, she sent information about SAA to the Rwandan authorities with a view to obtaining their agreement under the MOU to SAA's relocation to Rwanda. As at that time, no inadmissibility decision had been taken. For that matter too, the period for SAA to make representations in response to the Notice of Intent had not expired. This sequence of events in SAA's case was not out of the ordinary. The Inadmissibility Guidance anticipates that enquires with safe third countries on whether any would agree to admit an asylum claimant could be made when a decision on whether to treat the claim as inadmissible was still to be taken. On this basis, SAA further submits that this part of the Inadmissibility Guidance is inconsistent with the Immigration Rules, and unlawful.

89. We reject these submissions too. While it is correct that the Immigration Rules provide for a sequence of decisions – a decision on inadmissibility followed by a decision on whether or not to remove from the United Kingdom – and while it is also correct that a decision under 345C rests on the premise that a decision has been taken under paragraph 345A to treat the claim as inadmissible, there is nothing in the Rules to prevent the Home Secretary from taking steps preparatory to a possible decision on removal under paragraph 345C at the time when the decision on inadmissibility under paragraph 345A remains under consideration. By taking such a course of action, the Home Secretary may run the risk that work (concerning a possible decision under paragraph 345C) is undertaken unnecessarily, but that is not a matter going to legality.

(4) The fifth issue. Is the Inadmissibility Guidance unlawful; has the Home Secretary relied on unpublished guidance?

90. The Claimants' case on the legality of Inadmissibility Guidance is in three parts. The first part is that in one respect the Inadmissibility Guidance goes too far. It is submitted that the passage in the Guidance on the use of paragraph 345C of the Immigration Rules that identifies the types of case that "may be eligible for removal to Rwanda" cannot lawfully be the subject of a statement of policy because such a statement is a matter falling within section 3(2) of the Immigration Act 1971 that must be included in the Immigration Rules and, as required under the 1971 Act, must be subject to Parliamentary approval. The second part of the Claimants' case is that in a different respect, the Inadmissibility Guidance does not go far enough. The Claimants contend that the Guidance is inadequate because, while stating that decisions under paragraph 345C to remove a person to a safe third country (whether Rwanda, or elsewhere) must take account of "… the particular circumstances of [the] claimant", there is no further indication of either what circumstances may be material, or of the significance that may attach to them. The third part of the case is that the Home Secretary has relied on unpublished guidance to determine which claims that are inadmissible should be considered for further action under paragraph 345C of the Immigration Rules.

91. The submission based on section 3(2) of the Immigration Act 1971("the 1971 Act") is directed to the following part of the passage in the Inadmissibility Guidance (set out in context at paragraph 17 above).

> "An asylum claimant may be eligible for removal to Rwanda if their claim is inadmissible under this policy and (a) that claimant's journey to the UK can be described as having been dangerous and (b) and was made on or after 1 January 2022. A dangerous journey is one able or likely to cause harm or injury."

The particular focus of the submission is the criterion at (a) above – the so-called dangerous journey criterion.

92. Section 3(2) of the 1971 Act, so far as material, provides as follows:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances … If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)."

The Claimants' submission is that the dangerous journey criterion is a "rule … as to the practice to be followed in the administration of [the 1971 Act] for regulating the entry into and stay in the United Kingdom …", which should have been included in the Immigration Rules and made using the Parliamentary procedure prescribed by section 3(2) of the 1971 Act. Since this has not happened, any reliance on the dangerous journey criterion to decide which cases are subjected to action under paragraph 345C of the Immigration Rules is unlawful.

93. The legal premise for the submission is in the judgments of the Supreme Court in *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192 and *R (Alvi) v Secretary of State for the Home Department* [2012] 1 WLR 2208. These cases, which were heard together, concerned the reach of the requirement under section 3(2) of the 1971 Act to make rules. In *Munir*, the Home Secretary had

withdrawn a policy known as the "seven-year child concession" which concerned the circumstances in which he would not exercise deportation powers against families with children. The submission made in that case was that removal of the seven-year child concession had been ineffective because that change had not been made using the procedure required by section 3(2) of the 1971 Act. That submission failed. *Alvi* concerned the points-based system for non-EEA nationals who wish to work in the United Kingdom. Admission to work in the United Kingdom depends on scoring a specified level of points against criteria in the Immigration Rules. Points are awarded against various attributes. One such attribute was the job the applicant proposed to do: certain occupations scored points, others did not. The Rules stated that no points would be awarded unless the job appeared on a list of skilled occupations. The list was published but was not part of the Immigration Rules as made under section 3(2) of the 1971 Act. The issue for the court was whether the list fell within the scope of the section such that it could not be relied on unless it had been laid before Parliament. Mr Alvi succeeded. The court concluded that the list of skilled occupations fell within the scope of section 3(2) of the 1971 Act and that the Home Secretary could not rely on the list as it had not been laid before Parliament.

94. The primary significance of the judgments in these two cases is that the Supreme Court accepted that the 1971 Act represented a sea-change to the extent that it transformed all previous common law or prerogative powers governing entry and leave to remain in the United Kingdom into statutory powers. Thus, there was no power to make rules other than the power referred to in section 3(2) of the 1971 Act. At paragraph 33 of his judgment in *Alvi*, Lord Hope put the matter in this way.

> "… As Lord Hoffmann said in the *MO(Nigeria)* case, para 6, the rules are not subordinate legislation. They are therefore to be seen as statements by the Secretary of State as to how she proposes to control immigration. But the scope of that duty is now defined by the statute. The obligation under section 3(2) of the 1971 Act to lay statements of the rules, and any changes in the rules, cannot be modified or qualified in any way by reference to the common law prerogative. It excludes the possibility of exercising prerogative powers to restrict or control immigration in ways that are not disclosed by the rules."

As to the scope of section 3(2) of the 1971 Act, Lord Hope said this, at paragraph 57 of his judgment.

> "… I agree with Lord Dyson JSC (see para 94, below) that any requirement which, if not satisfied, will lead to an application for leave to enter or to remain being refused is a rule within the meaning of section 3(2). A provision which is of that character is a rule within the ordinary meaning of that word. So, a fair reading of section 3(2) requires that it be laid before Parliament. The problem is how to apply that simple test to the material that is before us in this case."

while Lord Dyson put the matter in this way.

> "94 … a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision "as to the period for which leave is to be given and the conditions to be attached in different circumstances" (there can be no doubt about the latter since it is expressly provided for in section 3(2)). I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2). That is what Parliament was interested in when it enacted section 3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined."

95. In *Munir*, Lord Dyson went on to say this in the context of the seven-year child concession, addressing both the source of the power to make or withdraw the concession and the issue of whether it amounted to a rule.

> "44. In my view, it is the 1971 Act itself which is the source of the Secretary of State's power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion under sections 3, 3A, 3B and 3C to control the grant and refusal of leave to enter or to remain: see paras 4–6 above. The language of these provisions, especially section 3(1)(b) and (c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules.
>
> 45. The question remains whether [the seven-year child concession] was a statement of practice within the meaning of section 3(2). If a concessionary policy statement says that the applicable rule will *always* be relaxed in specified circumstances, it may be difficult to avoid the conclusion that the statement is itself a rule "as to the practice to be followed" within the meaning of section 3(2) which should be laid before Parliament. But if the statement says that the rule *may* be relaxed if certain conditions are satisfied, but that whether it will be relaxed depends on all the circumstances of the case, then in my view it does not fall within the scope of section 3(2).

> Such a statement does no more than say when a rule or statutory provision may be relaxed. I have referred to [the seven-year child concession] at para 9 above. It was not a statement of practice within the meaning of section 3(2). It made clear that it was important that each case had to be considered on its merits and that certain specified factors might (not would) be of particular relevance in reaching a decision. It was not a statement as to the circumstances in which overstayers would be allowed to stay. It did not have to be laid before Parliament."

96. We do not consider that the principles emerging from the judgments in *Munir* and *Alvi* support the Claimants' submission in this case. Both Lord Hope and Lord Dyson identified the scope of section 3(2) of the 1971 Act: it applies to provisions that, as a matter of ordinary language, can be described as rules. It is also apparent that it is not the case that anything that is guidance on the exercise of a power on the Immigration Rules will, for these purposes, be a rule. In the present case, the starting point is paragraph 345C itself. This requires the Home Secretary, when an application has been treated as inadmissible, to attempt to remove the applicant to a safe third country. That is, self-evidently, a rule. By contrast, the passage in the Inadmissibility Guidance is addressing a matter of discretion. Persons within the class identified "may be eligible for removal to Rwanda"; whether a removal decision will be made will depend on consideration of each applicant's circumstances. While these matters provide structure to the way in which the Home Secretary will approach the task, under paragraph 345C, of attempting "to remove the applicant … to any other safe third country which may agree to [his] entry", they are provisions on prioritisation and process, not rules in the sense described by Lord Hope and Lord Dyson.

97. The next part of the Claimants' submission is that the Inadmissibility Guidance is inadequate so far as it concerns decisions under paragraph 345C of the Immigration Rules. Two linked points are made. The first (advanced by the Claimants in *AAA*, CO/2032/2022) is that the passage in the guidance that:

> "Decision makers must take into account country information of the potential country/countries to where removal may occur deciding whether referral into a particular route is appropriate in the particular circumstances of the claimant."

is insufficient. The Claimants further rely on the following statement made by the Home Secretary in pre-action correspondence.

> "…. certain claims may require a more intensive scrutiny than others. In particular it is evident from the Home Office's Country Policy Information Team ('CPIT') reports that claimants with certain characteristics will need particularly careful consideration before a decision can be made that Rwanda is a safe country for them."

The Claimants then submit that there should be guidance on which characteristics give rise to a need for a "more intensive scrutiny"; and what such scrutiny should entail.

98. This submission requires careful handling, not least because the bulk of the submission is directed not to the Inadmissibility Guidance but to the sufficiency of statements made by the Home Secretary in pre-action correspondence. It cannot be sufficient for a claimant merely to contend that further or more elaborate guidance could have been given. No doubt such forensic points could be made by any advocate in respect of any document, however formulated. The issue must and can only be whether the Home Secretary was subject to some legal obligation to issue guidance in the form claimed.

99. There is no relevant legal obligation in this case. The Claimants rely on the well-known passage in the judgment of Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at paragraphs 33 – 35. However, so far as material for present purposes, that requires only that if a Secretary of State adopts a policy for the purposes of explaining how a discretionary power will be exercised, the policy as adopted must be a "lawful exercise of the discretion deferred by the statute". That position is confirmed at paragraphs 63 – 64 of the judgment of Lord Sales JSC and Lord Burnett CJ in *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38, [2021] 1 WLR 3967 (a judgment with which all other members of the Supreme Court agreed). Applied to the present case, this says nothing going to the existence of an obligation on the Home Secretary to publish policy in the form for which the Claimants contend.

100. The Claimants then submit that the requirement for a legal obligation is made good by "the duty of transparency". The existence of such a general duty is not generally recognised. The notion of a legal duty of transparency is so protean that for it to exist at all, in any case, it would need to be firmly tethered to the facts under consideration. Our preferred view remains the one we stated in our judgment in *R (Manchester Airports Holdings Limited) v Secretary of State for Transport* [2021] 1 WLR 6190 – the duty does not exist in any general form (see that judgment at paragraph 39 – 45, in particular at paragraph 44). The extent to which law may dictate the scope of a policy can go no further than was stated by Lord Dyson at paragraph 38 of his judgment in *Lumba* when he put the matter in terms of what is necessary to permit those affected by the operation of the policy to make "informed and meaningful" representations.

101. In this case, that standard is met by the Inadmissibility Guidance as published. The passage already set out makes clear that any decision on use of the power at paragraph 345C of the Immigration Rules must consider the circumstances of the individual as they may be affected by country information about the third country to which removal is proposed. This is at page 13 of 30 of the Inadmissibility Guidance. This point is then further explained in sections headed "Is the country of connection safe?" and "If return/removal will be to a different country to the country of connection is it also safe?" (at pages 20 – 21 of 30 of the Guidance). Read in the round, the Inadmissibility Guidance is, in legal terms, sufficient.

102. The second submission on this point, made by the Claimant *AB* (CO/2072/2022), is to the effect that the Inadmissibility Guidance should, but does not, explain how the power at paragraph 345C of the Immigration Rules will be exercised taking account

of the protected characteristics specified at section 4 of the Equality Act 2010. The premise for this submission is an Equality Impact Assessment of the Inadmissibility Policy prepared by the Home Secretary as part of his compliance with the public sector equality duty (i.e., section 149 of the Equality Act 2010, the obligation, applicable to all public authorities, to have due regard to prescribed matters when exercising any function). That premise is incorrect. The Equality Impact Assessment document ("the EIA") is not part of the Home Secretary's policy. Rather, it is a document prepared during the development of that policy, aimed at identifying how the policy measures up against the matters to which section 149 of the 2010 Act requires due regard to be had. Moreover, any EIA will not address all matters potentially relevant to a decision under paragraph 345C of the Immigration Rules. It will focus on matters relevant to the protected characteristics at section 4 of the 2010 Act.

103. Be that as it may, the answer to *AB*'s submission is materially the same as the answer to the submission made by the *AAA* claimants. Taking account of the range of matters in the Inadmissibility Guidance that concerns decisions under paragraph 345C of the Immigration Rules that guidance is not, in law, in error.

104. The final issue concerning policy is the contention that what is said in the Inadmissibility Guidance as to the circumstances in which removal to Rwanda will be considered (i.e., the passage set out above at paragraph 17) is incomplete, and that the Home Secretary is, in addition, applying a further unpublished policy.

105. This point has also emerged from the EIA document. The position has been explained in a witness statement dated 5 July 2022 made by Ruaridh MacAskill, the Acting Head of the Home Office's Third Country Unit.

> "17. A further concern that has been raised about the EIA is that it indicates unpublished secret criteria about who is or is not eligible for relocation to Rwanda under the MEDP. An objective throughout the design of MEDP has been to avoid people pretending to possess certain characteristics to make their transfer to Rwanda less likely, and to avoid the people smuggling gangs who control cross-Channel journeys from selecting or encouraging people with certain characteristics from making such journeys. References to not publishing "exact criteria" in the introduction section and analysis of limb 3 (fostering good relations) were I understand intended to avoid flagging up what was already evident from the EIA and the County Policy Information Notes read as a whole: there are factors which decision makers have to carefully consider before deciding that a person is suitable for inadmissibility and transfer to Rwanda. The drafter responsible for EIA has explained to me that in several cases the word "eligibility" was used when what was really meant was "suitability", in that while the eligibility criteria are broad … the case by case assessment considers a person's suitability with regards to their characteristics. For example, the EIA at section 3a "consideration of limb 1: Advance equality of opportunity" makes this point in the introduction and under the assessments

> of the characteristics of sexual orientation, gender reassignment, and disability. Those characteristics may, when considered in individual cases, make transfer to Rwanda less likely. The objective is to avoid smugglers selecting people for a dangerous journey and avoid people pretending to have those characteristics. For this reason, those drafting the policy guidance were reticent about drawing attention to them.
>
> 18. When this issue was brought to light in pre-action correspondence on the MEDP we noted the concern that the EIA could be read as suggesting that there are unpublished exact criteria that set out who and who is not eligible for transfer. We have updated the EIA to clarify the absence of exact eligibility criteria and to clarify that it is a person's suitability for transfer to Rwanda that is accessed.
>
> 19. At present, as set out above, the policy applies to those who make a claim for asylum, having arrived by a dangerous journey since 1 January 2022. The vast majority of such arrivals do claim asylum and the policy's stated aim is to deter people from making such journeys. The operational process reflects this. If in future the scope of the policy were to be widened, to include for example those who do not claim asylum, then the operational process could be adapted."

Considering this explanation, which we accept, the unpublished policy submission falls away. It was not a matter pursued by the Claimants at the hearing of these claims.

(5) The sixth issue. Is removal to Rwanda contrary to retained EU law?

106. The submission made by Claimant *ASM* (CO/2080/2022) is (a) that removal to Rwanda in exercise of the powers at paragraphs 345A to D of the Immigration Rules is contrary to requirements in articles 25 and 27 of Council Directive 2005/85/EU "On minimum standards on procedures in Member States for granting and withdrawing refugee status" ("the Asylum Procedures Directive"); and (b) that the Asylum Procedures Directive is retained EU law.

107. Provisions in the European Union (Withdrawal) Act 2018 ("the 2018 Act") repealed the European Communities Act 1972 (the statute which had given effect to EU law in the United Kingdom) but also retained specified categories of EU law-derived rights, transposing them into a free-standing body of domestic law, referred to as "retained EU law" (see the definition at section 6 (7) of the 2018 Act). All this took effect from the "implementation period completion day" i.e., 31 December 2020 (see the definition at section 39 of the European Union (Withdrawal Agreement) Act 2020. The Claimant relies on section 4 of the 2018 Act.

> "**4 Saving for rights etc. under section 2(1) of the ECA**

> (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day —
>
> > (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
> >
> > (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
>
> (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—
>
> > (a) form part of domestic law by virtue of section 3 …
> >
> > (aa) are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or
> >
> > (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case)."

Specifically, the Claimant contends that the Asylum Procedures Directive is retained EU law because its provisions fall within section 4(1) of the 2018 Act and outside the exclusion at section 4(2)(b) of the Act.

108. Articles 25 and 27 of the Asylum Procedures Directive are, so far as material, as follows.

> "*Article 25*
>
> **Inadmissible applications**
>
> 1. … Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible pursuant to this Article.
>
> 2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;

(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);

(f) the applicant has lodged an identical application after a final decision;

(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application.

…

Article 27

The safe third country concept

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading

> treatment as laid down in international law, is respected; and
>
> (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.
>
> 2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:
>
> (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
>
> (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
>
> (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment."

Article 25 identifies the circumstances in which an asylum claim may be treated as inadmissible. Article 25(2)(c) is the material part for present purposes. Article 27 defines the "safe third country concept". Article 27(1) is in the same terms as paragraph 345B of the Immigration Rules. However, the Claimant submits that paragraph 345A – 345D of the Immigration Rules do not comply with article 27(2) in that: (a) they are not "rules laid down in national legislation"; (b) the final words of paragraph 345C go further than permitted by article 27(2)(a) by permitting removal to "any … safe country" which will agree to accept a claimant; and (c) the Immigration Rules do not contain "rules on the methodology [by which]… the safe third country concept may be applied to a particular country or to a particular applicant", as required by article 27(2)(b).

109. The Home Secretary has not made submissions on the compatibility of paragraphs 345A – 345D of the Immigration Rules with the requirements in article 27(2). Her submission is simply that by reason of section 1 of and Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ("the 2020 Act") the Asylum Procedures Directive is not retained EU law.

110. The material provisions of the 2020 Act are section 1 and paragraph 6 of Schedule 1. These provide as follows

> "**1 Repeal of the main retained EU law relating to free movement etc.**
>
> Schedule 1 makes provision to—
>
> (a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and
>
> (b) end other EU-derived rights, and repeal other retained EU law, relating to immigration.
>
> …
>
> **Schedule 1**
>
> …
>
> **6**
>
> (1) Any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures cease to be recognised and available in domestic law so far as—
>
> > (a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act), or
> >
> > (b) they are otherwise capable of affecting the exercise of functions in connection with immigration.
>
> (2) The reference in sub-paragraph (1) to any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures is a reference to any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—
>
> > (a) continue to be recognised and available in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (including as they are modified by domestic law from time to time), and
> >
> > (b) are not those described in paragraph 5 of this Schedule.
>
> (3) The reference in sub-paragraph (1) to provision made by or under the Immigration Acts includes provision made after that sub-paragraph comes into force.

The reference in paragraph 6(2)(b) of Schedule 1 to paragraph 5 of the Schedule is not material to present purposes: it refers only to matters arising under an agreement on the free movement of persons between the EU and the Swiss Confederation. The term "the Immigration Acts" in paragraph 6(1)(a) carries the meaning at section 61(2) of the UK Borders Act 2007 and therefore includes 1971 Act.

111. The Claimant's submission in response is that the provisions in the 2020 Act do not concern asylum applications but only immigration applications based on provisions governing the EU rules on freedom of movement. The submission relies on the proper construction of the 2020 Act and on the judgment of the Supreme Court in *G v G* [2022] AC 544.

112. In *G v G* the claim arose after a mother removed her child from South Africa to England and applied for asylum, naming the child as a dependent in that claim. The father (in South Africa) applied under the Hague Convention for an order returning the child to South Africa. The question was whether the Hague Convention procedure should be stayed pending determination of the asylum claim. In addressing this issue both the Court of Appeal and the Supreme Court assumed that the Asylum Procedures Directive remained in force. So far as concerns the Court of Appeal proceedings, that assumption was correct. The hearing before the Court of Appeal took place in August 2020 and judgment was handed down on 15 September 2020 – well before 31 December 2020, the implementation period completion day. The Supreme Court hearing took place in January and March 2021. Nevertheless, at that hearing, the Home Secretary accepted that the Asylum Procedures Directive remained retained EU law. Lord Stephens gave the judgment with which the other members of the court agreed. He stated (at paragraph 84) that he agreed that the Directive was retained EU law. No reasons were given for that conclusion. Later in his judgment, Lord Stephens relied on article 7 of the Asylum Procedures Directive to construe section 77 of the 2002 Act, relying on the principle in *Marleasing*. It does not appear that the court's attention was drawn to the provisions of the 2020 Act referred to above, which had come into force on 31 December 2020.

113. As a matter of ordinary language, the effect of paragraph 6 of Schedule 1 to the 2020 Act is that the Asylum Procedures Directive ceased to be retained EU law with effect from 31 December 2020. During submissions, we were referred to a number of matters. In support of his submission that the amendments to retained EU law made by the 2020 Act were intended only to affect free movement rights, Mr Drabble KC drew attention to the side heading above section 1 of the 2020 Act, the long title of the 2020 Act, and the Explanatory Notes published at the time the 2020 Act was introduced in parliament as a Bill. We accept that in principle, we can have regard to these materials. Ordinarily, side headings and long titles are permissible aids to construction of ambiguous matters; Explanatory Notes can be taken as indicative of the Government's intention when legislation is introduced. However, we do not consider any of these matters materially assists, not least because we do not consider that §6 of Schedule 1 to the 2020 Act is in any respect ambiguous or unclear.

114. The long title states that the 2020 Act is:

> "An Act to make provision to end rights to free movement of persons under retained EU law and to repeal other retained EU law relating to immigration to confer power to modify retained

> direct EU legislation relating to social security co-ordination and for connected purposes."

This does not suggest that the scope of the 2020 Act is restricted to removing free movement rights. Nor is this suggested by the side heading to section 1 – "Repeal of the main retained EU law relating to free movement etc". The "etcetera" is important, and in any event section 1 itself makes clear that the provisions in Schedule 1 are not limited to removal of free movement rights. The relevant part of the Explanatory Notes is paragraph 68 which says:

> "Paragraph 6 ensures any directive rights that will have been saved by EUWA 2018 and would, in the absence of this paragraph, be retained, cease to apply in so far as they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, immigration legislation or functions. For example, the residence rights that are derived from Articles 20 and 21 of the TFEU (rights of citizenship and free movement) will be retained EU law and, unless they are disapplied, would provide a right to reside in the UK for certain groups, for example "CHEN" carers who are primary carers of an EU citizen child who is in the UK and is self-sufficient. However, the rights derived from Articles 20 and 21 would continue to apply in non-immigration contexts unless disapplied."

There is nothing in this paragraph that illuminates the language of paragraph 6 of Schedule 1, as enacted.

115. Overall, in this case, each of these sources is peripheral at best. None affects the ordinary meaning of the words used. Paragraph 6(1)(a) and (b) are couched in broad terms. Provisions made by or under the Immigration Acts (which includes the 1971 Act, and in consequence, the Immigration Rules) are released from the confines arising from EU-derived rights etc. EU law ceases to be recognised as retained EU law to the extent that it is either "inconsistent" with any such provision or is capable of "affecting the interpretation, application, or operation" of the same. The submission that articles 25 and 27 of the Asylum Procedures Directive takes precedence over paragraphs 345A – 345D of the Immigration Rules cannot withstand the ordinary meaning and effect of paragraph 6 of Schedule 1 to the 2020 Act.

116. Mr Drabble's fall-back submission was that the reference to provisions on immigration did not include provisions concerning asylum. We do not accept that submission. In the context of the 2020 Act it is impossible to discern any purpose that would be served by such a distinction. In any event, paragraph 6(1)(a) of Schedule 1 does not depend on any putative distinction between immigration and asylum.

117. We maintain our conclusion on the effect of paragraph 6 of Schedule 1 to the 2020 Act as a matter of ordinary language notwithstanding the judgment of the Supreme Court in *G v G*. In that case the Supreme Court heard no argument on the effect on the 2020 Act; there is no reference to that Act anywhere in the judgment. Since paragraph 6 of Schedule 1 to the 2020 Act came into force between the judgment of the Court of Appeal and the hearing in the Supreme Court, the most likely explanation

is that the parties simply did not turn their minds to the matter at all. Mr Drabble draws attention to the judgment of the Supreme Court in *Robinson (Jamaica) v Secretary of State for the Home Department* [2022] AC 659. This judgment was handed down on 16 December 2020 following a hearing on 16 November 2020. Lord Stephens gave the judgment (with which all other justices agreed). At paragraphs 29 and 30 of his judgment, which concerned the Home Secretary's power to deport a Jamaican national who was the mother of a British national, Lord Stephens said this.

> "29. As to the position after "IP completion day" the current position is that the Immigration (European Economic Area) Regulations 2016 … and relevant provisions of the FEU Treaty to the extent that they are not implemented in domestic law, would continue to have effect as retained EU law pursuant to sections 2 and 4 of the 2018 Act. However, this is subject to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 as well as secondary legislation made under it. This Act provides for repeal of the main retained EU law relating to free movement.
>
> 30. The present position is that the United Kingdom's withdrawal from the EU has no impact on this appeal but the legal principles to be applied may change after 31 December 2020 at 11pm."

Mr Drabble's submission is that this shows that when he gave judgment in *G v G* (in March 2021), Lord Stephens must have had the existence of the 2020 Act well in mind and must have been of the opinion that that Act only affected free movement rights. We consider this to be a significant over-reading of these paragraphs. It is difficult to infer that a judge who has been referred to a statute or authority in one case will have the same matter at the front of his mind when deciding another case, months later. Moreover, the reference in paragraph 29 of *Robinson* to free movement rights is readily explicable since those rights were in issue in that case (see paragraph 1 of Lord Stephens' judgment).

118. We are satisfied that the better conclusion is the one we have already stated: in *G v G* the parties did not draw the effect of the 2020 Act to the court's attention, and for that reason the court did not deal with the matter. Nothing we have said either does or should be thought to cast doubt on the decision reached in *G v G*. However, the judgment in that case does not contain any authoritative conclusion on the effect of paragraph 6 of Schedule 1 to the 2020 Act. For these reasons, we maintain the conclusion reached as a matter of statutory construction, that by reason of paragraph 6 of Schedule 1 to the 2020 Act, articles 25 - 27 of the Asylum Procedures Directive ceased to be retained EU law. The submission that the decisions taken under paragraphs 345A – 345D of the Immigration Rules were made in breach of retained EU law, fails.

(6) The seventh issue. Are decisions under paragraphs 345A and/or 345C of the Immigration Rules removing asylum claimants to Rwanda contrary to articles 33 or

31 of the Refugee Convention? Are the Immigration Rules in breach of section 2 of the Asylum and Immigration Appeals Act 1993?

119. Section 2 of the 1993 Act states that "nothing in the Immigration Rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the [Refugee] Convention". Article 31 of the Refugee Convention provides.

"*Article 31*

Refugees unlawfully in the country of refugee

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

Article 33 of the Refugee Convention is also material for the purposes of this ground of challenge.

"*Article 33*

Prohibition of expulsion or return ("refoulement")

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

120. The Claimants' submissions were made primarily by the Claimants in *AAA* (CO/2032/2022), *RM* CO/2077/3033) and *ASM* (CO/2080/2022. They submit that the fact that inadmissibility decisions under paragraph 345A and removal decisions under paragraph 345C taken by the Home Secretary in furtherance of her Rwanda policy, which have the consequence that asylum claimants are removed from the United Kingdom without consideration of the substantive merits of their asylum claim, involves laying down a "practice" which is contrary to the Refugee Convention and so is prohibited by section 2 of the 1993 Act. Further, they submit that removing a person from the United Kingdom without having his asylum claim determined here amounts to a penalty for the purposes of article 31 of the Refugee Convention.

121. Mr Drabble KC submitted that the Refugee Convention imposes an obligation on contracting states to determine all asylum claims made, on their merits. We disagree. There is no such obligation on the face of the Convention. The obligation that is imposed is the one at article 33, not to expel or return a refugee to a place where his life or freedom would be threatened by reason of any of the characteristics that the convention protects. Mr Drabble's submission was that an obligation to determine asylum claims would be consistent with the spirit and purpose of the Convention and could therefore reasonably be assumed. Again, we disagree. Obligations in international treaties are formulated with considerable care. They reflect balances struck following detailed negotiations between states parties. An obligation to determine every asylum claim on its merits would be a significant addition to the Refugee Convention. There is no reason to infer the existence of an obligation of that order; to do so would go well beyond the limits of any notion of judicial construction of an international agreement; and the protection that is necessary if the purpose of the Convention is to be met, is provided by article 33.

122. Likewise, paragraph 345C of the Immigration Rules does not set out any practice of removal to Rwanda, only a practice that where a claim has been treated as inadmissible, the asylum claimant may be removed to any safe third country that agrees to his entry. That, of itself, is consistent with the Refugee Convention. Removal to a safe third country, one that meets the standard at paragraph 345B of the Immigration Rules, is consistent with article 33. Furthermore, a "practice" of removal to Rwanda emerges only when the Immigration Rules are read together with the Inadmissibility Guidance. Section 2 of the 1993 Act is directed only to ensuring consistency between the Immigration Rules and the Refugee Convention. We doubt that the situation here would amount to a breach of section 2 of the 1993 Act but we do not dismiss this part of the Claimant's case for that reason.

123. So far as concerns article 31 of the Refugee Convention, the Claimants' case is that the Inadmissibility Guidance makes clear that the Home Secretary intends to remove claimants to Rwanda to deter others from making dangerous journeys (such as across the Channel by small boat) to claim asylum in the United Kingdom. This deterrent aim shows that removal to Rwanda is intended to be a penalty. The Claimants initially contended that removal to Rwanda was certainly a form of penalty because none of them wishes to make an asylum claim in Rwanda. Each wish to claim asylum in the United Kingdom and each has travelled hundreds or thousands of miles to get here. We understood the Claimants' oral submissions to step back from this position; they accepted that simple denial of a subjective preference to make an asylum claim in one country rather than another would not amount to a penalty. This concession was made

to accommodate the United Kingdom's former practice of removal under the Dublin Convention. However, the Claimants maintained that removal under the Dublin Convention was action of a different order to removal to Rwanda, and that the latter did comprise a penalty for the purposes of article 31 of the Refugee Convention. The Claimants' submission also emphasised that what amounted to a penalty for the purposes of article 31 was not synonymous with a criminal penalty.

124. It is not necessary for the purposes of the decision in these cases to state any general conclusion on what can comprise a penalty for the purposes of article 31 of the Refugee Convention. The issue for us is more limited: is an inadmissibility decision *per se*, a penalty for these purposes, or is an inadmissibility decision followed by a removal decision a penalty? Counsel for the Home Secretary has referred us to academic commentary on the Refugee Convention. First, the commentary on the Convention edited by Andreas Zimmermann. At paragraph 75 of the Commentary, he states as follows:

> "Are certain measures *never* penalties in the 1951 Convention sense? The drafters have emphasised that *expulsion* does not fall under the prohibition of penalty's Art. 31, para. 1. Given that the provision is situated in the context of immigration control, this caveat is hardly surprising. The same conclusion follows from a contextual analysis drawing on Art.31, para. 2. That provision assumes that the contracting State in question might wish to remove the refugee in question."

This conclusion coincides with the one stated by James Hathaway in the second edition of "The Rights of Refugees Under International Law" at paragraph 4.2.3

> "There are two exceptions to the general rule that Art.31 bars the imposition of penalties on refugees or illegal entry or presence. First, Art.31 in no way constrains a state's prerogative to expel an unauthorised refugee from its territory.
>
> …
>
> It may seem ironic that an asylum country which is generally prohibited from imposing penalties on refugees may none the less expel them. The drafters were, however, unambiguous on this point, with Colombia going so far as to suggest an amendment that would have formally disavowed any duty to grant territorial asylum to refugees. The Canadian representative successfully argued that no modification of the text was required, since "the consensus of opinion was that the right [to expel refugees who illegally enter a state's territory] would not be prejudiced by the adoption of Article [31]." His suggestion that "he would even regard silence on the part of the Conference as endorsement of his point of view" led Colombia to withdraw its amendment. Indeed, the Netherlands representative remarked that "in view of the Canadian representative's statement … that he would interpret the silence of representatives as tacit approval of the Canadian

> Government's interpretation of article [31], he would remain silent." As such, the Irish Court of Appeal's worry that Art. 31 might interfere with the operation of an orderly system to accommodate asylum responsibilities is in fact answered by that article itself: a "first country of arrival" rule cannot be successfully attacked under Art. 31, as the sanction imposed under such systems is precisely expulsion to another non-persecutory state.
>
> The potentially devastating impact of the clear decision not to preclude expulsion under Art. 31 is mitigated by two key factors. First, whatever rights governments have to expel refugees is constrained by Art. 33's duty of *non-refoulement*. Any expulsion of a refugee must therefore not expose the refugee, directly or indirectly to a risk of being persecuted."

Finally, Dr Paul Weis in his analysis and commentary on the *Travaux Preparatoires* to the Refugee Convention, states.

> "Paragraph 1 [of article 31] does not impose an obligation to regularise the situation of the refugee nor does it prevent the Contracting States from imposing and expulsion order on him. However, a refugee may not be expelled if no other country is willing to admit him; he may not be put over the 'green border'."

125. There is, therefore, a clear consensus. Article 31 does not prevent a state expelling a refugee. States must not act in breach of article 33; removal that is not contrary to article 33 is not a penalty for the purposes of article 31. On this basis, neither decisions on inadmissibility under paragraph 345A of the Immigration Rules, nor decisions under paragraph 345C on removal to Rwanda are contrary to the Refugee Convention. The latter because one premise of a paragraph 345C decision is that the country concerned is a safe third country, as defined at paragraph 345B of the Immigration Rules. The deterrent purpose that the Home Secretary pursues in relation to removals to Rwanda does not, of itself, render removal to Rwanda contrary to article 31, let alone article 33 of the Refugee Convention. Further, the simple fact of removal to Rwanda is not sufficient to make good the Claimants' submission that removal is a penalty contrary to article 31. That submission would succeed only when removal amounts to a breach of article 33. Looked at on this basis, the Claimants' article 31 submission merges with their submission on whether Rwanda is a safe third country. If it is a safe third country, decisions taken in exercise of the powers in paragraphs 345A – 345D of the Immigration Rules are not in breach of article 31; if, however, Rwanda is not a safe third country, removal would be both contrary to paragraph 345C of the Immigration Rules and to both article 31 and article 33 of the Refugee Convention.

126. In the premises the submission made by reference to section 2 of the 1993 Act must fail. Even assuming the Immigration Rules contain a practice of removal to Rwanda, circumstances when removal would be contrary to the Refugee Convention would also be ones amounting to a breach of the Immigration Rules. The purpose of section

2 of the 1993 Act is to ensure consistency between the Immigration Rules and the Refugee Convention. So far as concerns the matters in issue in this litigation that consistency is present.

(7) The eighth issue. Have there been breaches of the Data Protection Act 1998 and/or the UK General Data Protection Regulation in the implementation of the Rwanda policy? Do such breaches invalidate decisions taking under either paragraph 345A or 345C of the Immigration Rules?

127. The MEDP contains provisions for the processing of personal data relating to persons who are to be removed from the United Kingdom to Rwanda. Paragraph 18 of the MOU makes provision as follows.

> "**18 General**
>
> 18.1 Pursuant to this Arrangement, the Participants will securely share information, including personal information, for the purposes of being able to accurately identify a Relocated Individual and take decisions about that individual for the purpose of the objective set out in Paragraph 2 and in accordance with their respective laws and international law.
>
> 18.2 In sharing information for these purposes, the Participants commit to adhere to the principles set out in Annex A of this Arrangement."

Annex A contains detailed provisions, including on: (a) the purpose for which personal data may be processed (only the purpose identified at paragraph 18.1 of the MOU); (b) restrictions on any further transmission of personal data (in particular such information is not to be provided to any "government, authority or person" of any third country if the data subject has obtained or is seeking protection from that country under the Refugee Convention, the UN Convention Against Torture, or the International Covenant on Civil and Political Rights); (c) restrictions on the use and handling in Rwanda of personal data provided by the Home Office; and (d) provision concerning the time for which data transferred under the terms of the MOU may be retained.

128. SAA's journey to the United Kingdom is described above at paragraph 85. He arrived in the United Kingdom on 23 May 2022. His asylum screening interview took place on 25 May 2022. On 27 May 2022 he was served with a Notice of Intent to the effect that his asylum claim might be held inadmissible and that, in that event, he could be removed to Rwanda. The Notice of Intent included the following.

> "In order to make this decision we may share your personal data, make enquires with one or more of the safe countries above to verify evidence or to ask if, in principle, they would admit you. We may also share your personal data with Rwanda in order to ask Rwanda, another country we consider to be safe,

> whether it would admit you, under the terms of the Migration and Economic Development Partnership between Rwanda and the UK."

129. On 30 May 2022 the Home Office provided the Rwandan authorities with details of SAA's name, date of birth, sex, nationality, and the date he made his asylum claim in the United Kingdom. A photograph of SAA was sent. No further personal data was provided at that time, and none has been provided since because the Home Secretary's consideration of SAA's case was put on hold following the decision of the NRM on 7 July 2022 that there were positive reasonable grounds to believe SAA had been a victim of modern slavery.

130. The sequence of events in SAA's case - a transfer of personal data following the Notice of Intent - is common to the cases of all the individual Claimants before us, and consistent with the Home Secretary's general operation of her Rwanda policy. Although the submissions on data protection have been made by Mr Gill KC, leading counsel for SAA, the issues are common to all claims.

131. The matters raised are as follows. *First*, that transfer of personal data to Rwanda on the terms set out in the MOU is contrary to the requirements in Chapter V of Retained European Parliament and Council Regulation (2016/679/EU), better known as the United Kingdom General Data Protection Regulation ("the UK GDPR"). Chapter V makes provision regulating the transfer of personal data to third countries. *Second*, that the Home Secretary has failed to comply with article 13 of the UK GDPR, which requires a data controller when obtaining personal data from a data subject to provide information, for example on the purposes for which the data obtained will be processed. *Third*, that the data protection impact assessment prepared by the Home Secretary in respect of the MEDP, to meet the requirements of article 35 UK GDPR, is defective.

132. There is, however, one logically prior issue. Even assuming that SAA is correct on any or all of his submission on compliance with the UK GDPR, does that affect the legality of any decision the Home Secretary has taken under paragraph 345A or 345C of the Immigration Rules such that it would be appropriate to quash that decision for that reason?

133. The submission for SAA is to the effect that the power to make decisions under the Immigration Rules (i.e., decisions under paragraph 345A and 345C) depended on compliance with whatever requirements might arise either under the UK GDPR or under its counterpart, the Data Protection Act 2018 ("the 2018 Act"). In consequence, failure to comply with data protection law would require the conclusion that the immigration decisions were unlawful and should be quashed.

134. We do not accept this submission. As a matter of principle, it cannot be that any breach of any rule on the part of a public authority or for which that authority is responsible, occurring in the context of either making or executing a public law decision will necessarily affect the validity of that public law decision. To take an obvious example, if a person being removed from the United Kingdom was assaulted by a Home Office official on his way to the airport, that assault would be unlawful but would not in itself compromise the legality of the immigration decision that was the

reason for removal. On its facts, this example is some way distant from the cases now before us. However, on the facts that are before us, the same conclusion should be reached.

135. The alleged breach of the UK GDPR that was first in time is the breach of article 35: the submission that the Home Secretary did not properly undertake the required data protection impact assessment. The assessment that was performed was directed to the MEDP. We do not consider that the validity either of a decision under paragraph 345A of the Immigration Rules or under paragraph 345C can plausibly be said to be conditional on compliance with the article 35 obligation to assess the "… impact of the envisaged [data] processing operations on the protection of personal data". The legal requirement to undertake that assessment is not a matter that is integral to the validity of the decisions (to be taken in the future) under the Immigration Rules. At its highest, the Claimants' case is to the effect that the MEDP was entered into in the expectation that relevant decisions under the Immigration Rules would be made. We do not consider that circumstance is sufficient to require the conclusion that failure to assess the impact of the data processing required by the MEDP goes to the validity, in public law terms, of immigration decisions taken later within the context of the MEDP. Looking at the same matter from the perspective of public law remedies, it would not be appropriate to quash decisions taken under the Immigration Rules albeit within the context of the MEDP, for that reason.

136. The matter next in time is the alleged breach of the article 13 of the UK GDPR: the failure when collecting personal data from each asylum claimant, to provide the information specified in that article concerning the identity etc. of the data controller, the purposes for which the data would be processed, the legitimate interest giving rise to the need to process data, and other matters. On the facts of *SAA*'s case, if there was such a breach it occurred at or shortly after the asylum screening interview on 25 May 2022. Information obtained at that interview was used when taking the decision to issue the Notice of Intent. In his case no decision was taken under either paragraph 345A or 345C of the Immigration Rules. However, in other cases those decisions have been taken, and each will have been informed by information obtained at the relevant asylum screening interview.

137. If there was a failure to comply with article 13 that gives rise to the possibility of a complaint under the UK GDPR and the 2018 Act, either to the Information Commissioner (article 77 read with section 165) or to a court (article 78 read with sections 167 and 180). It does not go any further. We do not consider that the validity of subsequent immigration decisions does or should depend on whether information relied on was collected in circumstances that complied with article 13 of the UK GDPR. There is no relevant connection between a breach of article 13, the consequences of the breach, and any standard going to the validity of the public law decision. Nor should any such failing give rise to the possibility of a public law remedy. The remedies available for breach of the UK GDPR are those provided in the 2018 Act: compliance orders and/or an award of damages (see sections 167 and 168, which concern claims to a court).

138. Lastly, there is the alleged breach of Chapter V of the UK GDPR by the transfer of data to Rwanda. *SAA* contends that the transfer of personal data provided for by the MEDP required either an adequacy decision under article 45, or appropriate safeguards as specified under article 46. The Home Secretary's position is that

neither was necessary and that article 49 of the UK GDPR provides a permissible legal basis for transfer of personal data from the United Kingdom to the Republic of Rwanda.

139. No part of any inadmissibility decision under 345A of the Immigration Rules rested on the transfer of personal data to Rwanda. As a simple matter of fact, failure to comply with Chapter V of the UK GDPR had no bearing on any such decision.

140. Removal decisions under paragraph 345C of the Immigration Rules do depend on Rwanda's consent to admit each relevant asylum claimant. Personal data was processed for that purpose – i.e., it was sent to the Rwandan authorities pursuant to paragraph 5.2 of the MOU and subject to the handling requirements at paragraph 18 of and Annex A to the MOU. The Claimant's case is that the way in which the consent required for the paragraph 345C decision was obtained involved an unlawful processing of personal data. Even assuming this to be so, we do not consider that prevented the Home Secretary from relying on the consent that had been given; it did not mean that the removal decision was unlawful.

141. A public law decision-maker has latitude to decide not only, the matters that are relevant to the decision but also what information relevant to those matters should be considered (subject always to any restriction arising in or from the powers being exercised). We do not rule out the possibility that in some circumstances a decision-maker may be entitled to conclude that information that is otherwise relevant ought not to be considered because of the way in which it has be obtained. There may be some situations in which a decision-maker may be required to take that course. But the present situation is not such a situation. Even if the consent of the Rwandan authorities under the MOU was obtained consequent to data processing that had taken place without compliance with Chapter V of the UK GDPR, the Home Secretary was entitled to rely on that consent for the purposes of a decision under paragraph 345C of the Immigration Rules. Reliance on that consent did not render her decision unlawful as a matter of public law.

142. This conclusion is supported by the remedies available under the UK GDPR and the 2018 Act on a complaint that data has been processed in contravention of the requirements of Chapter V. The UK GDPR provides a right of complaint to the Information Commissioner. On such a complaint the powers under article 58(1) to investigate, and the powers to correct under article 58(2), are available to the Commissioner. There is also the right of complaint to a court. If a complaint is made, the court may make a compliance order and/or award compensation. The tenor of these remedies is that either the Commissioner or the court may award compensation for past breaches and may make orders specifying what the data controller must do to ensure future compliance with data protection law. Neither the UK GDPR nor the 2018 Act provides, for example, that past transactions which have relied on data processed in breach of data protection law, are to be undone or for that reason treated as void. This supports the conclusion that, in these cases, the validity of the decisions taken under the Immigration Rules should depend on ordinary public law principles. Data protection law does not require any different approach.

143. All this being so, the data protection law submissions in this case are not capable of producing the conclusion that the Home Secretary's decisions under Immigration Rules are unlawful. For this reason, it is not necessary to address the specific

submissions on article 13, article 35 and Chapter V of the UK GDPR in detail. That is doubly so since those complaints ought not to have been made in these proceedings. While section 180 of the 2018 Act gives the High Court jurisdiction over complaints such as these, Part 53 of the Civil Procedure Rules states that claims in "data protection law" must be issued in the Media and Communications List: see CPR 53.1(3)(b). This does not rule out the possibility that a claim issued as required by Part 53, may then be then transferred from the Media and Communication List, for example to the Administrative Court. But there would have to be good reason for such transfer. Since, for the reasons above, the breaches of the UK GDPR alleged in these proceedings do not go to the legality of the Home Secretary's decisions under the Immigration Rules, there is no sufficient reason for the substance of these complaints to be addressed in judicial review proceedings. We therefore confine ourselves to the following brief observations on the breaches of the UK GDPR alleged.

144. We accept the Home Secretary's submission that that it is open to her to comply with the requirements of Chapter V of the UK GDPR through compliance with article 49. Other routes to the compliance with the Chapter are available: i.e., articles 45, 46 and 47. But, contrary to the Claimants' submission, there is no hierarchy within Chapter V and no other assumption that article 49 can only be used if the data controller is able to show that routes under other articles could not have been used. The side heading to article 49 is "Derogations for specific situations". That does not prevent the Home Secretary from relying on article 49 in aid of the Rwanda policy. It would not be correct to infer from that side heading that article 49 applies only to one-off data transfers.

145. We also accept that in this case, the conditions within article 49 are met. The submissions on this point focused on article 49(1)(d) and 49(4). Reliance on article 49 depends on demonstrating that one of the conditions in article 49(1) is met. In this case the Home Secretary relies on article 49(1)(d): that the transfer is necessary for important reasons of public interest". Article 49(4) then provides that:

> "The public interest referred to in point (d) of the first subparagraph of paragraph 1 must be public interest that is recognised in domestic law (whether in regulations under section 18(1) of the 2018 Act or otherwise)."

The Claimants' submission is that there is no relevant public interest "recognised in law", and that in any event, transfer of the personal data is "not necessary" because it is not proportionate. We do not agree with this submission. The public interest in immigration control in accordance with the Immigration Rules is recognised by the court and is long-established. The court regularly proceeds on that premise. Transfer of personal data subject to the safeguards provided in paragraph 18 of and Annex A to the MOU is a reasonable and proportionate way to give effect to this public interest.

146. So far as concerns article 13, we are concerned that the Home Secretary's practice may not meet what is required. Some of the information required by article 13 is provided at the asylum screening interview. These interviews are conducted on the basis of a standard script. One part of the script is as follows:

> "Your information may be shared with other UK government departments or agencies including the National Health Service, local authorities, asylum authorities of other countries, international organisations, and other bodies. Any information sharing is to enable us and other organisations to carry out functions, including the prevention and detection of crime."

This information goes towards meeting the requirements at article 13(1)(c) to (f). This part of the script is read at the beginning of each asylum screening interview and translated for the asylum claimant as necessary. For the purposes of compliance with article 13 the Home Secretary also relies on a Privacy Notice. This is referred to at the end of the screening interview script. The copy of the completed interview script provided to each asylum claimant includes the internet address where the Privacy Notice can be found. However, we are unclear as to the extent that asylum claimants who are detained have internet access, and in any event, we are told that the Privacy Notice is available only in English. This may not meet the requirement under article 12 UK GDPR that information required to be provided under article 13 is provided in a form that is intelligible and easily accessible.

147. We have seen the data protection impact assessment relied on by way of compliance with the requirements at article 35. Put briefly, the obligation to assess under that article arises in respect of data processing "… likely to result in a high risk to the rights and freedoms of natural persons"; and the obligation is to assess the impact on the protection of personal data of the processing that is envisaged. The Claimants' oral submissions focussed on two matters. The first was whether the assessment had been conducted in accordance with the Home Secretary's own policy on assessment, specifically whether matters raised by the assessment should have been considered by the Home Office Data Board. The suggestion that some matters should be brought to the Board's attention was made by Amanda Hillman, Deputy Data Protection Officer, and Head of Engagement, in an email dated 3 May 2022. These matters were not referred to the Board. We do not consider that anything turns on this. It was open to Ms Hillman to decide for herself whether to refer the matter; that she did not do so, having raised the possibility of a referral, suggests that her final conclusion was that referral to the Data Board was not warranted.

148. The second matter was that the detail and scope of the assessment undertaken was insufficient. It is fair to say that at first sight, the assessment document does not appear a particularly impressive document. It is in large part a tick-box process. There is some opportunity for a narrative explanation but on many occasions the narrative provided is brief. Mr Gill's submission was that the assessment required in this case was of the order identified by the CJEU in *Schrems v Data Protection Commissioner* [2016] QB 52, and *Data Protection Commissioner v Facebook Ireland Limited* [2021] 1 WLR 751 when that court considered the application of Commission Decision 2010/87/EU on standard contractual clauses for transfer of data to third countries, to data transfers to the United States. We do not consider this to be the appropriate yardstick for the assessment required in this case. Data transfer pursuant to the MEDP is a much more limited exercise. Given our primary conclusion on the data protection submissions, we have not reviewed the assessment document in detail.

On the review we have undertaken we consider it likely that this assessment does meet the requirements of article 35.

149. In his skeleton argument, Mr Gill attempted to raise a range of matters he had not pleaded. These are summarised in the Home Secretary's Skeleton Argument at paragraph 7.2. They form no part of the case before the court, and we do not address them.

(8) The ninth issue. Discrimination

150. Three Claimants make claims of discrimination.

151. SAA (CO/2094/2022) relies on article 14 of the ECHR. The premise for the claim is the provision in the Inadmissibility Guidance as to the circumstances to which a person who has made an asylum claim determined to be inadmissible could be removed to Rwanda:

> "An asylum claimant may be eligible for removal to Rwanda if the claim is inadmissible under the policy and (a) that claimant's journey to the UK can be described as having been dangerous and (b) was made on or after 1 January 2022. A dangerous journey is one able or likely to cause harm or injury. For example, this would include those that travel via small boat, or clandestinely in lorries."

SAA contends this provision results in indirect discrimination on grounds of age, sex and nationality because those crossing the English Channel in small boats tend to be young and male, and prior to the hearing, have predominantly been from Iraq, Iran, Syria, Sudan or Afghanistan. All these factual premises are borne out by the information in the Home Secretary's EIA document. Separately from this, SAA also contends that the dangerous journey criterion has not be applied consistently because it has not been applied to those who, since February 2022, have fled from Ukraine following the Russian invasion of that country.

152. This latter contention does not give rise to any viable claim of unlawful discrimination because it rests on a flawed comparison. The part of the Inadmissibility Guidance set out above applies only to persons who have made asylum claims which have been held to be inadmissible. Those persons are in a materially different position to those who have, since February 2022, come to the United Kingdom from Ukraine. That group has entered the United Kingdom under the terms of one or other of two Home Office Schemes: the Ukraine Family Scheme, and the Ukraine Sponsorship Scheme (Homes for Ukraine). It was not unlawful for the Home Secretary to make special provision for persons coming from Ukraine. Eligibility under these schemes does not rest on meeting the conditions for making a claim for asylum.

153. As for the first part of SAA's discrimination claim, even assuming all other requirements for a viable article 14 claim are satisfied, the Home Secretary's

dangerous journey criterion is justified.

154. It pursues a legitimate objective: to protect refugees from exploitation by criminal gangs who, for example, organise the small boat crossings. The Inadmissibility Guidance does not limit the possibility of removal to Rwanda to young men. The Inadmissibility Guidance does rule out the possibility that unaccompanied asylum-seeking children could be removed (to any safe third country). That exclusion is justified for obvious reasons of general welfare. The Home Secretary has stated, that for now, families will be removed to Rwanda only with their consent. We consider, again as a matter of generality, that the circumstances of families are materially different to those of lone adults, and that given that the Rwanda policy is a new departure, the Home Secretary has, for the purposes of any discrimination claim, good reason to treat families differently. The Inadmissibility Guidance does not specifically restrict the possibility of removal to Rwanda to men (rather than women), or to the young. It is true that with one exception, the Claimants before us are young men and, we are also prepared to assume that at least in the short term, the category of young men is the most likely to be the subject of removal decisions. Nevertheless, and even assuming that impact, we are satisfied the criterion is justified.

155. The dangerous journey criterion is not specifically directed to young men. It is not a criterion that they meet by reason of any inherent characteristic. Rather, it applies to them by reason of choices they have made: (a) not to make asylum claims before arriving in the United Kingdom (the premise here must be inadmissibility decisions have been correctly and lawfully made); and (b) to travel to the United Kingdom by unauthorised and clandestine means. Moreover, for the purposes of this discrimination claim we must also assume that any decision to remove to Rwanda will be consistent with article 33 of the Refugee Convention, and with a person's ECHR rights. All this being so, the dangerous journey criterion is proportionate to the objective the Home Secretary pursues through the inadmissibility policy.

156. AB (CO/2072/2022) also pursues an article 14 claim. The starting point for this claim is that being an asylum claimant is a relevant "other status" for the purposes of an article 14 claim. This is not disputed by the Home Secretary. AB contends that it is discriminatory to apply the policy only to persons who have claimed asylum and not also to those who have claimed that their removal from the United Kingdom would be in breach of their ECHR rights, but have not claimed protection under the Refugee Convention.

157. The Home Secretary's response is two-fold. First, it is submitted that the distinction AB suggests between persons that make claims for asylum and those who make only human rights claims is not a significant practical distinction. The Home Secretary submits that any claim to the effect that removal from the United Kingdom would give rise to a real risk of either article 2 or article 3 ill-treatment would, under the Immigration Rules, be treated as a claim for humanitarian protection (this point is made by reference to paragraph 327EA and 339CA of the Immigration Rules). She then relies on paragraph 327EC of the Immigration Rules.

> "If someone makes a claim for humanitarian protection, they will be deemed to be an asylum applicant and to have made an application for asylum for the purposes of these Rules.

> The claim will be recorded, subject to meeting the requirement of Rule 327AB (i) to (iv), as an application for asylum and will be assessed under paragraph 334 for refugee status in the first instance. If the application for refugee status is refused, then the Secretary of State will go on to consider the claim as a claim for humanitarian protection."

By paragraph 327 of the Immigration Rules the definition of "asylum applicant" includes a person deemed, pursuant to paragraph 327EC, to have made a claim.

158. Thus, says the Home Secretary, the difference in treatment AB suggests will not arise in practice because persons who have made claims akin to asylum claims are treated under the Immigration Rules as having made asylum claims and, as such, do fall within the scope of the Inadmissibility Guidance. Other human rights claims, which do not fall to be treated as asylum claims, are, says the Home Secretary, claims of a different nature such that the difference in treatment does not comprise unlawful discrimination.

159. We accept the Home Secretary's submissions on these points. The Home Secretary also relies on the fact that, in practice, persons who arrive in the United Kingdom having travelled through safe third countries and then to the UK via a dangerous journey, do claim asylum rather that making any other form of claim. She submits that, in those circumstances, she is entitled to formulate the Inadmissibility Guidance and the MEDP to meet what happens in practice, and that were the position to change such that the same class of persons ceased to make asylum claims but claimed leave to enter the United Kingdom for other reasons, she would consider adapting the MEDP and the Inadmissibility Guidance to meet those circumstances. Although we say nothing about the latter point, we do accept that it is not contrary to article 14 for the Home Secretary to formulate her policy on removal to Rwanda to meet the problem that actually exists rather than to address matters that are, for now, hypothetical.

160. ASM (CO/2080/2022) relies both on article 14, and section 19 of the 2010 Act, contending that "the MEDP scheme" entails indirect discrimination on grounds of "race/nationality" and disability. Here too, we assume that the focus of the complaint is the possibility of removal to Rwanda.

161. We do not consider that a claim for indirect discrimination based on nationality can be pursued under the 2010 Act. Neither section 19 nor section 20 of the 2010 Act gives rise to any free-standing claim of discrimination. Each is a definitional provision; the operative provisions which state when discrimination is unlawful, are elsewhere in the 2010 Act. Neither ASM's statement of Facts and Grounds, nor his Skeleton Argument identifies the operative provision relied on. We have however, assumed the relevant provision to be section 29(6) in Part 3 of the 2010 Act, which prohibits discrimination by persons acting "in the exercise of a public function that is not the provision of a service to the public or a section of the public". If that is correct (and we can see no other route for the Claimant), the claim under the 2010 Act is met by paragraph 1 of Schedule 23 to the 2010 Act, which sets out a relevant exception to the application of the provisions of part 3 of the 2010 Act. By paragraph 1(1), no contravention of Part 3 occurs if the act said to comprise discrimination is:

> "(a) in pursuance of an enactment;
>
> (b) in pursuance of an instrument made by a member of the executive under an enactment;
>
> (c) to comply with a requirement composed … by a member of the executive by virtue of an enactment;
>
> (d) in pursuance of arrangements made … by or with the approval of, or for the time being approved by, a Minister of the Crown;
>
> (e) to comply with a condition imposed … by a Minister of the Crown."

if it is done because of a person's nationality: see paragraph 1(2) of Schedule 23

162. However, so far as concerns the remainder of the claim, whether under article 14 or under the 2010 Act, we consider that any indirectly discriminatory impact is justified. The claim does not go further than the claims to similar effect made by SAA and AB. It fails for the same reasons. ASM contends that the Home Secretary is not pursuing any lawful purpose. He submits the removal provisions within the Inadmissibility Guidance represent a departure from the requirements of the Refugee Convention. For the reasons given above we do not accept that submission. For the present purposes we accept that the Home Secretary's Inadmissibility Guidance does pursue a legitimate objective: that of protecting persons coming to the UK from exploitation by the criminal groups that organise these irregular routes to the United Kingdom.

163. The premise of the claim of disability discrimination is that persons claiming asylum having travelled across Europe and reached the United Kingdom by a dangerous journey are more likely to have mental illnesses amounting to a disability than those reaching the United Kingdom by different means. There is no evidence to that effect, but for present purposes we will assume this contention is made out. Even on that assumption, this claim does not succeed. We do not consider that a person who suffers from mental illness will be prejudiced as the Claimant suggests. Any relevant prejudice will arise from a lack of appropriate care. One premise of removal to Rwanda under the MEDP is that appropriate medical care will be available: see paragraph 6 of the Support NV. If appropriate care were not available in Rwanda it is to be expected that the person's claim to remain in the United Kingdom on human rights grounds would succeed.

164. For these reasons the claims for unlawful discrimination all fail.

(9) The tenth issue. Irrationality

165. This submission was made by Mr Gill KC on behalf of SAA (CO/2094/2022). In one part, the submission rehearses the contention that it was irrational to conclude that Rwanda is "a safe third country" or to reach that conclusion without further

investigation. We have addressed those matters above and do not need to add anything to what we have said.

166. The second part of the submission concerns whether the Home Secretary acted lawfully using the powers available to her under the Immigration Rules and the 2004 Act. In substance, it is a variation on arguments considered above: (a) on whether aspects of the Inadmissibility Guidance ought to have been included within the Immigration Rules; and (b) whether the powers under Part 5 of Schedule 3 to the 2004 Act were used for a proper purpose. Mr Gill submits that the Rwanda Policy is "far reaching" and "fundamentally changes the asylum system in the UK", and that in those circumstances the Home Secretary should have sought parliamentary approval to take the decision that asylum claims made in the United Kingdom should not be decided here, and that instead the persons who made them should be removed to Rwanda with the opportunity to make their asylum claim in that country.

167. We do not accept this submission. The powers that the Home Secretary used, under the Immigration Rules and under the 2004 Act, were available to her and were (and are) capable of being used to take the decisions legally required to give effect to her Rwanda policy. That being so, there was no legal requirement on the Home Secretary to seek further powers from Parliament or otherwise, seek parliamentary approval of her policy.

168. The third part of this submission is that the Home Secretary acted unlawfully by failing to seek Treasury approval for the Rwanda policy. Mr Gill relies on a letter dated 13 April 2022 from Matthew Rycroft, the Permanent Secretary at the Home Office, to the Home Secretary. In that letter Mr Rycroft sets out his assessment of the MEDP in his capacity as the Responsible Accounting Officer for the Home Office. He concluded there was insufficient evidence that "… the policy will have a deterrent effect [i.e. deterring people from entering the United Kingdom illegally] significant enough to make the policy value for money". In those circumstances he requested (in accordance with ordinary practice) that the Home Secretary give a written direction that the policy should be pursued. Later the same day the Home Secretary gave that direction.

169. Mr Gill's submission is that this sequence of events shows that the Home Secretary should, before proceeding, have sought the agreement of HM Treasury. He refers to the HM Treasury document "Managing Public Money" (a document of long-standing most recently published in March 2022), specifically paragraph 7.11 which states as follows:

> "7.11 Innovative structures
>
> 7.11.1 Sometimes central government departments have objectives which more easily fit into bespoke structures suited to the business in hand, or to longer-range plans for the future of the business. Such structures might for example, include various types of mutual or partnership.
>
> 7.11.2 Proposals of this kind are by definition novel and thus require explicit Treasury consent. In each case, proposals are

> judged on their merits against the standard public sector principles after examining the alternatives, taking account of any relevant experience. The Treasury will always need to understand why one of the existing structures will not serve: e.g. the NDPB format has considerable elasticity in practice. …"

This, contends Mr Gill, means that the Home Secretary ought not to have pursued her policy without the consent of the Treasury.

170. This submission also fails. A point of detail is that paragraph 7.11 of the "Managing Public Money" document has no application to the Home Secretary's decision to pursue her Rwanda policy. Chapter 7 of Managing Public Money is titled "Working with others" and concerns situations where a public body decides to work with some other organisation, for example a commercial company or a non-governmental organisation. The wider reason this submission fails is that it does not touch on any legal obligation affecting the Home Secretary. Mr Gill contended that the MOU provides for the United Kingdom to provide significant funds to the Rwandan government. That does appear to be the case. However, there is no challenge to the decision to enter into the MOU, and in any event, no challenge to that decision to the effect that the agreement should have been reached on different terms, or one that would have any likelihood of success.

(10) The eleventh issue. Public Sector Equality duty

171. The Home Secretary relies on the Equality Impact Assessment document dated 9 May 2022 ("the EIA") as evidence of compliance with the obligation at section 149 of the Equality Act 2010 (the public sector equality duty). That obligation is as follows:

> "**149 Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need 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.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it 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.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation."

172. The submission made by ASM (CO/2080/2022) is that the Home Secretary failed to comply with the section 149 duty: (a) because the EIA does not sufficiently address concerns in the Home Secretary's May 2022 Rwanda assessment documents that the rejection rate for asylum claims made by applicants from middle-eastern countries appeared to be higher than claims being made for others, and that, even if their asylum claim was successful, persons removed to Rwanda may find it difficult to integrate into Rwandan society; (b) because the EIA focused on what might happen once a person had been removed to Rwanda and did not consider the impact of the removal process, particularly on those suffering from mental illness amounting to disability; and (c) because the EIA post-dated the MOU and *Notes Verbales* which are the core elements of the MEDP and as such evidences only a "rear guard action", not genuine compliance with the section 149 obligation.

173. The parties did not disagree on the general effect of section 149 of the 2010 Act. A decision-maker must consider the likely consequences of the action or decision under consideration by reference to the framework set by section 149.

174. We do not consider that the timing of the EIA shows any failure to meet the requirements of section 149(1) of the 2010 Act. The EIA was published at the same time as the Home Secretary's Rwanda assessment documents and her Inadmissibility Guidance. This explains the date on the face of the document. Mr Armstrong's evidence (witness statement dated 5 July 2022) explains that work on the EIA commenced in February 2022 and continued in tandem with the negotiation of the MOU (the MOU was signed on 13 April 2022.) He states that the EIA served to inform the substance of the terms that were sought during the negotiations. We accept this evidence, and conclude from it that in the course of formulating what became the Rwanda policy, the Home Secretary did have due regard to the section 149(1) criteria.

175. Nor do we consider that the other two criticisms of the EIA are sufficient to reach the conclusion that the Home Secretary failed to comply with section 149 of the 2010 Act. The section 149 obligation is not an obligation of exhaustive consideration of all possible matters. Overall, the EIA evidences that there was thorough consideration of how removal to Rwanda might affect persons with protected characteristics.

176. The focus of consideration was on the position in Rwanda; the document did not specifically address the process of removal from the United Kingdom: i.e. transport to an airport, transfer to a plane, and the arrangements for the flight. However, those exercises would be undertaken in the usual way, applied to any removal to any country. There is no suggestion that the process to removal to Rwanda gave rise to any unique considerations.

177. The remaining matter concerns the consideration given to how the system in Rwanda for dealing with asylum claims might work. In this regard, the EIA is evidence that the Home Secretary attached particular significance to the terms of the MOU on arrangements for monitoring compliance with, amongst other matters, the obligations assumed by the Rwandan authorities to ensure access to the system for deciding asylum claims and the arrangements to be in place to decide asylum claims made by

persons who were going to be transferred under the MOU. The EIA also emphasises that the monitoring arrangements would permit the Home Secretary the opportunity over the duration of the MOU, to continue to monitor the "equality impacts" on removal to Rwanda. We are satisfied, considered in the round, that on this matter also the Home Secretary acted as required by section 149(1) of the 2010 Act.

C. Decision on the issues in the individual claims

(1) General points

178. In these claims, the individual Claimants' challenges are directed to decisions under paragraph 345A and 345C of the Immigration Rules (which, unless required otherwise by context, we have described, compendiously, as inadmissibility decisions), and (save for AHA, the second claimant in CO/2032/2022), the decisions that removal to Rwanda would not be in breach of their ECHR rights (referred to as "human rights claims"), and decisions certifying those human rights claims under paragraph 19(c) of Schedule 3 to the 2004 Act (thereby removing rights of appeal). As stated above, these decisions are, for the purposes of the legal analysis, the premises of the Home Secretary's Rwanda policy.

179. A number of the grounds of challenge raise issues said to apply to all claims and these have been considered above. For the reasons given above, none of those generic grounds establishes any illegality in relation to the inadmissibility decisions (or decisions refusing human rights claims and certifying the claims as clearly unfounded).

180. The Claimants also, however, allege specific grounds of challenge in respect of the decisions taken in their individual cases. In this section, we set out the material facts, or alleged facts, so far as they appear from the material before us and consider these specific challenges. We have already considered, at length, the provisions under which the inadmissibility and removal decisions were taken (i.e., paragraphs 345A – D of the Immigration Rules). So far as concerns the decisions to certify the human rights claims, all parties agree that the correct approach is the one explained in *R(ZT (Kosovo)) v Secretary of State for the Home Department* [2009] 1 WLR 348 and in *R (SP (Albania)) v Secretary of State for the Home Department* [2019] EWCA Civ 951. For the reasons set out below many of these decisions do stand to be quashed and the individual cases will need to be looked at again. In some instances, this is because the Home Secretary has accepted that one or more pieces of information provided before a decision was taken was not considered. In those cases, she accepts that the decision should be revisited taking account of that information. In two instances, inadmissibility decisions fall to be quashed because in the course of decision-making, the facts of the cases were accidentally transposed.

181. In yet other cases, decisions fail because of the way decision-making was allocated within the Home Office. Ordinarily, a court will have little to say about the way a Secretary of State chooses to allocate decision-making among her officials. Such decisions rarely go to the legality of any matter. However, in this case, the way in which decision-making was organised became material. In most (but not all) cases, the claimants challenged both the decisions made under paragraphs 345A and 345C of the Immigration Rules, and the decision that removal to Rwanda would not entail breach of his ECHR rights. As noted above, the Home Secretary allocated decisions

on the paragraph 345A and 345C claims to the Third Country Unit in Glasgow, and the decisions on the human rights claims to the Detained Barrier Casework Unit in Croydon. While that allocation was entirely a matter for the Home Secretary, it did mean that care then had to be taken to ensure that representations made on the different types of claim had to be directed for consideration to the correct officials. In this regard, errors occurred. The one reoccurring problem was that representations relevant both to the decisions being taken in Glasgow and those being taken in Croydon were considered by officials in the former, but not the latter. A number of the decisions on the human rights claims have failed for this reason: see below.

182. As explained below, Claimant by Claimant, we have considered each decision on its own merits. The submissions to the effect that decisions were taken in a way that was procedurally unfair are addressed in the next section of this judgment.

183. During the hearing, the Claimants made a new suggestion (not developed in any of the Skeleton Arguments) as to how the issues in this litigation should be managed. This was to the effect that this court should first decide the legality of the decisions under paragraph 19(c)of Schedule 3 to the 2004 Act to certify the human rights claims as "clearly unfounded"; that if any such decision was held to be unlawful, the hearing of all other aspects of these judicial review proceedings (including the inadmissibility decisions taken under paragraphs 345A and 345C of the Immigration Rules) should be stayed pending consideration by the First-tier Tribunal of the appeals against the human rights decisions; and only once those appeals (and any subsequent appeals arising) had been determined should this court decide the other grounds of challenge. The premise for this suggestion was that the First-tier tribunal, not this court, was the appropriate forum to decide if removal of any of the Claimants to Rwanda would be in breach of their Convention rights.

184. We did not consider that that course of action to be appropriate. This court is seized of a number of judicial review claims which (among other matters) contend that inadmissibility and removal decisions are unlawful because those decisions are incompatible with a claimant's rights under article 3 of the ECHR. The court should, therefore, deal with those claims and should not leave them undetermined. Further, in one case, AHA, no human rights decision has been taken and the only challenge at present is to the inadmissibility decision.

185. Ultimately, while the Claimants raised this suggestion, no claimant applied to stay, or withdraw his individual claim. We are satisfied that this court should deal with all matters before it, and, so far as concerns the challenges to the human rights decisions, is capable of dealing fairly and adequately with the issues that have been raised.

(2) AAA (Syria) (Claimant 1, CO/2032/2022)

186. AAA was born in Derik, in Syria, in 2000. He is of Kurdish origin. In his witness statement, AAA says he lived in the north eastern area of Syria which was controlled by a group known as the Kurdish YPG. He says that the group wanted him to join the YPG forces and fight the Syrians, but neither he nor his father wanted him to. He says that his father and brother paid someone $20,000 to enable him to leave Syria. AAA

says he left Syria on about 2 September 2021, crossed into Turkey and travelled to France.

(i) Arrival and detention in the United Kingdom

187. On 9 May 2022, AAA arrived in the UK having travelled in a small boat from Dunkirk in France. He was intercepted by Border Force officials and detained at an immigration detention centre at Yarl's Wood.

188. On 10 May 2022, AAA claimed asylum. On 11 May 2022, he had a screening interview with immigration officials. The record of the interview notes that AAA gave his main language as Kurdish-Kurmanji but that he spoke some Kurdish Badhini and was content to continue in Kurdish Badhini for the screening interview. An interpreter interpreted by telephone. He was asked to outline his journey to the United Kingdom. He said that he left Syria on 3 September 2021 going to Turkey on foot where he stayed for one month. He said that he travelled to an unknown country by lorry and then by train to France and stayed in France for 7 to 8 months. He travelled to the UK by boat arriving on 9 May 2022. The record notes that AAA said that he had understood all of the questions asked.

(ii) The notice of intent

189. On 13 May 2022, AAA was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter stated that before AAA claimed asylum in the United Kingdom he had been present in, or had a connection with, France and that could have consequences for whether his asylum claim was considered in the UK. The notice was in the form explained above at paragraph 33 and stated that the Home Office would review his particular circumstances to determine whether it was reasonable to have expected him to claim asylum in France. It indicated that, amongst other things, the Home Office might ask Rwanda, another country considered to be safe, if it would in principle be prepared to admit AAA. The notice said that it was important that these inquiries be completed promptly. It said that:

> "If you wish to submit reasons not already notified to the Home Office why your protection claim should not be treated as inadmissible, or why you should not be required to leave the UK and be removed to the country or countries we may ask to admit you (as mentioned above), you should provide those reasons in writing within 7 calendar days of the date of this letter. After this period ends, we may make an inadmissibility decision on your case based on the evidence available to us at that time"

190. In his later witness statement, AAA says that he had a copy of the notice but did not understand it. He says that the Home Office called him using an interpreter who spoke Kurdish Sorani and he understood that they were saying that he might be taken to Rwanda and that he had seven days and needed to speak to a solicitor.

191. On 14 May 2022, AAA was transferred to IRC Brook House. The documentation records he underwent an induction session at Brook House. It records that the duty solicitor scheme had been explained to AAA including the times of surgeries and the

initial appointment. The documentation noted that AAA wanted a solicitor and one had been booked for 17 May 2022. It noted that AAA needed interpretation into Kumanji. The documentation noted AAA had been provided with a mobile phone. No welfare concerns were noted and none were recorded as having been raised by AAA.

(iii) The inadmissibility decision

192. On 31 May 2022, AAA was issued with a letter headed "Inadmissibility of Asylum Claim and Removal from the United Kingdom". This was a decision under Paragraph 345A of the Immigrations Rules. The letter noted that, on the evidence provided, the Home Secretary was satisfied that AAA could have enjoyed sufficient protection in a safe third country, France, basing that conclusion on the fact that he travelled to France and stayed there for 7 or 8 months before arriving in the UK by boat on 9 May 2022. The letter also considered removal to Rwanda and stated:

> "It is proposed to remove you to Rwanda (a possibility notified to you in the Notice of Intent, issued previously). It is considered that Rwanda is a place where your life and liberty will not be threatened by reasons of your race, religion, nationality, membership of a particular social group or opinion; and a place from which you will not be sent to another State otherwise than in accordance with the Refugee Convention or otherwise than in accordance with Article 3 of the European Convention on Human Rights. Rwanda is also considered to be a country with an effective asylum system, which can be expected to properly meet your protection needs".

The letter also contained a decision under paragraph 17 of Part 5 of Schedule 3 to the 2004 Act, certifying AAA's asylum claim. Certification had the effect of preventing AAA from bringing an appeal on grounds inconsistent with the opinion leading to the certification decision (see paragraph 19 of Schedule 3, as then in force).

193. On 31 May 2022, AAA was also served with a notice of liability to removal and removal directions which provided for his to Rwanda at 22.30 on 14 June 2022. Those removal directions were cancelled on 9 June 2022.

(iv) The representations

194. On 1 June 2022, AAA says he contacted Care4Calais, a charity that works with asylum seekers. He provided them with copies of the documents he had including the notice of intent. Care4Calais referred him to Duncan Lewis, a firm of solicitors. On 4 June 2022 AAA met a solicitor from Duncan Lewis; a Kurdish Kumanji interpreter was present. On 6 June 2022, solicitors acting for AAA made written representations to the Home Secretary. Those representations alleged that the process for inviting representations were unfair. They contended that AAA's claim should not be treated as inadmissible as AAA had been told that members and supporters of the YPG group lived in France and he feared that, if he remained there, he would be discovered by the YPG and would be in trouble for refusing to join him. The representations stated that AAA was not suitable for transfer to Rwanda as: (1) he was illiterate which would hinder his ability to engage with the asylum process; (2) he had a significant and unassessed mental health condition and had expressed suicidal ideation; and (3) he did

not speak English or any of the other major languages spoken in Rwanda. The letter further stated that the representations included a human rights claim (i.e., a claim that removal to Rwanda would be incompatible with AAA's Convention rights). The solicitors sought an extension of time to make further representations.

195. On 7 June 2022, AAA made a witness statement. He repeated his account of travelling from Syria via Turkey to France and spending 7 or 8 months in France. He says that he spoke by phone to a friend living in the UK and the friend advised him not to stay in France because there were YPG supporters there and it would not be safe for him. AAA says that he spoke to his uncle by phone, and that he told him there were YPG supporters in neighbouring countries and advised him that he would be safer if he went to the UK. AAA says that he did not claim asylum in France because he was scared that if he stayed in France the YPG supporters would find him and he would be in trouble. He says that he was scared that the YPG supporters would kill him.

(v) The claim for judicial review

196. On 8 June 2022, AAA and other claimants issued a claim for judicial review (CO/2032/2022). Among other matters, that claim challenged the inadmissibility decision of 31 May 2022. AAA was subsequently granted permission to include a challenge to a subsequent inadmissibility decision dated 5 July 2022, and the decision to refuse his human rights claim and to certify it as manifestly unfounded also made on 5 July 2022. Those decisions are described below.

(vi) Subsequent representations

197. On 27 June 2022, Dr Komolafe wrote to the Healthcare Team at Brook House stating he had assessed AAA as having symptoms of depression and anxiety, and panic attacks. He said that AAA had disclosed suicidal thoughts. On 7 July 2022 he made a fuller report. On 1 July 2022, solicitors for AAA made further detailed written representations.

(vii) The 5 July 2022 inadmissibility decision.

198. On 5 July 2022, the Home Secretary provided a letter, again headed "*Inadmissibility of Asylum Claim and Removal from the United Kingdom*". The letter explained that following receipt of representations, consideration had been given as to whether Rwanda was a safe country to which AAA could return. The letter explained that it was to be read in conjunction with the previous decision letter (of 31 May 2022). The letter stated that the Home Secretary had reviewed all material in AAA's case including: material provided by the UNHCR as evidence in the judicial review proceedings; the representations of 6 June 2022; and AAA's witness statement of 7 June 2022.

199. The letter stated that the decision stated that the conclusions previously reached on rule 345A(iii)(b) had been reviewed (i.e., whether AAA could have claimed protection in France and whether there were exceptional circumstances preventing such an application being made). The letter continued:

> "You have stated in your witness statement that you did not claim asylum in France as you felt it was not safe there. It is noted in your

> screening interview when you were asked why you did not claim asylum before coming to the UK you stated that you did not claim because you have family in the UK and wanted to come to the UK to be with your family rather than raising any concerns about your safety in France. It is further noted by your own admission that were able to make phone calls to both your friend and uncle and as such it is considered that you had the opportunity to claim in France. You now claim that you did not do so because you were told it was unsafe in France. However, even if there are YPG supporters in France, there is no reason why France would not have provided protection for you. It is considered that there were no exceptional circumstances which prevented you from claiming asylum in France".

200. The decision of 5 July 2022 also dealt with the question of whether Rwanda was a safe country for AAA. The conclusion reached by the Home Secretary was there was no risk either that AAA would be refused entry on arrival, or that his claim would not be passed to the relevant authorities for consideration. AAA's alleged vulnerabilities arising out of significant and unassessed mental health conditions were also considered. The decision was that these issues could be addressed in Rwanda and they would not impact on AAA's ability to engage with the asylum process in Rwanda.

201. The letter then dealt with several other specific topics including whether there was a gap in the protection system in Rwanda, appeals in Rwanda, refoulment from the airport, risk of bias, the risk of non-referral of the asylum claim, accommodation and support in Rwanda, the evidence of the UNHCR and the ability of Rwanda to comply with the assurances in the MOU and the *notes verbales*, and other matters.

202. The letter set out the conclusion that Rwanda was a safe country for AAA in his particular circumstances, and stated that the decision on paragraphs 345B(i), (ii) and (iv) "is maintained". The decision to certify the asylum claim under Part 5 of the 2004 Act was also maintained.

(viii) The human rights decision

203. A further letter, also dated 5 July 2022, but prepared by a different Home Office official, working in a different team, set out the decision on AAA's human rights claim. This decision considered the representations made by AAA's solicitors dated 6 June 2022 and 1 July 2022. The decision did not, however, take account of the material filed by the UNHCR in the judicial review claim. We have been told that the official who took the human rights decision had not seen the inadmissibility decision, and vice-versa.

204. The decision on the human rights claim was that removal to Rwanda would not be incompatible with AAA's Convention rights. Further, the human rights claim was certified under paragraph 19(c) of Schedule 3 to the 2004 Act as clearly unfounded, thus preventing any appeal against the decision (see the version of paragraph 19(c) in force with effect from 28 June 2022).

(ix) The challenges raised by AAA specific to his own circumstances

205. AAA makes the following specific challenges to the decision that AAA was not prevented by exceptional circumstances from making a claim for asylum in France:

(1) the Home Secretary did not consider the 1 July 2022 representations when reaching the inadmissibility decision;

(2) the Home Secretary acted on the basis of a mistake of fact when taking the inadmissibility decision. She thought that AAA had said in his screening interview that he had not claimed asylum in France because he had family in England. That was not so. The Home Secretary had mixed up the facts of AAA's case with the facts of a different case (brought by the claimant AHA);

(3) the Home Secretary failed to provide adequate reasons for the conclusion;

(4) the Home Secretary had had regard only to objective circumstances and failed to consider, as she was required to do on a proper interpretation of rule 345A(iii)(b), AAA's subjective state of mind; and/or that that decision was irrational or failed to have regard to his state of mind; and

(5) it was irrational for the Home Secretary to maintain reliance on her previous conclusions set out in the 31 May 2022 letter.

206. Mr Dunlop KC, on behalf of the Home Secretary made the following submissions. *First*, he accepted that the inadmissibility decision had been taken without regard to the 1 July 2022 representations. However, he submitted that the 1 July 2022 representations had been considered when the human rights decision was made and the decisions should be read together. *Second*, he accepted that the inadmissibility decision had confused AAA's evidence with the evidence given by AHA, and that AAA had not said that he had not claimed asylum in France because he had family in the United Kingdom. Nevertheless, he submitted that the error was not material as the inadmissibility decision had addressed the question of whether AAA's fears over safety prevented him from claiming asylum in France. He further submitted on this point that it was highly likely that the outcome for AAA would have been the same even if that error had not occurred so that a remedy ought to be refused pursuant to section 31(2A) of the Senior Courts Act 1981. *Third*, Mr Dunlop accepted that the letter dated 27 June 2022 from Dr Komolafe had not been considered when the inadmissibility decision was taken. However, he submitted that the decision-maker had considered the pleadings in the judicial review claim which raised mental health conditions similar to those raised by Dr Komolafe. Further, the doctor had made a further report after the 5 July 2022 admissibility decision, and that would have to be considered. He submitted that because the Home Secretary had agreed to consider this later report, no purpose would be served by granting any remedy in respect of any failure to have regard to the earlier letter. *Fourth*, he submitted that when the inadmissibility decision was taken, regard had been had to the objective facts and AAA's subjective state of mind, arising out of what he had been told. However, the conclusion reached was that they did not amount to exceptional circumstances preventing AAA from claiming asylum in France.

(x) Conclusions

207. There are a number of flaws in the reasoning contained in the 5 July 2022 inadmissibility decision. The decision took account of the wrong facts. It is clear that the decision that AAA had not been prevented from making an asylum claim in France was materially influenced by the erroneous belief that AAA had originally said he had family in the UK and wanted to come here rather than claim asylum in France.

208. This was not an immaterial error. The decision begins by noting that AAA had said in his witness statement that he did not claim asylum in France because he did not feel safe there. Then in the next sentence, the decision notes (wrongly) that AAA had initially claimed that he had family in England. Later, the decision letter notes that AAA "now" claimed that he did not claim asylum in France because he felt unsafe. The decision letter then refers to the possibility of protection in France. The final conclusion was that there were no exceptional circumstances which prevented AAA from claiming asylum in France. Thus the (erroneous) view that AAA had said he wanted to come to England where he had family, and what he later said about not feeling safe in France, were taken together, part and parcel within the decision. That decision was materially influenced by the erroneous belief about the original basis for not claiming asylum in France.

209. Further, there are two other matters the Home Secretary did not consider when taking the inadmissibility decision of 5 July 2022 – the representations made on 1 July 2022 and the 27 June 2022 letter from the doctor. We do not accept that it was sufficient that a different official, taking a different decision (the human rights decision) considered those documents. It is for the Home Secretary to decide how and by whom different decisions will be taken within her department. If she decides that different decisions are to be taken by different teams, she must ensure that the different teams have the material relevant to their decision (or, as a minimum, an adequate summary of that material) available to them when they come to take their decision. In the present case, that did not happen: the inadmissibility decision was taken without access to or consideration of relevant material. It is not sufficient that all the material was – in a general sense – known to the Home Office; there is no reverse *Carltona* principle: see *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 per Sedley LJ at §§24 – 38. Nor, in this instance, was it sufficient merely to consider AAA's pleadings in these proceedings. The pleadings refer in general terms to the need to assess mental health conditions for five Claimants (including AAA). That falls far short of consideration of the material in the 27 June 2022 letter from the doctor.

210. Given that the decision of 5 July 2022 was materially influenced by an erroneous belief as to the reasons why AAA did not claim asylum in France, and given also the failure to have regard to relevant representations and evidence, the decision is legally flawed. We cannot say whether it is highly likely that the outcome would be substantially the same for AAA if those errors had not been made. We simply do not know. There is no evidence that the Home Secretary would have come to the same decision if these errors had not occurred.

211. We consider, on the facts of this case, that the reasoning in the inadmissibility decision of 5 July 2022 superseded the reasoning in the earlier decision of 31 May 2022. The reality is that the issues raised under paragraph 345A were considered afresh, in the light of further evidence and further representations, and the conclusion was reached that AAA's claim was inadmissible. The Home Secretary therefore

maintained the decision reached in the 31 May 2022 letter for the reasons given in the 5 July 2022 letter. Given that the reasoning in the 5 July 2022 letter is flawed, that decision must be quashed. As the 31 May 2022 decision was maintained only because of that flawed reasoning, we consider that the sensible course is (for the avoidance of any doubt) also to quash that decision. That will enable the Home Secretary to consider afresh, and reach a determination on, the question of whether or not AAA's claim is inadmissible under paragraph 345A of the Immigration Rules, and whether it is appropriate to remove him to Rwanda. That consideration will be based on all the material available at that time. In the light of that conclusion, we make only the following observations on the remaining grounds of challenge that are specific to AAA's circumstances.

212. On the question of objective and subjective circumstances, it was said in AAA's case that, whilst objectively there was nothing to prevent him from claiming asylum in France, subjectively he was concerned for his safety in France and was scared that he would be killed by YPG supporters. It is said that the Home Secretary had to consider whether AAA's subjective belief amounted to exceptional circumstances for the purposes of paragraph 345A(iii)(b) of the Immigration Rules. As that matter is to be considered by the Home Secretary, it would not be appropriate to express a definitive view on that issue. We do, however, make the following general observations.

213. The relevant question under paragraph 345A(iii)(b) is whether there were "exceptional circumstances preventing" the individual from applying for asylum in the country concerned. *First*, we would not rule out the possibility that there may be circumstances where an individual had a genuine belief that he would not be safe in a particular country and so did not claim asylum in that country. The fact that there were no reasonable grounds for such belief may be one factor relevant to assessing whether the belief was genuinely held. *Secondly*, the Home Secretary will have to consider, in each such case, whether any belief held amounts to exceptional circumstances "preventing" that individual from claiming asylum in that country. It would not be sufficient if they were merely circumstances which provided a reason, or even a reasonable excuse, for not making an asylum claim in the third country. It may well be open to the Home Secretary to conclude that a genuine belief explained why the individual did not claim asylum in a particular country, but also to conclude that the belief did not prevent him from doing so. *Thirdly*, the Home Secretary accepted the possibility that there may be cases where psychological reasons existed which prevented a person from claiming asylum in a particular country (although she considered that such cases would be likely to be exceptional). For present purposes, we simply note that in this case it will be for her to consider, on all the relevant material, whether AAA really had a genuine and honest belief that he would not be safe in France and if so, whether that belief did prevent him from claiming asylum in France.

214. On the question of consideration of Dr Komolafe's report of 8 July 2022, that was provided to the Home Secretary after the decision of 5 July 2022. As such, she could not have considered it at the time that she reached her inadmissibility decision and made no legal error by not having regard to it. Now that the matter is to be considered afresh, the Home Secretary will need to consider all relevant material including the report of 8 July 2022.

215. We do not consider it necessary to express a view on the adequacy of the reasons in the 5 July 2022 inadmissibility decision. The decision rested on one error and did not consider certain matters. Those are the flaws leading to the decision being quashed. The failure to give reasons in relation to erroneous matters or matters that were not considered does not materially add anything to the challenge.

216. We turn next to the decision to refuse the human rights claim and to certify that claim as clearly unfounded. This decision was not taken having regard to material that was potentially relevant to that decision – i.e., the material that, by 5 July 2022, had been filed and served by the UNHCR in these proceedings. It is no answer to that criticism to say that in a different decision (the inadmissibility decision) regard was had to that material and that the two decisions must be "read together". That would be a fiction too far. The person who took the human rights claim on behalf of the Home Secretary did not have available relevant material (or a summary of it) and did not even have a copy of the inadmissibility decision which did consider that material. Furthermore, in certifying the human rights claim as clearly unfounded, a different legal question had to be addressed: whether an appeal to a tribunal, properly directing itself on the law and the evidence, would be bound to fail. The person taking the inadmissibility decision did not have to address that question and did not express a view on it. Given that the human rights decision-maker did not consider material that was potentially relevant to the certification question, it is no answer to say that his decision should be read with a different decision which did not consider that question at all. The 5 July 2022 human rights decision, and the certification of that claim as manifestly unfounded must therefore be quashed.

(3) AHA (Syria) (Claimant 2, CO/2032/2022)

217. AHA was born in September 2000. He is a Syrian national. He says that he left Syria as he feared being required to undertake military service in Syria.

(i) Arrival and detention in the United Kingdom

218. On 20 May 2022, AHA crossed from France to the United Kingdom by small boat. The boat was seen by the UK Coast Guard while still at sea and AHA and the other occupants of the boat were brought to the United Kingdom. He was detained and taken to IRC Yarl's Wood. He claimed asylum.

219. On 22 May 2022, he had a screening interview. An interpreter interpreted by phone. The record of the interview notes that AHA said that he was fit and well and was not taking medication. He was asked to describe his journey to the United Kingdom. The record states he said that he left Syria in July 2018 and crossed the border on foot to Turkey where he stayed for four years before leaving for Greece. He described a journey from Greece to Albania and then to Serbia. The record says that he travelled to Cornwall where he stayed for about two days. That appears to be a mis-transcription and (according to AHA's later witness statement) should record that he travelled from Serbia to Hungary. AHA then travelled to Austria by foot and stayed 10 days there. He then travelled by car to France and stayed 3 days there before travelling by rubber dinghy to the United Kingdom.

220. Asked why he had not claimed asylum on his way to the United Kingdom, the record says that AHA said "*Because I close family in the UK I want to stay there*". Asked if there was any reason why AHA could not be returned to one of the countries he had travelled through, AHA is recorded as saying "*I wanted to come here because my brother lives here*".

(ii) The notice of intent and the representations

221. On 23 May 2020, AHA was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter stated that before AHA claimed asylum in the United Kingdom he had been present in, or had a connection with, France, Greece, Hungary and Austria and noted that might have consequences as to whether his asylum claim would be admitted to the UK asylum system and could mean that he might be removed either to one of the countries names, or the United Kingdom might ask Rwanda to admit him.

222. The letter invited AHA to submit written reasons within seven days of the date of the letter why the claim should not be treated as inadmissible or why he should not be removed from the UK to one of the countries mentioned, or Rwanda. The letter stated that, after the period for representations had expired, a decision on whether the asylum claim was inadmissible would be made, based on the evidence available at that time.

223. The letter was given to AHA by an official at IRC Yarl's Wood. The official explained that AHA needed to tell the Home Office within seven days why he should not be sent to another country or to Rwanda and that he should contact a lawyer.

224. On 26 May 2022, AHA instructed Duncan Lewis, a firm of solicitors, although AHA says it took some days, until 29 May 2022, for relevant documents to be signed authorising the solicitors to represent him. On 30 May 2022, Duncan Lewis submitted written representations to the Home Office, running to approximately 10 pages, making submissions about the process by which representations had been invited, giving reasons as to why AHA had not claimed asylum in Greece, Hungary, Austria or France, and why he should not be removed to Rwanda: namely that AHA had significant unassessed mental health conditions; did not speak English or any major language spoken in Rwanda; and had close family connections with the UK as he had a brother in the UK. The representations also made a human rights claim, contending that removal to Rwanda would be a breach of his rights under articles 3 and 8 of the Convention because of AHA's mental health, family connections in the UK and a concern that he would be unable to access protection (i.e. make an asylum claim) in Rwanda. The representations also sought an extension of time to make further representations.

(iii) The inadmissibility decision of 1 June 2022.

225. By letter dated 1 June 2022, the Home Secretary decided that AHA's claim for asylum was inadmissible. The letter stated that she had not received any representations from AHA. This was incorrect. The Home Secretary had received the representations dated 30 May 2022 summarised above. In terms of substance, the decision letter stated that the Home Secretary was satisfied that Austria and France were safe third countries for AHA. She proposed to remove AHA to Rwanda as that was a place where AHA's life and liberty would not be threatened by reasons of his

race, religion, nationality, membership of a particular social group or political opinion, and where he would not be sent to another state otherwise than in accordance with the Refugee Convention and article 3 of the Convention.

226. On the same day, the Home Secretary issued removal directions for AHA to be removed to Rwanda on 14 June 2022. Those directions were cancelled on 9 June 2022.

(iv) The claim for judicial review

227. On 8 June 2022, AHA filed a claim for judicial review seeking to challenge the inadmissibility decision of 1 June 2022 (claim CO/2032/2022). Subsequently, he was granted permission to amend the claim to challenge a later inadmissibility decision of 5 July 2022 described below.

228. AHA made a witness statement in these proceedings, dated 8 June 2022. In that witness statement, he says that he spent only two days in Austria. He says that he was detained by authorities on arrival and his belongings were confiscated. He says that when released he was scared of being detained again and wanted to leave Austria as soon as possible. He says he did not view Austria as a safe country. He says that he travelled directly from Austria to Calais in France and stayed there for four days sleeping under a bridge with group of other people. He says that the police came each morning and took all their belongings. He said the police were horrible towards the refugees in the area and he did not feel safe.

(v) Subsequent representations and evidence

229. AHA was seen by a doctor at the detention centre. The doctor provided a report dated 1 June 2022 under Rule 35 of the Detention Centre Rules 2001. The report recorded AHA's account including his claim that he was trafficked via Albania and Serbia, that the mafia took all his possessions, that in Greece he was made to take his clothes off and put in the cold, and was beaten and pushed (the report does not record who or which authorities in which country are said to have beaten and pushed AHA). The doctor noted that AHA did not have any scars on his body. The report noted that AHA's "*narration of events [is] consistent with torture and would need to be looked into further*".

230. By letter dated 1 July 2022, solicitors for AHA made further detailed submissions on, amongst other things, why the inadmissibility decision of 1 June 2022 should be withdrawn and why AHA's asylum claim should not be declared inadmissible under paragraph 345A of the Immigration Rules. The letter included, amongst other things, the Rule 35 report.

(vi) The 5 July 2022 inadmissibility decision

231. The decision letter of 5 July 2022 referred to the inadmissibility decision letter dated 1 June 2022 (although it mis-dated the earlier letter as a letter of 4 June 2022). It said that the 5 July 2022 letter should be read in conjunction with the June letter. The 5 July 2022 letter made it clear that the decision-maker had had regard to the representations of 30 May 2022, the Rule 35 report and the material filed by the UNHCR in the judicial review proceedings.

232. The decision letter stated that AHA had said in his witness statement that he did not claim asylum in France as he felt it was not safe there. It noted that by his own evidence he had regularly had contact with the police in France and he had the opportunity to claim asylum in France while he now claimed that he did not do so "because you were told that it was unsafe in France". The conclusion stated in the letter was that there were no exceptional circumstances which prevented AHA claiming asylum in France, and maintained the earlier decision in that regard. The letter does not refer to Austria. The letter further stated that AHA would be removed to Rwanda and dealt with a number of issues related to that question, again maintaining the conclusion stated previously in the June 2022 letter. Lastly, the 5 July 2022 letter (as had the June letter) contained a decision to certify the asylum claim under paragraph 17 of Schedule 3 to the 2004 Act.

233. The inadmissibility decision expressly stated that it was not a decision on AHA's human rights claim, which would be dealt with separately following conclusion of consideration of whether AHA was a victim of trafficking. To date, no decision has been taken on AHA's human rights claim. AHA cannot be removed from the UK until that claim is determined and either all appeals are exhausted or the claim is certified as manifestly unfounded.

(vii) The challenges raised by AHA specific to his own circumstances

234. AHA makes the following specific challenges to the decision that he was not prevented by exceptional circumstances from claiming asylum in France:

(1) The 5 July 2022 inadmissibility decision was made without consideration of the 1 July 2022 representations;

(2) The inadmissibility decision rested on a mistake of fact because the Home Secretary had confused the facts of AHA's case with the facts of AAA's case. The decision rested on the premise that AHA had said he had not claimed asylum in France because he had been told it was unsafe, but that was what AAA had said. AHA had said that he had not made a claim because he had been mistreated by the French police;

(3) No adequate reasons were provided for the inadmissibility decision;

(4) When applying rule 345A of the Immigration Rules, the Home Secretary had regard only to objective circumstances and failed to consider AHA's subjective state of mind; and/or failed to have regard to his state of mind; and/or reached an irrational conclusion; and

(5) It was irrational for the Home Secretary to maintain reliance on her previous conclusions set out in the 1 June 2022 letter.

235. Mr Dunlop accepted that the decision letter wrongly referred to AHA saying that he had been told that it was unsafe to remain in France and accepted that that was what AAA had said in his interview. He submitted, however, that the error was not material and, in any event, no remedy was required as the Home Secretary had already stated that she intended to take a fresh inadmissibility decision in order to consider further evidence that had been provided on 7 July 2022. Mr Dunlop accepted that there was

no evidence that regard had been had to the 1 July 2022 representations, but submitted those representations added nothing of substance. He submitted that when the inadmissibility decision reflected consideration both of objective and subjective features (i.e., what AHA said about his state of mind).

(viii) Conclusions

236. There are several flaws in the 5 July 2022 inadmissibility decision. *First*, the decision did rest on a mistake of fact – the accidental transposition of AAA's evidence into the decision made on AHA's case. The Home Secretary has not, therefore, properly considered AHA's case on the application of paragraph 345A of the Immigration Rules – which is based on the ill-treatment he says was afforded to him by the French police. In the premises, the inadmissibility issue has not been properly determined. *Secondly*, on the evidence before this court, it appears the Home Secretary did not consider the written representations of 1 July 2022. That is not remedied by the fact that some of the points made in those representations were in fact considered by the decision-maker. Other matters set out in the representations, such as the claim that AHA was prevented by claiming asylum by the alleged abusive treatment of the French authorities were not considered. Further, we would regard the decision-letter as inadequately reasoned as it does not address the principal reason given by AHA for not claiming asylum in France.

237. Given the errors in the 5 July 2022 inadmissibility decision that decision must be quashed. We are not persuaded by the argument that there is no need to grant a remedy because the Home Secretary proposes to take a fresh decision. The decision of 5 July 2022 is legally flawed and has not been withdrawn. Therefore, it should be quashed.

238. As for the 1 June 2022 decision, the conclusion and reasons set out in AAA's case apply here too. The 5 July 2022 decision effectively superseded the 1 June 2022 decision; the 5 July 2022 letter purported to maintain the June decision for the reasons in the 5 July decision. Since the 1 June 2022 decision was maintained only because of the flawed reasoning in the 5 July 2022 letter, that letter too should, for sake of completeness, also be quashed. In any event, the 1 June 2022 decision was, on its own terms, flawed because it failed to have regard to the representations made on 30 May 2022. Had that decision remained an operative decision, it would fall to be quashed for that reason.

239. In these circumstances, it is not necessary to consider the question of objective and subjective reasons why AHA did not claim asylum. We have set out our general observations on that issue above. The matter will be remitted to the Home Secretary so that she may consider, on the basis of all the material and representations available at the time of that decision, whether exceptional circumstance prevented AHA from claiming asylum in a safe country such as France, or Austria, or any other safe country.

(5) AT (Iran) (Claimant 4, CO/2032/2022)

240. AT is an Iranian national of Kurdish ethnicity. He was born in March 1998. He says that he distributed leaflets for a Kurdish political party, which is illegal in Iran. He says that he fears that he would be killed or tortured in Iran.

(i) Arrival and detention in the United Kingdom

241. On 17 May 2022, AT arrived in the United Kingdom having travelled from France in a small boat. He was detained at IRC Yarl's Wood. He claimed asylum.

242. On 18 May 2022, AT attended a screening interview. He said his main language was Kurdish Sorani, and an interpreter interpreted by phone. He was asked to describe his journey to the United Kingdom. He said that he had left Iran 3 months earlier and travelled to Turkey where he stayed for 2 months. He then travelled by lorry to an unknown country (close to Italy) where he stayed for 2 days. He then was taken by lorry to the beach, then travelled to the UK by boat. He said an agent was used; AT's mother had paid the agent €13,000. AT was asked why he had not claimed asylum on his way to the United Kingdom and said, "I did not know the countries I was travelling through".

(ii) Notice of Intent

243. On 20 May 2020, AT was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter noted that before AT claimed asylum in the United Kingdom he had been present in, or had a connection with, France and Italy, and stated that that may have consequences as to whether his asylum claim would be admitted to the UK asylum system. The letter continued in the form we have already described above: referring to the possibility of an inadmissibility decision, a decision to remove AT either to France or Italy or some other safe third country, the possibility of removal to Rwanda; inviting AT, within seven days, to make representations on why the claim should not be treated as inadmissible, or why (if the claim was inadmissible) he should not be removed either to France or Italy or Rwanda. In a witness statement prepared for these proceedings, AT says he was not given a translation of the notice of intent but that a brief call with an interpreter was arranged who gave what AT describes as a "vague explanation". The interpreter suggested that AT get a lawyer.

(iii) Representations

244. On 27 May 2022, AT, with the assistance of a Kurdish Sorani interpreter, spoke with a lawyer from Duncan Lewis following a referral by the charity Care4Calais.

245. On the same day, the solicitors sent written representations to the Home Secretary. In the description of the background, they say that AT was taken by lorry to an unknown country close to Italy, and then by lorry and van to France where he was forced by agents into a boat. They said that at no point was AT safe or free to claim before arriving in the United Kingdom; that AT was not aware of the countries he was passing through; and that he was kept locked in the van and when let out was closely watched by the agents; and that the agents threatened him and were violent towards him when they forced him into the boat. The solicitors criticised the process by which representations were invited. They made representations on whether AT's asylum claim was inadmissible. They said that AT had not been in Italy at any point but had

been in a country a couple of hours from Italy; that AT had been the victim of mistreatment at the hands of agents in France and was fearful of being forced to interact with these individuals again; and that while under the control of agents, AT could not have made any application for protection in any of the countries through which he passed. The solicitors also made representations as to why AT was not suitable for transfer to Rwanda: that he had been the victim of torture; had suffered abuse and violence at the hands of traffickers; suffered from significant and unassessed mental health conditions and might have significant and unassessed physical health issues arising from being shot in Iran; and that he did not speak English, or any other major language spoken in Rwanda.

246. The representations also made a human rights claim, that relocation to Rwanda would be a breach of articles 3, 4 and 8 of the Convention as a result of the physical injuries and trauma arising out of being shot in Iran, the likelihood that AT would be destitute and the subject of mistreatment and trafficking in Rwanda, would not be able to access protection in Rwanda, and might be returned to Iran. The representations sought an extension of time to make further representations.

(iv) The inadmissibility decision of 4 June 2022

247. On 4 June 2022, AT was provided with a decision that his asylum claim was inadmissible and he would be removed to Rwanda. The decision came from the Third Country Unit of the Home Office. The letter referred to and summarised the representations of 27 May 2022. The decision letter concluded that AT could have enjoyed sufficient protection in France and there were no exceptional circumstances preventing him from claiming protection in that country. The reasons given were, in effect, a recitation of what AT had said in his screening interview: that he travelled by lorry to a country near to Italy, then to the beach and then to the UK; and his mother had paid an agent €13,000. The letter does not address the points raised in the representations that he had, throughout his journey to the United Kingdom, been watched by agents who threatened him and were violent (for example, when forcing him into the boat).

248. The letter then dealt with why France was a safe third country for AT. Next, the letter stated that AT could be removed to Rwanda, a place where AT would not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, or from which he would be sent to another state otherwise than in accordance with the Refugee Convention and the ECHR. However, the letter stated that the specific concerns about Rwanda raised by AT (including the risk of being returned to Iran) had not been considered in the inadmissibility decision but had been considered in the human rights decision letter dated 4 June 2022. It said that the conclusions in that other letter that Rwanda was a safe place for AT, and he would not be removed from there to a place of danger, stood for the conclusions in the inadmissibility decision. The decision was certified under paragraph 17 of Part 5 of Schedule 32 to the 2004 Act. We have some difficulty in understanding parts of the letter. The reference to a human rights decision letter dated 4 June 2022 appears to be wrong as that letter was dated 5 June 2022. We have some difficulty also in understanding how the decision-maker on 4 June 2022 could be relying on a decision by another civil servant which had not yet been taken. There is no evidence that the maker of the inadmissibility decision saw an earlier draft of the 5 June 2022 letter and it would be speculation to assume that.

(v) The human rights decision of 5 June 2022

249. AT's human rights claim was refused in a letter dated 5 June 2002. This decision was taken by a member of the Home Office "Detained Barrier Casework" team. That letter considered the adequacy of the asylum arrangements in Rwanda and the risk that AT might, directly or indirectly, be returned to Iran. The conclusion was that there was no risk either that AT's asylum claim would not be considered in Rwanda, or that he would be returned to Iran; or that he would be ill-treated in Rwanda, or that removal to Rwanda would put AT's health at risk. AT's human rights claim was certified as clearly unfounded.

(vi) The claim for judicial review

250. AT's claim for judicial review was filed on 8 June 2022. He challenged the inadmissibility decision and the human rights decision of 4 June 2022. Later, he obtained permission to amend the claim to challenge the inadmissibility and human rights decisions of 5 July 2022, described below.

251. AT's witness statement was made on 7 June 2022. AT said that he was put in the back of a lorry with others leaving Turkey and kept there for many days, he thought seven days. He said he was occasionally allowed out of the lorry to go to the bathroom. Whenever the lorry stopped, it was not near civilisation and there was nowhere to run to or escape the smugglers. The smugglers watched them and warned them not to create trouble or they would create trouble for the people in the group. AT said that at one stage, they stopped for two days before changing lorries, but he says he does not know where this was. He said that when he was told to get out of the van they were in a jungle near the sea. He said that the next day the smugglers grabbed him and pushed into a boat. He says that during the screening interview he did have a Kurdish Sorani interpreter on the phone but, he says, the whole process was rushed, he has learning difficulties and only two years of primary education and was confused.

252. There is a rule 35 report, dated 8 June 2022, prepared by a doctor who saw AT in the detention centre. He noted that AT said that he was shot at by policemen when delivering leaflets in Iran two years ago. AT reported that the attack had lasted a few minutes and he collapsed; and that he was treated at a hospital for a broken leg. The report says that on examination AT "has scars, which may be due to the history given". On 6 July 2022 (after the inadmissibility and human rights decisions were taken), AT submitted a medical report from a Dr Galappathie.

(vii) The 5 July 2022 inadmissibility decision

253. On 5 July 2022 the Home Secretary issued a further decision on whether AT's asylum claim was inadmissible. The letter stated that this, second, decision on inadmissibility should be read with the first one, in the letter of 4 June 2022. The 5 July decision letter recorded that regard had been had to the material filed by the UNHCR in the judicial review proceedings, AT's witness statement, and the representations of 27 May 2022. The conclusion on the application of paragraph 345A of the Immigration Rules, was as follows:

> "You claimed that paragraph 345(iii)(b) is not applicable in your case because you were under the control of agents and therefore unable to

> claim asylum in France. Further details were given in your witness statement.
>
> During your screening interview you were asked why you did not claim asylum on route to the UK and you stated that you did not know which countries you travelled through on route to the UK. You also now claim in your witness statement that you couldn't claim asylum as you were under the control of agents and did not know what countries you travelled through. It is noted that in your screening interviews you stated that you left Iran 3 months prior to entering the UK and stayed in Turkey for 2 months entering the UK. Leaving an unspecified time between leaving Turkey and entering the UK. It is considered that in this period you would have had the opportunity on your journey to claim asylum. We have taken into account your claim that you are illiterate and have learning difficulties. However, by your own admission you were politically active in Iran and therefore it is considered reasonable to assume that you are aware of the possibility of claiming asylum and capable of doing so, furthermore as you have claimed asylum in the UK it is considered you were aware of how to claim asylum and capable of doing so. You have provided little detail about how or why the agent controlled you and prevented you from claiming asylum. Therefore, for the reasons given above it is not accepted that there were exceptional circumstances which prevented you from claiming asylum in France.
>
> The previous conclusions relating to paragraph 345A of the immigration rules are maintained".

254. The letter then addressed other matters before concluding (a) that Rwanda was a safe country for AT, and (b) that the decision to certify under paragraph 17 of Schedule 3 to the 2004 Act should be maintained.

(viii) The human rights decision of 5 July 2022

255. The decision of 5 July 2022 on AT's human rights claim was made by the Detained Barrier Casework Team. The decision letter does not refer either to the material provided by the UNHCR in the judicial review claim, or AT's witness statement. The letter concludes that in the light of "all the circumstances in our letter dated 5 June 2022" the evidence and claims did not demonstrate a real risk that Rwanda would fail to comply with the arrangements in the MOU and the Refugee Convention, or that and removal to Rwanda would result in AT being treated in breach of Convention rights. The decision to certify the human rights claim, previously set out in the 5 June 2022 decision, was maintained.

(ix) The challenges raised by AT specific to his own circumstances

256. AT makes the following specific challenges to the decision that he was not prevented by exceptional circumstances from claiming asylum in France:

(1) it was irrational to draw adverse inferences from any inconsistency between the screening interview and his witness statement;

(2) it was irrational to consider that he could have claimed asylum simply because he had been politically active in Iran (and as such should be taken to be aware that asylum claims could be made);

(3) the decision not to accept AT's account that he was under the control of agents throughout his journey to the United Kingdom was irrational and/or the reasoning was illogical.

AT challenged the human rights decision on the basis that the decision had been made without consideration of the UNHCR material filed in the judicial review proceedings after the initial 5 June 2022 decision. He further submitted that the Home Secretary acted unlawfully by giving no warning that a second decision was to be taken on the human rights claim. This had meant that the decision was taken without a chance to consider a report by Dr Galappathie, sent to the Home Secretary on 6 July 2022.

257. Mr Dunlop submitted that the Home Secretary had not drawn adverse inferences from differences between what AT said in the screening interview and in his witness statement. Rather, the conclusion on the application of paragraph 345A of the Immigration Rules turned on the fact that AT had "provided little detail about how or why the agent controlled you and prevented you from claiming asylum". Further, he submitted that the Home Secretary was entitled to take account of the fact that AT had been politically active in Iran and had claimed asylum in the United Kingdom, as those matters were relevant to whether AT had sufficient knowledge about asylum claims to claim in France to make such a claim in France. He submitted that the 5 July 2022 human rights decision simply withdrew erroneous statements about the UNHCR, and that it was not necessary for the UNHCR material to be considered in the human rights decision because it had been considered in the inadmissibility decision, and both decisions had been taken on the same day and should be read together. Dr Galappathie's report came after the decisions and there was no error on the part of the decision-makers in not having regard to it.

(x) Conclusions

258. We deal first with the inadmissibility decision. So far as concerns the reference to AT's political activity in Iran, the Home Secretary made no error. She was entitled to consider that AT's previous political activity and the fact that he claimed asylum in the United Kingdom were relevant to whether he had sufficient knowledge to be able to make an asylum claim in France. The sentence referring to these matters comes after a reference to the fact that AT says that he is illiterate and has learning difficulties. The Home Secretary was entitled to conclude that these circumstances did not prevent AT claiming asylum, and to rely on the fact of his previous political activity and his later claim for asylum as indicating that neither illiteracy nor learning difficulties had prevented AT from making a claim for asylum in France. The Home Secretary made no error by not considering the report from Dr Galappathie. That report was not provided to her (or indeed, written) until after the decisions and, that being so, she could not have taken it into account.

259. The real issue in this case concerns the application of paragraph 345A(iii)(b) of the Immigration Rules: the requirement that the asylum claimant "could have made an application for protection in a safe third country" and there were "no exceptional circumstances preventing such an application being made". The reasoning in the 5 July 2022 decision is two-fold: first that there was a period of 1 month between leaving Turkey and arriving in the United Kingdom and during that time AT could have made an asylum claim during his journey; secondly, that AT provided little detail about how or why the agent controlled him and prevented him from claiming asylum earlier.

260. The reasons for a decision that the requirements of paragraph 345A(iii)(b) are met can be stated briefly. The Home Secretary may, in appropriate cases, draw inferences from matters such as the period likely to have been spent in safe countries, and a failure to give adequate explanation in screening interviews, witness statements or other representations as to why the claimant could not claim asylum.

261. In the present case, the Home Secretary was entitled to conclude that AT knew about the possibility of claiming asylum and before arriving in the United Kingdom and had spent a sufficient time in safe third countries (including France) to have had the opportunity to make a claim for asylum. Thus, the Home Secretary was entitled to conclude that in this instance, the requirement in the first part of paragraph 345A(iii)(b) was satisfied. The real question, however, is whether she gave adequate reasons for concluding that there were no exceptional circumstances that prevented AT from claiming asylum. AT's representations and witness statement were that throughout the journey he was either locked up in a lorry or, when the lorry stopped, it was "not near civilisation", that he had no freedom to run or escape, and that the smugglers would watch him and the others in the group. He said that all he knew was that his mother had tried for him to arrange to get somewhere safe, but he was not sure what was happening or where he was going and that he feared the smugglers and was unwilling to ask questions. AT did say that at one stage the lorry stopped for two days. So far as France is concerned, AT said that he arrived, and the next day was told to get into the boat and was grabbed and pushed into the boat.

262. On balance, we are not satisfied that the reasons in the 5 July 2022 letter adequately address the points made by AT. We do recognise that there is a lack of detail in relation to the journey from Turkey to France. If that is the period that the Home Secretary considers establishes that the second part of paragraph 345A(iii)(b) was met, she would have needed to explain why that was the case. Similarly, in relation to the time spent in France, if that is the period relied upon, the Home Secretary needs to provide some reasoning as to why she considered that the circumstances were not exceptional and did not prevent AT making an asylum claim. From the reasons given, is unclear whether the Home Secretary concluded that the account given by AT, carefully analysed, did not demonstrate exceptional circumstances preventing him from making a claim in France (i.e., AT could have refused to get into the boat and contact authorities but did not do so, and that was more likely to be the result of a willingness to go along with the smugglers whom his mother had paid rather than any exceptional circumstances preventing him from making a claim in France). Or the Home Secretary may simply have dis-believed AT's account; or she might conclude that the circumstances were not exceptional circumstances in the context in which those words are used in paragraph 345A – i.e., that as a matter of principle, on a

correct interpretation of the Immigration Rules a person who pays smugglers to transport him through safe countries to the United Kingdom, does not comprise exceptional circumstances because any restriction on that person's ability to make a claim arises from the decision to pay smugglers to transport him to the United Kingdom. Or there may be some other reason. We do not consider that the 5 July 2022 decision letter adequately explains the reasons why, in this case, the Home Secretary concluded the requirements of paragraph 345A(iii)(b) were met. For this reason (only) we will quash the 5 July 2022 inadmissibility decision and remit the matter to the Home Secretary for reconsideration. The Home Secretary will need to consider the matter afresh, and properly explain her conclusion.

263. As the reasoning in the 5 July decision was essentially intended to be the reasons for maintaining the earlier 4 June 2022 decision, and as the reasoning is not adequate, it is sensible also to quash the earlier 4 June 2022 decision (for the reasons given above in relation to AAA and AHA). That will enable the Home Secretary to consider the matter afresh, taking account of all relevant material.

264. We consider that the 5 July 2022 decision refusing the human rights claim and certifying that claim as unfounded should also be quashed. The decision did not consider the evidence put forward. It is no answer to say that the inadmissibility decision and the human rights decision must be read together. As we have explained, each decision was taken by a different person in a different team. There is no indication in the human rights decision letter, and no evidence before this court, that the person who took the human rights decision first read the inadmissibility decision. In any event, the question of certifying the human rights claim as clearly unfounded is a different issue. It would not have been considered by the person who took the inadmissibility decision. The person who took the human rights decision would have to consider the evidence (or an adequate summary of it) to determine whether the evidence was such that no tribunal properly directing itself could allow an appeal. That has not happened in this case. Since the 5 July 2022 human rights decision replaced the 5 June 2022 decision, and its reasoning was intended to provide the reasoning for the refusal of the human rights claim and certification of it as clearly unfounded, the 5 June 2022 decision should also be quashed.

(6) AAM (Syria) (Claimant 8, CO/2032/2022)

265. AAM was born in Damascus in 2001 and is a Syrian national. He says that he left Syria as he would have been imprisoned or killed because of refusal to join the military.

(i) Arrival and detention in the United Kingdom

266. On 16 May 2022 he arrived in the United Kingdom, having travelled by small boat from France. He was detained, first at IRC Yarl's Wood and then at IRC Colnbrook.

267. On 18 May 2022 he attended a screening interview. Asked why he had come to the United Kingdom he is recorded as saying "Claim Asylum". He was asked about his journey to the United Kingdom and is recorded as saying: that he left Syria on 31 July 2021 and travelled to Libya by air and stayed there for 9 months; that he then

travelled by boat to Italy and stayed for 10 days there; and that he then went to France by train and stayed there for 10 days. He said the travel was organised by his family who paid $6,000 to a smuggler to take him to the United Kingdom.

(ii) The notice of intent

268. On 19 May 2022, AAM was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter noted that before AAM claimed asylum in the United Kingdom he had been present in, or had a connection with, Italy and France, and stated that could mean that his asylum claim would not be admitted to the UK asylum system. The letter further stated that AAM might be removed either to Italy or France, or that the United Kingdom might ask Rwanda if it was prepared, in principle, to admit him. The letter invited AAM to make written representations within seven days of the date of the letter on why his claim should not be treated as inadmissible, and why he should not be removed from the UK either to France or Italy, or to Rwanda. The notice said that, after that period, an inadmissibility decision could be made based on the evidence then available.

(iii) Representations

269. On 24 May 2022, Care4Calais referred AAM to Duncan Lewis. AAM spoke by phone with a case worker, gave details of his case, and formally instructed Duncan Lewis to make representations on why his asylum claim should be considered in the United Kingdom.

270. On 26 May 2022, Duncan Lewis (a) sent a letter setting out written representations; and (b) sent a pre-action protocol letter to the Home Secretary. The representations said that AAM had travelled to Libya, stayed there for 9 months and summarised alleged mistreatment he had undergone in Libya; that AAM subsequently travelled by boat to Italy where he stayed for 10 days and then to France where he also stayed for 10 days before travelling by boat to the United Kingdom. It was said that AAM recalled racist treatment in both countries but especially in France and did not seek protection there as he had not felt safe and lacked language skills and family ties. The representations stated that AAM "instructs that it was always his plan to travel to the UK to claim asylum" but that "he also did not feel safe in any of the countries that he was forced to spend time in". Next, it was contended that AAM should not be removed to Rwanda because he displayed symptoms of stress, depression, and anxiety, and of an as yet unassessed mental health issues, and had expressed suicidal ideation. The representations further contended that removal would be incompatible with AAM's Convention rights. The representations requested an extension of time to make further representations. Similar points were made in a pre-action protocol letter.

(iv) The inadmissibility decision letter of 6 June 2022

271. The decision on admissibility was set out in a letter dated 6 June 2022. The decision referred to representations having been made in the pre-action letter but did not refer to the written representations provided separately the same day. The Home Secretary concluded that AAM's asylum claim was inadmissible because AAM could have enjoyed protection in a safe third country but did not do so, and there were no exceptional circumstances preventing an asylum claim being made before AAM arrived in the United Kingdom. The Home Secretary relied on what AAM had said in

his screening interview – that he had travelled to Italy by boat and stayed there for 10 days and then travelled to France by train and stayed there for 10 days. The letter did not expressly refer to the part of the written representations or pre-action protocol letters that had stated that AAM had always planned to travel to the United Kingdom to claim asylum, or to his claim that he felt unsafe in Italy and France. The Home Secretary made a certificate under paragraph 17 of Schedule 3 to the 2004 Act.

272. On 6 June 2022, AAM was also served with directions for his removal to Rwanda on 14 June 2022. Those directions were cancelled on 10 June 2022.

(v) The claim for judicial review

273. On 9 June 2022, AAM was added as a claimant in case CO/2032/2022. He challenged the 6 June 2022 inadmissibility decision. Subsequently AAM was granted permission to add a challenge to decisions taken on 5 July 2022 (a) that his asylum claim was inadmissible; (b) that removal from the United Kingdom would not be a breach of his Convention rights; and (c) to certify his human rights claim. Those decisions are described below.

(vi) Further representations and evidence

274. On 9 June 2022, AAM made a witness statement. AAM said that he travelled by boat to Italy with about 420 other men; that he arrived at an island where Italian border guards helped him out of the boat and took his fingerprints, but that this was not part of an asylum application; he stayed in Italy for ten days, five days in quarantine and five days sleeping on the street. He said, "*I did not claim asylum in Italy because I did not have any family or friends there and I had always intended to go to the UK to claim asylum there*". He also said, "*I did not want to be alone in a place where I did not speak the language or have any community to join*". AAM said that he travelled to France and spent time in a migrant camp in Calais, and that the camp was attacked by gangs. He said, "*I did not claim asylum in France due to my experiences in the migrant camp, because I knew that France was discriminatory to Muslims, and I am a Muslim, and because I had always intended to claim asylum in the UK. I also did not have any friends or family in France*". He said he has several cousins in the United Kingdom.

275. On 1 July 2022, Duncan Lewis made further written representations on behalf of AAM. They referred to the racism, gang violence, and street homelessness which he experienced in France or Italy as amounting to exceptional circumstances that prevented him from claiming asylum in either country. Further representations were made in relation to the human rights claim.

276. Further, on 11 June 2022 a doctor prepared a report under rule 35 of the Detention Centre Rules. That records AAM's account of going to Libya in 2021, being detained by the militia and being tortured by being beaten on his feet with a stick. The report recorded that there were no scars on AAM's feet or body. The report stated that AAM's claim of imprisonment and beating in Libya is consistent with torture and

would need to be looked into further. For sake of completeness, we note that on 7 July 2022 (after the Home Secretary's decisions on 5 July 2022) AAM's solicitors sent the Home Secretary a copy of a report (dated 6 July 2022) from Dr Galappathie.

(vi) The inadmissibility decision of 5 July 2022

277. Like the letters described in the other claims, the inadmissibility decision of 5 July 2022 sent to AAM stated that it was to be read in conjunction with the earlier inadmissibility decision (which in his case had been dated 6 June 2022). The letter stated that the material provided by the UNHCR in the judicial review proceedings, AAM's witness statement, the representations dated 26 May 2022 and certain paragraphs of the judicial review claim form had all been considered. The decision did not refer to the representations of 1 July 2022.

278. The decision letter does not deal at all with the application to AAM of paragraph 345A(iii)(b) of the Immigration Rules. The letter only deals with the decision under paragraph 345C of the Immigration Rules. In these proceedings, the Home Secretary has provided no witness statement to explain why the decision letter did not address whether AAM's claim was inadmissible.

(vii) The human rights decision of 5 July 2022

279. The decision on the human rights claim was set out in a different letter, also dated 5 July 2022. As in the other cases referred to above, the human rights and inadmissibility decisions were taken by different persons working in different units in the Home Office. The human rights decision does not mention the material filed by the UNHCR in the judicial review claims. Rather, the decision letter considered the other evidence available, concluding that there was no risk that if in Rwanda, AAM would be treated otherwise than in accordance with the MOU and the Refugee Convention, and that AAM would be safe and would be able to pursue his asylum application and access adequate support in Rwanda. The decision considered AAM's personal circumstances and concluded that there would be no risk to his health given the terms of the MOU and the Home Secretary's assessment in May 2022 of the healthcare available in Rwanda. The letter further concluded that there was adequate medical treatment in Rwanda to address his care and treatment on arrival. The decision also contained the conclusion that removal to Rwanda would not entail unjustified interference with AAM's right to respect for family and private life as guaranteed by Article 8 of the Convention. The human rights claim was certified as clearly unfounded.

(viii) The challenges raised by AAM specific to his own circumstances

280. AAM makes the following specific challenges to the inadmissibility decisions of 6 June 2022 and 5 July 2022:

(1) the 5 July 2022 decision failed to have regard to the representations made on 1 July 2022;

(2) the 6 June 2022 decision was irrational or failed to consider relevant evidence as it did not deal with his specific reasons for not claiming asylum in Italy or France; and

(3) it was irrational for the Home Secretary to maintain reliance on her previous conclusions set out in the 6 June 2022 letter.

281. AAM challenged the human rights decision on the grounds that the Home Secretary did not have regard to the material filed in the judicial review proceedings by the UNHCR. He further submitted that the Home Secretary had applied the wrong test in terms of assessing the risk that he would commit suicide if removed to Rwanda; had given little or no weight to the rule 35 report and the evidence of Dr Galappathie; and had relied on the MOU and the availability of health care treatment in Rwanda when only limited weight ought to have been given to those assurances. In those circumstances, he submitted that removal would be a breach of Articles 3 and 8 of the Convention.

282. Mr Dunlop accepts that the 5 July 2022 inadmissibility decision does not address the application of paragraph 345A(iii)(b) of the Immigration Rules, and was taken without regard to the written representations dated 1 July 2022. His submission was that there was no need for the court to intervene because the Home Secretary proposes to take a fresh decision on inadmissibility. So far as concerns the human rights decision, his submission was that the Home Secretary had properly assessed the suicide risk and the position of AAM in relation to Article 8 of the Convention.

(viii) Conclusions

283. The 5 July 2022 inadmissibility decision is flawed and must be quashed. *First*, the representations made on 1 July 2022 were not considered. *Secondly*, the decision does not in fact contain any assessment of whether the requirements of paragraph 345(iii)(b) are met. There is no assessment of whether AAM could have claimed asylum in Italy or France and why it is considered that there were no exceptional circumstances preventing AAM making a claim.

284. For completeness, the decision of 5 June 2022 should also be quashed. Had that letter stood alone, it would just have been sufficient to demonstrate why the Home Secretary considered that the requirements of paragraph 345A(iii)(b) were met. AAM had spent 10 days in France and then 10 days in Italy and there were no exceptional circumstances preventing him from claiming for asylum. It might have been better had that letter included a slightly fuller explanation. But that is as may be. However, after that letter, the Home Secretary purported to reconsider the application of paragraph 345A(iii)(b) following further representations and AAM's witness statement. As we have explained, that reconsideration was entirely ineffective; the 5 July 2022 letter contains no reasons to explain why the 6 June 2022 decision on paragraph 345A(iii)(b) was maintained. In the premises, the preferable course of action is to quash the decisions of 6 June 2022 and 5 July 2022. This will permit the Home Secretary to reconsider the matter afresh in the light of all the representations and evidence. The Home Secretary accepts that she is proposing to take this course, but that is no reason, in this case, to refuse to grant relief. Neither the June nor the July decision has been withdrawn.

285. The decisions on the human rights claim and to certify it as clearly unfounded must be quashed because relevant evidence was not considered – i.e. the material filed by the UNHCR in the judicial review proceedings. That was available to the Home Secretary before she took the 5 July 2022 human rights decision. In large part, the conclusions

on the human rights claim rests on the premise that Rwanda will meet the obligations under the MOU, and generally on an assessment of the position in Rwanda. Those matters were addressed in the UNHCR evidence and the Home Secretary should have considered that material. The decision will be quashed and the defendant will have to consider the human rights claim, and the question of certification, in the light of all the relevant material including, if considered appropriate, the court's conclusions on the UNHCR evidence.

(7) NSK (Iraq) (Claimant 10, CO/2032/2022)

286. NSK was born in 1986 in Iraq. He is Kurdish and speaks Kurdish Sorani. He says that he worked as a security guard in a prison in Tikrit in 2004, alongside British and American military forces. Since then he says that he worked as a security guard working for the government of Iraq and the Kurdish regional government. He says that he lived with his wife and children. One day, he found his wife in bed with another man who then chased him and shot at him. He says that man was the body guard for his brother-in-law who is the head of intelligence for a Kurdish political party. He says that when he reported the incident to the police, his brother-in-law arranged for him to be kidnapped and he was attacked with a knife and sustained knife wounds to his hands. He says his brother-in-law arranged on a second occasion to kidnap him. He says that he fled Iraq. His senior officer gave him $3,000 and lent him a further $9,000. He used this money to pay an agent to enable him to leave Iraq. NSK says that he cannot read or write.

(i) Arrival and detention in the United Kingdom

287. NSK arrived by small boat from France on 17 May 2022. He was detained, initially at IRC Yarl's Wood and then at IRC Brook House from about 22 May 2022. He claimed asylum. He attended a screening interview on 18 May 2022, and was assisted by a Kurdish Sorani-speaking interpreter. The information provided by NSK to the court includes part of the record of the screening interview but not the whole of it. The sections dealing with his journey, and the reasons why he did not claim in another country, were not included. However, it is possible to work out what it was likely that NSK said from other documentation.

288. The detention records show that at Brook House NSK was told about the duty solicitor scheme as part of his induction on about 23 May 2022 (an interpreter was present on that occasion). In a witness statement made about 9 June 2022, NSK confirms that about two weeks earlier, he was given a card by staff at Brook House and told that a lawyer would contact him. He did not in fact speak to his solicitors, Duncan Lewis, until 8 June 2022.

(ii) The notice of intent

289. On 24 May 2022, NSK was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter noted that before NSK claimed asylum in the United Kingdom he had been present in, or had a connection with, France. It said that may have consequences as to whether his asylum claim would be admitted to the UK asylum system, and stated that he could be removed to France, or the United Kingdom

might ask Rwanda if it was prepared in principle to admit him. The letter invited NSK, within seven days of the date of the letter, to submit written representations on why his asylum claim should not be treated as inadmissible, and why he should not be removed from the UK to France, or to Rwanda. The notice said that, after that period, the Home Office could make an inadmissibility decision based on the evidence available to it.

(iii) Further material

290. On 27 May 2022, an "Immigration Request Form" was completed on NSK's behalf. The form stated that NSK wanted to claim asylum because he was a victim of torture. It said that he was trafficked through Turkey to Dunkirk. It says that six months previously NSK had been tortured by a person *"... who is now a British Citizen*" and that he wanted "*legal justice*". It referred to NSK's torture scars.

291. A rule 35 report dated 27 May 2022 was prepared by a doctor at the immigration detention centre where NSK was being detained. The report noted NSK's account that he had been tortured in his house; that a knife was used to his right eye; and that he had defended himself with his right hand. The report noted that there was a scar under NSK's right eye and on the fingers and wrist of his right hand. The report stated that the account may be consistent with torture; that NSK appeared to have been attacked without means of escape; and that NSK reported been psychologically affected by his attack and feared for his life if returned to Iraq. The report noted that NSK was currently stable in detention.

(iv) The inadmissibility decision of 6 June 2022 and the letter of 13 June 2022

292. The decision on whether NSK's asylum claim was admissible is in a letter dated 6 June 2022. The letter concluded that the claim was inadmissible because NSK could enjoy protection in a safe third country and there had been no exceptional circumstances that prevented him from making an asylum claim before arriving in the United Kingdom.

293. The letter recorded that that conclusion was supported by the following evidence:

> "On 18 May 2022, Home Office Officials observed when undertaking your initial contact and asylum registration questionnaire you stated that you left Iraq 1 month prior to encounter in the UK, using your official passport and travelled to Turkey, staying for approximately 5 days. You then stated that you travelled through unknown counties [sic] by car and foot before you ended up in Dunkirk, France You arrived in the UK by boat."

294. The form of the decision letter (a form seen in other cases too), is not helpful. It simply states the conclusion and then recites what was said at the screening interview. It does not relate the information received to the decision taken. Nevertheless, the implication is that the decision-maker considered that NSK had had sufficient time in a safe third country to make an asylum claim, and that there was nothing to indicate

that there had been exceptional circumstances that prevented NSK from claiming asylum during the course of his journey to the United Kingdom. The letter stated that it had been decided to remove NSK to Rwanda which was a safe third country for him. The decision was certified under paragraph 17 of Schedule 3 to the 2004 Act. Removal directions were issued for the removal of NSK to Rwanda on 14 June 2022. Those directions were ultimately cancelled following a decision by the European Court of Human Rights granting an interim measure under rule 39 of its Rules that he should not be removed to Rwanda.

295. On 8 June 2022, NSK instructed solicitors to act for him. They wrote to the Home Secretary on that date. A first witness statement was made by NSK on about 9 June 2022. By letter dated 11 June 2022, the solicitors provided a copy of the statement to the Home Secretary, stating that the witness statement demonstrated that NSK's asylum claim was not inadmissible as there were exceptional circumstances that had prevented him from claiming asylum in a safe third country. In the witness statement NSK stated that he left Iraq on about 17 April 2022, and travelled to Turkey where stayed for approximately 10 to 15 days. He says he left Turkey in the back of a lorry. He says that throughout the journey he was under the control of the agent to whom he had paid $12,000. In paragraph 11 of his statement, he said that he was unable to ask questions or discuss the journey and "*I decided that I would keep my head down and do what I was told to do*". In paragraph 12, he said that between Turkey and Dunkirk, they stopped at one place for approximately seven days and he and the others were provided with food, drink and accommodation by a charity. He said he did not know where that was (although in a later statement he said he suspected, but was not sure, it was in Italy). He said that, ultimately, he was taken by train and a van to Dunkirk, where he stayed for one day at a camp he called the jungle. He said he walked for 12 hours to the beach and boarded a boat, sailed for 2½ hours until someone on the boat contacted the coastguard who rescued them. He said that throughout the journey, he was under the control and acting on the instructions of the agent, and that he had no idea where he was most of the time "*other than the fact that I wanted to get to the UK to claim asylum and protection*".

296. On 13 June 2022, the Home Secretary provided a further letter responding to NSK's witness statement, and to a rule 35 report. This was, in substance, a further decision on whether NSK's asylum claim was inadmissible. The letter noted that NSK had said that he stopped in a place for seven days where he was provided with food, drink and accommodation by a charity. The letter concluded that NSK was not under the control of the agent for the entire journey. It noted that NSK had failed to give any reasonable explanation as to why he could not approach the charity for assistance in making an asylum application. The decision that the asylum claim was inadmissible was maintained.

(v) The claim for judicial review

297. On 10 June 2022, NSK was added as a claimant to claim CO/2032/2022. He challenged the Home Secretary's decisions that his asylum claim was inadmissible and that he should be removed to Rwanda.

(vi) Further representations

298. On 13 June 2022, solicitors for NSK sent a letter before action. A second witness statement was made by NSK on about 14 June 2022. In that, NSK asserted that it was incorrect to say that because he received charity support, he was not under the control of the agent for the entire journey. He stated that the agents were present the whole time when he was with the charity, and said "*essentially we received the support through the agents*". He said that he was unable to talk to anyone, and that he was threatened by an agent and told that if he spoke to anyone he would be killed, and he was told that he would be stabbed.

299. The Home Secretary was provided with two further documents. One was a four-page document dated 14 June 2022 provided by Steven Harvey, a former police officer of many years-experience who describes himself as an expert in international human trafficking and people smuggling. He commented, based on the account given by NSK in his first statement, on whether NSK's reliance on charity support for a seven-day period amounted to a break in control by the agent. In particular, he commented on paragraph 12 of that statement. Mr. Harvey stated that the account was consistent with what he described as the "*general people smuggling narrative*". He said it was his experience that migrants had no say in the process from the point that the fee was agreed to the point of arrival at their end destination. He further expressed the view that smugglers make use of legitimate services (such as the charity which provided food and accommodation). He said it was highly likely that what NSK described had been an example of this.

300. The second document, dated 14 June 2022, was prepared by Dr Aidan McQuade, the director of an organisation called Anti-Slavery International. He had been asked to comment on whether NSK's ability to access charity demonstrated that he was not under the control of an agent. Dr McQuade based his view on correspondence between NSK's lawyers and the Home Secretary, NSK's first witness statement, and a bundle of papers the contents of which are not identified. It does not appear that he met or spoke to NSK. The bulk of the report is, essentially, Dr McQuade's comments or assessment of what NSK said in his statement, measured against a book written by Dr McQuade and a United Nations guidance note. Dr McQuade expressed the view that social pressures from peers or from perceived authority figures, and also being in unfamiliar settings, can influence individuals and constrain how they act. He concluded that NSK's account described an example of what he called "constrained agency". Dr McQuade also commented on what he assessed to be vulnerability on the part of NSK because of what he calls his "situational vulnerability" (NSK being in fear of his life from his brother-in-law's henchmen), and "circumstantial vulnerability" because he had paid $12,000 to the agent to get him to the United Kingdom. He concluded that the circumstances would have led NSK to have a psychological dependency on the agent. He concluded that NSK described a set of circumstances which, in modern slavery guidelines, were reasons for assuming that a person remains under the control of an agent even when they apparently have an opportunity to escape. He concluded that the fact that NSK had access to a charity for a period at some point along his journey did not mean that, at the same time, he remained under the control of the agent.

301. On 1 July 2022, NSK's solicitors made further representations. These invited the Home Secretary to consider a range of documents including: the request of 27 May 2022; the rule 35 report; the reports of Mr Harvey and Dr McQuade; the submissions

made by NSK on 11 June and 14 June 2022; and the arguments advanced in the judicial review proceedings. Read carefully and as a whole, the 1 July 2022 representations repeated the essence what had been said in NSK's first and second witness statement, in the opinions of Mr Harvey and Dr McQuade and in the earlier written representations. The representations contended that NSK displayed signs of undiagnosed anxiety and depression, and that the rule 35 report had stated that his account was consistent with him having been tortured. The representations said that these vulnerabilities put him at risk of harm if he were to be removed from the UK. The representations contended that the inadmissibility decision was unlawful.

(vii) The inadmissibility decision of 5 July 2022

302. The Home Secretary's further inadmissibility decision is dated 5 July 2022. Like the other decision letters of that date, this one said that it should be read in conjunction with the Home Secretary's first decision letter (dated 6 June 2022). The letter records that regard had been had of the material filed by the UNHCR in the judicial review proceedings, the rule 35 report, NSK's witness statement of 14 June 2022, the request of 27 May 2022 and the submissions of 11 and 14 June 2002, and arguments in the judicial review proceedings. The letter did not refer to the 1 July 2022 representations.

303. In relation to paragraph 345A of the Immigration Rules, the letter said this:

> "Your witness statement states that you travelled from Turkey to France in the back of 3 or 4 lorries, on foot and in a cargo train and in a van. It says that you stopped in an unidentified country for approximately 7 days where you were provided with food drink, and accommodation by a charity organisation, and stayed in the "Jungle" in Dunkirk for approximately 1 day. You have claimed that paragraph 345A(iii)(b) is not applicable in your case because were not able to claim in asylum in France as you were under the control of an agent. You have provided two reports from Dr Aidan McQuade and Steve Harvey challenging the assertions in our letter dated 13 June 2022 wherein it was deemed that there were no exceptional circumstances preventing you from claiming asylum prior to coming to the UK.
>
> Your evidence now asserts that you were in a situation of "constrained agency" and had developed a dependency on your smugglers. You assert that your lack of knowledge of your environment and your rights subsequently prevented you from claiming asylum prior to arriving in the UK. It is noted that the reports of Dr Aidan McQuade and Steve Harvey were concluded on written evidence of your account only. While this new evidence is noted it is considered that for the reasons given in the letter of 13 June 2022, there were no exceptional circumstances preventing you from claiming asylum on route to the UK.
>
> Therefore, the previous conclusions drawn relating to paragraph 345A of the immigration rules are maintained."

304. The letter dealt with other matters, including the state of NSK's mental health, which had been said to be associated with his experience of torture, and concluded that there would be suitable health care and support available in Rwanda. The inadmissibility decision was maintained as was the decision to remove NSK to Rwanda. The certification of the decision was also maintained.

(viii) The human rights decision of 5 July 2022

305. On 5 July 2022, the Home Secretary provided a separate decision on NSK's contention that removal from the United Kingdom would be in breach of his Convention rights. As in the other cases, the human rights and inadmissibility decisions were taken by different officials in different Home Office units. The human rights decision in this case referred to the letter of 11 June 2022, and to NSK's first witness statement. The decision did not refer to the material filed by the UNHCR in the judicial review proceedings; we were told that the official who took the decision had not seen that material. The conclusion in the 5 July 2022 letter was that the removal of NSK to Rwanda would not be incompatible with his Convention rights. The human rights claim was certified as clearly unfounded.

(ix) The challenges raised by NSK specific to his own circumstances

306. NSK makes the following specific challenges to the decision that he was not prevented by exceptional circumstances from claiming asylum in a safe third country:

(1) the Home Secretary only had regard to his objective circumstances and did not consider his subjective state of mind;

(2) the Home Secretary dismissed the reports from Mr Harvey and Dr McQuade on the basis that their conclusions were reached on the basis of written evidence only, and did not address the substance of the reports;

(3) the Home Secretary failed to give adequate reasons for her conclusion; and

(4) if NSK's evidence that he was under the control of an agent throughout his entire journey is credible, then the Home Secretary could not rationally conclude that the asylum claim was inadmissible as there would exceptional circumstances preventing him from claiming asylum;

NSK challenged the human rights decision on the basis that the evidence filed by the UNHCR in the judicial review proceedings, which was provided after the initial 6 June 2022 decision, had not been considered.

(x) Conclusions

307. The Home Secretary did not provide adequate reasons for her conclusion that NSK's asylum was inadmissible. As we have already observed, reasons need not be elaborate, they can be briefly stated, and in all cases, it will be open to the Home Secretary to draw inferences from such primary circumstances as she accepts have prevailed.

308. In the present case, the key issue was the claim by NSK that he was in the control of the agents throughout his journey to the United Kingdom and whether that amounted

to exceptional circumstances that prevented him from claiming asylum. One aspect of that is the significance to be attached to the seven days when NSK and the others with him were provided with accommodation and food and drink by a charity. We have referred above to NSK's evidence on this point.

309. Overall, the Home Secretary needed to explain why she concluded that the conditions in paragraph 345A(iii)(b) were met. It is unclear whether the Home Secretary decided not to believe NSK's account. It may be that having considered his evidence as a whole, she did not believe that he was unable to ask the charity for help in claiming asylum if he had wanted to, or unable to board the boat in Dunkirk. She may have concluded that NSK did not claim asylum before reaching the United Kingdom simply because he wanted to come here to claim asylum. Or the Home Secretary may not have believed NSK. Or she may have concluded that the circumstances he described were not exceptional circumstances in the context in which those words are used in paragraph 345A: see the point we have made above at paragraph 262. Or there may be some other reason. On balance, we are satisfied that the 5 July 2022 decision letter does not adequately explain the reasons why, on the particular facts of this case, the Home Secretary concluded that the requirements of paragraph 345A(iii)(b) were met and the asylum claim was inadmissible.

310. We are unpersuaded that the Home Secretary acted irrationally in not accepting the conclusions stated by Mr Harvey and Dr McQuade. Each was asked to comment on a particular question: did he consider that the time spent with the charity meant that NSK was not under the control of the agent? That was an aspect of the question which, ultimately, the Home Secretary had to decide. The responsibility for that decision could not be usurped. The Home Secretary had to reach a conclusion on what had happened (both Mr Harvey and Dr McQuade based their views on the assumption that NSK's account was correct, albeit that they assessed it by what they say is their experience in matters of trafficking, smuggling and modern slavery); she was also entitled to form her own opinion on the significance (for the purposes of the application of paragraph 345A of the Immigration Rules) of what had happened (the question she had to address – were there exceptional circumstances which prevented NSK from making a claim for asylum before coming to the United Kingdom – is a different and broader question from that addressed by either Mr Harvey or Dr McQuade).

311. We do not consider that the Home Secretary failed to consider questions of subjective intent. Nor, on the particular circumstances of this case, would we have regarded the failure to have regard to the 1 July 2022 representations as a factor which would invalidate the inadmissibility decision of 5 July 2022. On a fair reading of those representations, they only made points that were already set out in the other material provided to the Home Secretary which she did consider. In the present case, we quash the inadmissibility decision of 5 July 2022 because we are satisfied that the reasons given are not adequate. As the 5 July 2022 decision was essentially the reasons for maintaining the earlier 6 June 2022 decision, and as the reasoning is not adequate, it is sensible also to quash the earlier 6 June decision (for the same reasons as those given in relation to AAA, AHA and AT). We do not consider that the 13 June 2022 letter contains a free-standing decision. Rather it contains supplemental reasons dealing with the representations made on 11 June 2022 and the Rule 35 report.

312. The 5 July 2022 decision refusing the human rights claim and certifying the claim as unfounded should also be quashed. The decision simply did not consider the evidence put forward. As we have said above, it is no answer to say that the inadmissibility decision and the human rights decision should be read together. They were taken by different individuals in different teams. There is no indication in the human rights decision letter, and no evidence before this court, that the decision-maker read the inadmissibility decision before taking the human rights decision. In any event, whether the human rights claim should be certified as clearly unfounded is a different issue. It would not have been considered by the official taking the inadmissibility decision. The official who took the human rights decision would have to consider the evidence (or an adequate summary of it) to determine whether the evidence was such that no tribunal properly directing itself could allow an appeal. That has not happened in this case.

(8) HTN (Vietnam) (CO/2104/2022)

313. HTN is a Vietnamese national born in January 1986. He says that he borrowed money to buy land in Vietnam. He says that, when he tried to sell the land, he discovered that he had been deceived and he did not in fact own the land. He says the people he had borrowed from asked for the money plus interest and threatened to kill him when he said he could not pay. He said he left Vietnam and took a fishing boat and ended up in Ukraine shortly before the war there began.

(i) Arrival in the United Kingdom, and detention

314. On 9 May 2022, HTN travelled by small boat from France to England. He was detained at IRC Yarl's Wood and then IRC Colnbrook. He claimed asylum. He had a screening interview on 11 May 2022. An interpreter was used by telephone but HTN says that the interpreter spoke a different way from the way he was used to, and his accent and the words he used were different and HTN found him hard to understand. In the record of his interview, HTN is recorded as saying he had no medical issues; that he left Vietnam three and a half months earlier and travelled to Ukraine and stayed there for 3 months; that he then travelled through unknown countries by train, car and foot but did not recognise where he was until he got to France; and that he then travelled to the United Kingdom on 9 May 2022. Asked why he did not claim asylum on his way to the United Kingdom he is recorded as saying "*I don't know anything; I was just following people*".

(ii) The notice of intent

315. On 12 May 2022, HTN was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter noted that before NSK claimed asylum in the United Kingdom he had been present in, or had a connection with, France, and stated that could have consequences as to whether his asylum claim would be admitted to the UK asylum system. The notice continued that if the claim was held to be inadmissible he could be removed to France, or the United Kingdom may ask Rwanda if it was prepared in principle to admit him. The letter invited HTN, within seven days, to submit written reasons why his asylum claim should not be treated as inadmissible or why he should not be removed either to France or to Rwanda. The notice said that,

after that period, the Home Office could make an inadmissibility decision based on the evidence then available.

316. Evidence from two Home Office officials confirms that when the notice was served on HTN, he had assistance from an interpreter who spoke Vietnamese. An officer was asked to assist HTN to arrange an appointment with the welfare officer. HTN requested a solicitor and interpreter. In a witness statement dated 10 June 2022, HTN said that no interpreter was present when he was given the notice of intent and said the contents of the letter was not explained to him. In a later witness statement, he confirmed that he meant that an interpreter was not present in the room but was available on the telephone, but HTN then said that he could not understand the interpreter enough to understand what he was told as the interpreter was speaking in a different accent or dialect from his and the interpreter used words he did not know. HTN said that he had been told he could get help to find a solicitor at the welfare office. He went there and asked for a solicitor and his details were given to a solicitor. The solicitor called twice, once to sign a consent form and once to take a statement. The first call lasted 20-30 minutes, the second about an hour and a half. After the second call, the solicitors did not contact him again. He spoke to the welfare office and said he needed a new solicitor.

(iii) The inadmissibility decision of 1 June 2022

317. The first inadmissibility decision was dated 1 June 2022. The evidence from the two Home Office officials is that when the letter and other documents were given to HTN, an interpreter explained what they were. The records indicate that HTN said that he had legal representation and was in contact with his lawyers.

318. The decision letter was in similar form to the letters in the other cases described above. So far as concerns the application of paragraph 345A of the Immigration Rules, the letter stated that HTN could enjoy protection in a safe third country and that no exceptional circumstances had prevented an asylum claim being made before HTN arrived in the United Kingdom. The letter continued as follows:

> "On 11/05/2022, Home Office Officials observed when undertaking your initial contact and asylum registration questionnaire you stated that you left Vietnam three and a half months prior to being encountered in the UK and travelled to Ukraine by car, train and walking, where you stayed for 3 months. You then stated you travelled through unknown countries by train, car and foot but couldn't recognise where you were until you arrived in France. You then stated you arrived in the UK on 09/05/2022 by boat."

The letter explained why removal to Rwanda was safe for HTN. It certified the decision under paragraph 17of Schedule 3 to the 2004 Act. Directions were fixed for the removal of HTN to Rwanda on 14 June 2022, directions subsequently cancelled on 14 June 2022.

(iv) Further representations

319. HTN was put in touch with new solicitors (Duncan Lewis) by a charity and he instructed them on 9 June 2022. They wrote to the Home Secretary on 9 June 2022 seeking cancellation of the removal directions. On 10 June 2022, HTN made his first witness statement. In that he said the witness statement was prepared with his lawyer who took instructions over a number of lengthy phone calls, using a Vietnamese-speaking interpreter. HTN set out his account of why he left Vietnam. He said when he arrived in Ukraine he decided to get a job there. He worked for about a week and then war broke out. He said that he followed Ukrainians who were leaving the country. He said he followed them for about a week and then got on a train and then a bus. He says that he was tired and slept for most of the bus journey. He got off the bus in France and walked through some forest and stayed in France for about a day. He then got on the boat.

320. On 27 June 2022, Dr Galappathie, a consultant forensic psychiatrist, prepared a report on HTN. He expressed the view that HTN was suffering from a severe episode of depression, generalised anxiety disorder, and post-traumatic stress disorder. He expressed the view that those conditions affect decision-making; that HTN did not present clinically as having a learning difficulty but he appeared to have difficulty understanding concepts such as asylum and removal and would need a lot of help in litigation.

321. Representations were made on 27 June 2022. They contended (at paragraph 18) that there were exceptional circumstances which prevented HTN claiming asylum in France: (a) the mental health conditions diagnosed by Dr Galappathie had a direct bearing at the time of HTN's journey through France such that he would have been less likely to seek out information and would make use of fewer resources and would be more risk-adverse; and (b) the circumstances of HTN's journey, fleeing the outbreak of war in Ukraine, without any knowledge of where he was going and unable to speak the language, meant he would not have been able to seek out the French authorities, present himself and claim asylum. The representations also attached a report from a Vietnamese linguistic expert.

322. On 1 July 2022, HTN's solicitors wrote again in connection with an application for bail. Attached to this letter were Dr Galappathie's report of 27 June 2022, the report from a Vietnamese linguistic expert, a witness statement provided by a case worker at Duncan Lewis and further material. In the written representations, the solicitors referred to paragraphs 8 to 18 of the earlier written representations which had set out the basis on which it was contended that there had been exceptional circumstances that had prevented HTN claiming asylum before his arrival in the United Kingdom.

(v) The inadmissibility decision of 5 July 2022

323. In this case too, the Home Secretary made further inadmissibility decision on 5 July 2022. The decision letter contained reference to the evidence filed by the UNHCR in the judicial review proceedings. It did not refer to the letter of 1 July 2022, or the attached documents, which had included Dr Galappathie's report, the report of the Vietnamese linguistic expert, and the statement from the caseworker at Duncan Lewis. The letter stated it was to be read in conjunction with the letter of 1 June 2022. The letter maintained the decision that the asylum claim was inadmissible. The letter stated that HTN had said in his witness statement that he was in France for one day and one night and, while he claimed that he could not have claimed asylum as he was

just following people, that did not amount to exceptional circumstances preventing him from claiming asylum. The certification decision of 1 June 2022 was also maintained.

(vi) The human rights decision letter of 5 July 2022

324. The Home Secretary treated HTN's representations as raising a human rights claim. By letter dated 5 July 2022, she refused that claim and certified it as clearly unfounded. The decision included consideration of Dr Galappathie's report but did not consider the UNHCR material filed in the judicial review claim. As in the other cases, these human rights and inadmissibility decisions were taken by different officials in different Home Office units.

(vii) The challenges raised by HTN specific to his own circumstances

325. HTN's application for judicial review was filed on 13 June 2022 (CO/2104/2022). In that claim HTN submits that the inadmissibility decision of 5 July 2022 was unlawful as the Home Secretary did not have regard to the representations in the 1 July 2022 letter or Dr Galappathie's report of 27 June 2022. He further submits that the refusal of the human rights claim, and certification of that claim as clearly unfounded was unlawful because those decisions had not been reached on consideration of the evidence filed by the UNHCR in the judicial review claim.

326. Mr Dunlop accepted that neither the representations of 1 July 2022 nor the medical report was considered when the inadmissibility decision was made. He said that the Home Secretary intended to take a fresh inadmissibility decision and a further decision on the human rights claim.

(viii) Conclusions

327. The inadmissibility decision dated 5 July 2022 is flawed and must be quashed. Representations were made on behalf of HTN and a medical report produced which, it was said, explained what were the exceptional circumstances that prevented HTN from claiming asylum in France. That material should (as the Home Secretary accepts) have been considered (together with all other material relevant to determine whether or not she accepts that that exceptional circumstance prevented HTN from claiming asylum). If the inadmissibility decision of 1 June 2022 had stood alone, we would not have quashed it. However, it is clear that the reasoning in the 5 July 2022 letter was intended to replace the reasoning justifying the decision in the 1 June 2022 letter. As that reasoning is flawed, the sensible course is to quash the 1 June 2022 inadmissibility decision as well.

328. The 5 July 2022 decision refusing the human rights claim and certifying that claim as clearly unfounded must also be quashed. In this case, as in the cases above, information relevant to the decision was not considered because, in error, it was thought relevant only to the inadmissibility decision. Since the human rights and inadmissibility decisions were taken by different officials there is no scope for any argument that what was known for the purpose of one decision must be taken to have been known for the purposes of the other.

(9) RM (Iran) (CO/2077/2022)

329. RM is a national of Iran born in 1996. He seeks to challenge three decisions: (1) inadmissibility decisions to the effect that he could have claimed asylum in a safe third country and there were no exceptional circumstances preventing him from doing so; (2) decisions refusing his human rights claim and certifying it as clearly unfounded; and (3) a decision of 15 July 2022 deciding that there were no reasonable grounds for concluding that RM was the victim of modern slavery.

(i) Travel to the United Kingdom and detention

330. RM left Iran and travelled to France. He then travelled to the United Kingdom on 14 May 2022. He was detained. He claimed asylum. On 15 May 2022, he attended a screening interview. In that interview he was recorded as saying that he left Iran about 40 days before, and travelled by car, on foot, and by lorry. He said that his uncle paid an agent. Having arrived in France he was put on a boat and travelled to the United Kingdom. Asked why he had not claimed asylum on route, he said that he followed the agent.

(ii) The notice of intent

331. On 16 May 2022, RM was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter noted that before RM claimed asylum in the United Kingdom he had been present in, or had a connection with, France, and stated that may have consequences as to whether his asylum claim would be admitted to the UK asylum system. The letter stated that if the claim was inadmissible he could be removed to France, or the United Kingdom might ask Rwanda if it was prepared in principle to admit him. The letter invited RM to submit written reasons within seven days of the date of the letter on why his claim should not be treated as inadmissible and why, if the claim was inadmissible, he should not be removed from the UK to France or to Rwanda. The notice said that, after that period, the Home Office may make an inadmissibility decision based on the evidence available to it.

332. By 23 May 2022, RM had instructed solicitors. On that day, they requested that the time for responding to the Notice of Intent be extended to 8 June 2022. An extension of time was granted. The solicitors were told this would be until 30 June 2022, but in an email sent on 31 May 2022 that was corrected and RM's solicitors were told that the extension had been for 7 days and had expired on 30 May 2022.

333. On 31 May 2022, RM's solicitors provided an initial response to the Notice of Intent. They explained that they had met their client on 24 May and 26 May 2022 with an interpreter. The letter set out further details of RM's journey to the UK. It stated that RM thought he was in France for about four days, and that RM had said that the agent used to say that all the people in his group had to help the agents or they would be killed or hurt. The letter stated that RM said that he saw lots of agents and they were carrying guns and a knife which they used to threaten the people in the group, and that in France, he had been told to help carry the boat that he and others were to travel on, but did not actually help and only pretended to help. The letter also made a claim that removal to Rwanda would breach RM's rights under Articles 3 and 8 of the Convention and also Article 4 as RM had been subject to exploitation and ill-treatment by smugglers.

334. On about 5 June 2022, a referral was made to the Home Secretary's Immigration and Enforcement Competent Authority to consider whether RM was a victim of modern slavery.

(iii) The inadmissibility, human rights and trafficking decisions of 6 June 2022

335. The Home Secretary's first inadmissibility decision was taken on 6 June 2022. The letter summarised the representations from the solicitors. It summarised the decision as one where RM's asylum claim was inadmissible and, subject to resolution of any other claims, RM would be removed to Rwanda as it was a safe third country for RM. The decision was certified under paragraph 17 of Schedule 3 to the 2004 Act. In relation to paragraph 345A of the Immigration Rules, the letter concluded that RM could have claimed asylum in a safe third country and there were no exceptional circumstances preventing him from doing so. It said this:

> "This decision is supported by the following evidence and reasoning.
>
> On 9 May 2022 you were detected by the Home Office at the juxtaposed control zone in Coquelles, France, while attempting to enter the UK clandestinely concealed in an HGV. You were detained and then removed from the control zone into the care of the French authorities, when you had the opportunity to seek protection.
>
> On 15/5/2022, Home Office officials observed when undertaking your initial contact and asylum registration questionnaire you stated that you left Iran about 40 days ago, by car and on foot. You then by 2-3 lorries through unknown countries where you then travelled to the UK by boat on14/05/2022 from France".

336. In a further letter dated 6 June 2022, the Home Secretary determined RM's claim that removal to Rwanda would be a breach of RM's Convention rights. The claim was rejected and was certified as clearly unfounded.

337. By a further letter dated 6 June 2022, the Home Secretary decided that there were currently no grounds for concluding that RM was a victim of modern slavery. The Home Secretary accepted that RM had been transported or transferred or harboured by means of threat or the use of force or other coercion. RM had said that he was told by the smugglers that the money paid for the journey did not include food, and if he carried boxes and did certain tasks, he would be paid, but only money, not food, was given for this and he had been made to carry the boat that transported him and others to the United Kingdom. RM had said that he was never told to commit any crimes or forced into any form of sexual exploitation. In summary, the Home Secretary took the view that RM undertook the tasks as a way of earning money from the smugglers and a matter of economic necessity rather than because he was being subjected to forced labour or exploitation consistent with the definition of modern slavery. RM had entered the situation voluntarily as a way to travel to the United Kingdom and the situation was dissimilar to a situation of forced labour. In addition, the defendant noted that RM had not actually participated in forced labour as he said that he did not carry the boat but only pretended to.

338. Removal directions were issued for the removal of RM to Rwanda on 14 June 2022. These were subsequently cancelled.

(iv) Further representations

339. On 11 June 2022, a report under rule 35 of the Detention Centre Rules was prepared by a doctor at the immigration detention centre where RM was detained. It noted RM's claim that he had been in a fight four years ago and sustained a cut to the top of the right eye and noted a scar was there. It also noted that RM claimed he had been tortured by traffickers, verbally abused, beaten, slapped and kicked in the place where he stayed in France (referred to as the Jungle). The doctor said that RM's injuries and narration of events was consistent with torture and would need to be investigated. The report noted that RM claimed that he had flashbacks and nightmares, and that the doctor had referred him to the mental health team for assessment.

340. On 13 June 2022, RM's solicitors wrote indicating that a preliminary psychological report on RM indicated he should not be removed to Rwanda. The report was prepared by Dr Curry who had carried out a phone assessment for RM, but had not read his medical records, had not met him and had never been involved in his clinical care. Dr Curry was not in a position to complete a full diagnostic assessment. Her provisional opinion was that it was too early to determine if RM met the criteria for post-traumatic stress disorder as a result of his treatment by smugglers. She said that RM was in a state which he considered life-threatening.

341. The Home Secretary treated the material as amounting to fresh representations on RM's human rights claim, and on 13 June 2022, gave further reasons for refusing the human rights claim which addressed, in detail, the points made by Dr Curry. The conclusion was that removal of RM to Rwanda would not amount to a breach of Article 3 of the Convention, and raised no further issue under Article 8 of the Convention. The Home Secretary considered that the material did not amount to a fresh human rights claim; she did not refer to the rule 35 report.

(v) The inadmissibility and human rights decisions of 5 July 2022

342. By letter dated 5 July 2022 the Home Secretary maintained the earlier (6 June 2022) inadmissibility decision. As in all other cases, the 5 July 2022 letter stated it was to be read in conjunction with the earlier decision letter. The letter noted the Home Secretary had considered the material filed by the UNHCR in the judicial review claim, the rule 35 report, and the preliminary psychology report of Dr Curry of 13 June 2022.

343. Surprisingly, the 5 July 2022 letter does not deal with the application of paragraph 345A(iii)(b) of the Immigration Rules, or why the Home Secretary concluded the exceptional circumstances proviso did not apply. The letter did explain that the report of Dr Curry had been considered, and that the conclusion reached was that appropriate medical care would be available for RM in Rwanda. The letter also dealt with other matters.

344. In a further letter of the same date, a further decision was made on the human rights. In this case too, the human rights claim and inadmissibility decisions were taken by different Home Office officials from different units. This letter corrected one error in

the 6 June 2022 letter (the erroneous implication that the UNHCR was working in Rwanda with the Home Office). It did not consider the material the UNHCR had filed in the judicial review proceedings. It did consider the evidence from Dr Curry. It stated that no concerns had been identified by immigration staff at the immigration detention centre. The conclusion was that the evidence did not demonstrate a real risk of a breach of a Convention right.

(vi) Further representations

345. On 9 July 2022, RM made a witness statement for the purposes of the judicial review claim that he had issued on 10 June 2022 (CO/2077/2022). In that statement, RM said that when in France he was put in a vehicle; and that the vehicle was stopped by police who passed him on to other police wearing different uniforms. RM said that he realised they were police but did not know what government they were representing. He said he was initially happy when he went with the second set of policemen as he thought they would protect him. However, they took him and a friend in a car back to the "jungle" (the camp where he had been staying). Later in the statement, he said he was asked why he had not claimed asylum in France or elsewhere and said he did not know where he was, and that he was under the control of the smugglers and was not allowed to do anything. He also said that he did not know what asylum was, or what a refugee was, or how to claim. He said it was only when he was in the immigration detention centre in the United Kingdom that he was given knowledge about the asylum process and how claiming asylum status would lead to refugee status. On 10 July 2022, Dr Katy Robjant provided another medical report.

(vii) The trafficking decision of 15 July 2022

346. On 15 July 2022, a second letter was sent dealing with the trafficking claim which considered RM's witness statement and the medical report. The conclusion was that RM had, in essence, been transported by means of threat or force but had not been transported for the purpose of exploitation. The letter included the following:

> "The smugglers advised you that the money paid by your uncle was for the journey only and therefore you owed them money for the food they were providing you with. You state within your account that you did not experience any force or threat in relation to the work you completed or that you worked under any menace of penalty. As you did not experience any force or threat when completing these tasks, it indicates that you did not work under any menace of penalty and completed these jobs as a way to earn money to purchase food from the smugglers. It is the view of the ICEA that you accepted this role due to pure economic necessity and a requirement for survival. The situation you describe is dissimilar to forced labour or any type of exploitation within the modern slavery definition.
>
> You also stated within your NRM referral that you were forced to carry a dinghy; however, you go on to confirm that you did not carry the dinghy, you only pretended to and attempted to sabotage the arranged journey.
>
> …

> Your uncle paid the people smugglers as a way to get you to the UK for your own safety. The actions that you state you were forced to do were part of the activities that were required as part of your journey to the UK which had previously been agreed. As mentioned above the International Labour Organisation (ILO) definition of forced work is 'All work or service which is enacted under the menace of any penalty and for which the person has not offered himself voluntarily'. As you entered this situation voluntarily as a way to travel to the UK this account is dissimilar".

(viii) The challenges raised by RM specific to his own circumstances

347. RM challenges the inadmissibility decision, human rights decision, and trafficking decision. Put broadly, he relies upon the generic challenges as to why Rwanda is not a safe country for him and that relocation to Rwanda would breach his ECHR rights (Grounds 2 to 7 of the Re-amended Claim Form). Those grounds are not established for the reasons given above. The inadmissibility decision is not therefore flawed by reason of the matters referred to in those grounds. We deal below with procedural unfairness (Ground 1 and part of Grounds 8 and 12), including specific points raised by individual Claimants.

348. Mr Drabble KC made the following specific challenges. *First*, that the trafficking decision was unlawful as it failed to take account of RM's account of events, misdirected itself when considering whether RM's experiences involved forced labour and failed to have regard to policy. (This is Ground 9 of the claim.) Further, in the skeleton argument, it was submitted that the Home Secretary had erred in considering that RM had not been subject to forced labour because he had not actually carried the boat but only pretended to do so.

349. *Secondly*, Mr Drabble submitted that in her further reasons for the human rights decision dated 13 June 2022 or otherwise, the Home Secretary had failed to consider RM's eligibility to be transferred to Rwanda considering the medical evidence (Ground 11). That included the report of Dr Curry and the rule 35 report. Further, although the decision of 5 July 2022 said that there were no concerns identified by immigration detention healthcare staff, this must have overlooked the rule 35 report.

350. In relation to the human rights decision, Mr Drabble submitted that the process was procedurally unfair (see below), and that the Home Secretary could not rationally or lawfully consider that the asylum process in Rwanda was effective, and that she failed properly to consider whether RM could access mental health treatment in Rwanda (Ground 8).

351. In relation to both the inadmissibility decision and the human rights decision, he submitted that RM could not lawfully be transferred to Rwanda because, on the medical evidence, the Home Secretary could not reasonably consider that he was not vulnerable, or that she failed to take reasonable steps to investigate or to allow RM to obtain definitive medical evidence (Ground 12).

352. Mr Dunlop submitted that the Home Secretary was entitled to conclude that what RM described did not amount to transportation for the purposes of exploitation, and there was no proper basis for considering that the trafficking decision was wrong. He submitted that proper consideration had been given to Dr Curry's report, and that the rule 35 report did not add anything. He accepted that the Home Secretary had not, when dealing with the human rights decision, considered the evidence filed by the UNHCR in the judicial review proceedings but, he said, that information had been considered when the inadmissibility decision was taken.

(ix) Conclusions

353. The trafficking decision did not fail to have regard either to RM's account of events or to any relevant policy. Nor did it rest on any error of law. The Home Secretary was fully entitled to reach the conclusion she did. The third element of the definition of modern slavery concerns whether the individual was being transported for the purpose of exploitation. That looks to the purpose for which the individual is being transported to the United Kingdom. It is primarily concerned with what will happen to the individual after he arrives in the United Kingdom. The Home Secretary was entitled to conclude that there was nothing to suggest that RM was transported in order to be exploited after he arrived in the United Kingdom. He was transported here because his uncle had paid for him to be taken to the United Kingdom.

354. So far as events on the journey are concerned, the Home Secretary was fully entitled to conclude that RM being told that he would be paid, or given food, if he completed certain tasks did not involve forced labour. Similarly, she was entitled to conclude that when he was told to help carry the boat which was to take him and others to the United Kingdom, that did not involve RM being transported for the purposes of exploitation and did not involve forced labour. The reality is that this was part and parcel of the journey to the United Kingdom that his uncle had paid the agents to arrange, not any form of exploitation of RM by the agents. There is no flaw in the reasoning underlying the decision that there were no reasonable grounds for concluding that RM was trafficked. The claim in relation to that decision (Ground 9 of the claim) is refused.

355. The human rights decision of 5 July 2022 suffers from the same deficiency that arises in relation to consideration of the evidence filed the UNHCR in the other cases and will be quashed for this reason. The person who decided to maintain the refusal of the human rights claim and certify it as clearly unfounded did not consider relevant material. The fact that a different decision maker, considering different issues, had regard to the material does not avoid the fact that the decision maker dealing with the human rights claim did not consider it. The human rights decision of 5 July 2022 will therefore be quashed. For sake of completeness, we were satisfied that the Home Secretary had, in her letter of 13 June 2022, adequately considered and addressed the matters arising out of Dr Curry's report.

356. The earlier decisions on the human rights claim (and to certify that claim) should also be quashed. The reasoning in the 5 July 2022 letter was intended to supersede the reasons in the 6 June 2022 letter and the 13 June 2022 letter. It would make no sense for those decisions to stand when the 5 July 2022 decision has fallen. The Home Secretary should now reconsider the matter taking account of all relevant available

material then available including, for example, Dr Curry's report and the rule 35 report.

357. The inadmissibility decision was not unlawful. The position is as follows. Save for the procedural fairness issue, the only specific ground of challenge was that the Home Secretary had failed to consider the medical evidence and RM's vulnerability. We do not consider that the policy documents establish that a person will not be relocated to Rwanda if he can establish that he is vulnerable. It will be a question for the Home Secretary to consider, case by case. In this case the Home Secretary did consider the medical evidence available at the time of the decision on 5 July 2022, including the rule 35 report and Dr Curry's report. She did not act unreasonably in not making further inquiries. The grounds of claim in relation to the 5 July 2022 inadmissibility decision, therefore, fail.

358. We note that the 5 July 2022 inadmissibility decision did not specifically address paragraph 345A(iii)(b) of the Immigration Rules, i.e., whether RM could have claimed asylum in a safe country, and whether there were exceptional circumstances preventing him from doing. However, there is no ground of challenge to the decision on that ground (and RM was granted permission to amend the claim specifically to raise any alleged illegality in relation to the 5 July 2022 decision). Further, the position was dealt with in the decision of 6 June 2022. After that, no further substantive representations on that issue appear to have been made before the 5 July 2022 decision. Thus, we do not regard the 5 July 2022 inadmissibility decision flawed for this reason. It may be that the witness statement of 9 July 2022 raises new points (as RM provides explanation of why he did not claim in France). If RM wishes to make further representations on this matter, he will need to make them to the Home Secretary.

(11) AS (Iran) (CO/2098/2022)

359. AS is a national of Iran who was born in July 1976. He has a son, and two daughters born in 2001. AS says he converted to Christianity and he and his son left Iran. AS and his son went to Greece, where, they say, they applied for and were granted asylum. They then went to Germany and claimed asylum there, but left before decisions were made: AS's son went to the United Kingdom; and about a month later, AS travelled to France.

(i) Arrival in the United Kingdom, and detention

360. AS arrived by boat in the United Kingdom on 9 May 2022. He claimed asylum. He was detained at an immigration centre. In his screening interview, he was asked if he had claimed asylum elsewhere. He said he had claimed in Greece and Germany; that his claim had been accepted in Greece, and he had been issued with a passport and ID card. He is recorded as saying that he did not wait to be interviewed in Germany so he left. He said that he spent about two years in Greece and about five or six months in Germany. He travelled by train to France and spent seven days there. He said that he wanted to come to the United Kingdom because it was easier to bring his family there.

(ii) The notice of intent, and representations

361. On 13 May 2022, AS was provided with a document headed "*Notice of intent – this is not a decision letter*". That letter noted that before he had claimed asylum in the United Kingdom AS had been present in, or had a connection with, all of Greece, Germany and France. The letter stated that that could have consequences on whether his asylum claim would be admitted to the UK asylum system. The letter also stated that AS could be removed to one of those countries, or the United Kingdom might ask Rwanda if it was prepared in principle to admit him. The letter invited AS to submit written reasons within seven days of the date of the letter on why the claim should not be treated as inadmissible and why he should not be removed from the UK, either to any of Greece, Germany or France, or to Rwanda. The notice said that, after that period, the Home Office may make an inadmissibility decision based on the evidence available to it at that time.

362. On 17 May 2022 AS instructed solicitors. On 20 May 2022 they made written representations and sent various documents including a witness statement from AS. They sought an extension of time to make further representations. They said that the Greek authorities granted asylum to AS and his son but did not provide further support, making it difficult for AS to consider a family reunion application. He went to Germany with his son and claimed asylum there. He began to experience low mood. His son went to France and made his way to the UK. AS subsequently did the same. The representations said that AS was experiencing significant mental health problems in detention, and that his son was in the UK and AS was emotionally reliant and attached to him. They said that removal to Rwanda would be unlawful as AS was severely vulnerable, had his son in the United Kingdom, and may face treatment in Rwanda and in the reception system such that removal there would breach his rights under Article 3 of the ECHR.

363. In his witness statement dated 18 May 2022, AS said his claim in Greece was processed but took two years to get to a decision. Whilst he was waiting, the Greek authorities did not help him find work or provide shelter but did provide him and his son with €140 to provide for themselves. He described his time in Athens. He was granted refugee status, but having seen how difficult life in Greece was, and the difficulty in bringing his remaining family from to Iran to Greece, he decided to leave. He moved to Germany one week after he obtained his Greek refugee status. He stayed in Germany for about five to six months and claimed asylum. His said his son went to France. AS went to France and stayed there for seven days before travelling to the United Kingdom. For completeness, it is clear from the witness statement of AS's son that he had left France and arrived in the United Kingdom on around 13 April 2022. He was already in the United Kingdom before his father left Germany.

364. On 28 May 2022, a report under rule 35 of the Detention Centre Rules was completed by a doctor at the immigration detention centre. The report noted that AS claimed he had been in a camp in Greece where he was threatened with a knife and abused from 2019 to 2020. He said he saw people being stabbed there. No scars were noted on AS. The doctor said that AS's narration of events was consistent with mental torture and would need to be investigated. He said that AS claimed to have flashbacks and nightmares and he had been referred to the mental health team for further assessment. That report was sent by e-mail to the Third Country Unit of the Home Office on the evening of 1 June 2022. The Unit stated that it would be considered and a response sent.

(iii) The inadmissibility and human rights decisions of 2 June 2022

365. By a letter dated 2 June 2022, AS was informed that his claim for asylum had been declared inadmissible and certified under paragraph 17 of Schedule 3 to the 2004 Act. The conclusion reached was that AS could have claimed asylum in a safe third country, and there had been no exceptional reasons preventing him from doing so. The letter pointed out that he had been granted asylum in Greece, and had claimed asylum in Germany, and had been in France for seven days and no exceptional reasons were provided as to why he could not have claimed asylum there. The letter stated the conclusion that there was no reason to believe that AS would, if removed to Rwanda, suffer inhuman or degrading treatment or that his asylum claim would not be properly processed. The letter considered AS's evidence of vulnerability and emotional reliance on his son, but concluded that Rwanda was a safe place for him and that it was appropriate to remove him there.

366. By a further letter of the same date AS's human rights claim was refused and certified as clearly unfounded. As in all the cases before us, the human rights and inadmissibility decisions were taken by different officials from different teams. The decision on the human rights claim was that there was no basis to conclude there was a real risk AS would be ill-treated in Rwanda (whether by reason of his asserted vulnerability, or otherwise). The reasons for that conclusion were set out. This letter stated that AS had said that he had been provided with an appointment to see a doctor on arrival at the detention centre "and the detention centre has not notified us of any concerns about your health". It appears that the Third Country Unit had not passed on the rule 35 report to the NRC Detained Barrier Casework Team that made the human rights decision. The decision accepted that many people in AS's position would, to an extent, show indicators of vulnerability, but concluded that AS had shown considerable resilience and assertiveness by travelling through various European countries where he had sought asylum and supported himself not always with the assistance of the authorities. The conclusion was that AS had not established he was exceptionally vulnerable such that, if removed to Rwanda, he faced a risk of treatment contrary to Article 3 of the Convention. The decision included the further conclusion that AS had not demonstrated he had an established family or private life in the United Kingdom falling within Article 8 of the Convention but, that even if such a family or private life did exist, interference with it consequent on removal to Rwanda would be justified as a necessary and proportionate means of ensuring the public interest in the effective maintenance of immigration controls.

367. Removal directions were issued for the removal of AS to Rwanda on 14 June 2022, but these were subsequently cancelled.

(iv) Further representations, and consideration of them

368. Further representations were made by AS's lawyers on 8 June 2022. Various material was provided, including the rule 35 report of 28 May 2022. The representations made express reference to this document. On or about 9 June 2022, AS's solicitors also provided a psychological report on AS prepared by Dr Olowookere. He stated that AS was suffering from a depressive disorder to a moderate degree, and post-traumatic stress disorder. The nature of the mental disorder was chronic, relapsing and remitting with a moderate degree. Dr Olowookere said that AS had described suicidal ideation

which had become worse lately but he had not attempted suicide as he talked to a priest and because of his religious faith.

369. By letter dated 12 June 2022, the Home Secretary said that AS's further representations in relation to his human rights claim had been "unsuccessful". The letter considered the representations and the rule 35 report which were said to show that AS was highly vulnerable. It considered the report by Dr Olowookere in detail, noting that his opinion was that AS was suffering from a depressive disorder of a moderate degree and post-traumatic stress disorder. The letter considered generally the position in Rwanda and whether it would be a safe country for AS. It considered his claim to private life. The conclusion was that the representations did not amount to a fresh claim as the further material did not give rise to a realistic prospect of success before an immigration judge. Consequently, the certification of the original refusal remained in place such that AS could only appeal the human rights decision from outside the United Kingdom.

370. On 12 June 2022, AS's son made a witness statement. He explained that he was with his father in Greece and described the problems that he said they had there. He described how life was in Germany and how he decided to travel to the United Kingdom. He said that he told his father he would go first and if it was safe his father could follow him. He went to France and had travelled to the United Kingdom before his father came to France. On 14 June 2022 AS made a second witness statement saying how close he and his son were and how they went through the dangerous journey from Iran together.

(v) The inadmissibility and human rights decisions of 5 July 2022

371. On 5 July 2022, the Home Secretary issued a new inadmissibility decision in which she considered the material filed by the UNHCR in the judicial review proceedings, the representations of 8 June 2022, the rule 35 report, the report of Dr Olowookere, and the witness statement of AS's son. The decision maintained her previous conclusion that the asylum claim was inadmissible, and the certification of that decision. The letter pointed out that AS had not been prevented from claiming asylum, and had done so in Greece. It considered AS's vulnerabilities, as identified in the rule 35 and the medical report, and concluded that they would not impact on AS's ability to engage with the asylum system in Rwanda, and that he would be able to access healthcare to address those needs in Rwanda. It also considered other matters.

372. By a letter dated 5 July 2022, the Home Secretary took a second decision on AS's human rights claim. As before, the human rights claim was considered by the NRC Detained Barrier Casework Team. This letter corrected an error in the earlier decision (concerning the fact that the UNHCR did not in fact work with the Home Office in Rwanda), but did not consider the material the UNHCR had filed in the judicial review claim.

(vi) The challenges raised by AS specific to his own circumstances

373. By a Claim Form filed on 13 June 2022, and amended subsequently, AS challenged the decision to certify the human rights claim as clearly unfounded and the decision to reject the further submissions as not amounting to a fresh claim. He contended the Home Secretary had not properly considered his mental health condition, or the interference with his/his son's right to family and private life. Ms Naik KC, for AS, submitted that the heart of the claim was the proposition that it would be reasonably open to a First-tier Tribunal judge to conclude that on the facts of this case, taken at its highest, AS had established his human rights claim. Thus, she submitted, the human rights claim ought not to have been certified.

374. AS also challenged the determination in the inadmissibility decision that Rwanda was a safe country for AS by reference to the generic issues concerning Rwanda and contended that neither decision had been taken fairly.

375. Mr Dunlop submits as follows: (a) the report of Dr Olowookere post-dated the decision on 2 June 2022 to certify the human rights claim; (b) in any event, neither that report nor the rule 35 report were capable of justifying a view that a First-tier Tribunal might reach a contrary decision because the evidence was not capable of demonstrating substantial grounds for believing that he faced a real risk of subjection to inhuman or degrading treatment in Rwanda; (c) AS was wrong to submit that this was a case where the mental condition arose out of actions for which the state was responsible, rather it was a naturally occurring illness; (d) a properly directed tribunal judge would be bound to conclude that the care available for AS in Rwanda would be adequate; and (e) on the article 8 claim, that the evidence of AS's son had not been before the decision-maker when the human rights claim was certified as clearly unfounded. All this notwithstanding, he accepted that AS's son's witness statement had not been considered in the context of the human rights decision and a further decision would need to be taken.

(vii) Conclusions

376. The 5 July 2022 decision maintaining the refusal of the human rights claims and certification as clearly unfounded is unlawful because it failed to consider the 12 June 2022 witness statement of AS's son as to the relationship between them. The Home Secretary has recognised that she must consider the matter again, but has not withdrawn her decision. Further, although not raised as a ground of claim in AS's case, the Home Secretary did not, for the purposes of the decision, consider the UNHCR material filed in the judicial review proceedings. That too, was in error. In the premises, the better course of action is to quash the 5 July 2022 decision.

377. The 2 June 2022 human rights decision should also be quashed. The Home Secretary had been provided with the rule 35 report but it was not considered for the purposes of this decision. Rather, the letter suggests the absence of any concerns about AS from the detention centre. Thus, and although not put in this way, the Home Secretary did fail to have regard to potentially relevant material. Whether or not that material would have made a difference is a matter that the Home Secretary should properly have considered It follows from the above, that the certification decision of 2 June 2022 was also flawed.

378. We have considered whether it would be appropriate on the particular facts of AS's case to conclude that it is highly likely that the outcome for him would have been

substantially the same even if the rule 35 report had been considered. The Home Secretary did consider that report as part of the further submissions on 13 June 2022, concluding that the representations did not amount to a fresh claim. However, we do not refuse relief on that basis in this case. The fact is that the supplemental reasons started from the premise that there was a valid refusal of the human rights claim which had been properly certified, whereas that was not the case as the 2 June 2022 decision had reached a conclusion without consideration of relevant material. In these circumstances the 2 June 2022 decisions should be quashed, together with the 13 June 2022 decision that fresh representations did not amount to a fresh claim, and the 5 July 2022 decisions which maintained the 2 June 2022 decisions.

379. Subject to the issue of procedural fairness, which we consider below, the grounds for challenging the lawfulness of the inadmissibility decision are the generic ones discussed above and they are not made out and those grounds do not invalidate the inadmissibility decision.

D. Decision on procedural fairness

380. To give effect to her Rwanda policy, the Home Secretary took a series of decisions (a) under paragraph 345A of the Immigration Rules (on inadmissibility); (b) under paragraph 345C of the Immigration Rules (to remove each Claimant to Rwanda having decided that Rwanda was a safe third country as defined at paragraph 345B of the Immigration Rules); and (c) to make a certification decision under paragraph 17 of Schedule 3 to the 2004 Act (on the basis that she holds the opinions specified at sub-paragraph (b) and (c)).

381. The Claimants submit that there were breaches of procedural fairness in their cases which rendered unlawful either the inadmissibility decisions or the decisions to refuse and certify the human rights claims, or both. For convenience, the complaints can be divided broadly into two categories. One of set complaints is that there was procedural unfairness at different stages such as the screening interview or the giving of the notice of intent. A second set complaints concerns whether, before decisions were taken, the Claimants were given a fair opportunity to make representations. Here, the points raised concern the time permitted for representations to be made, the information that ought to have been provided by the Home Secretary to permit a fair opportunity to make representations, and whether there was sufficient access to legal advice (again, for the purposes of permitting representations to be made). These complaints were pursued both by the individual Claimants, and also, in a separate claim (CO/2056/2022) by Asylum Aid, a charity that, among other things, provides legal representation to asylum seekers. Asylum Aid's overall submission was that the approach taken by the Home Secretary to taking the decisions required under the Immigration Rules and the 2004 Act was unfair because it was systemically flawed. The Claimants in all other claims adopted this submission. We will address this latter set of complaints first, since these matters provide the context for considering the complaints that are specific to each Claimant.

(1) Was there a fair opportunity to make representations?

382. The complaints rest on the decision-making process as described above at paragraphs 29 – 34: an asylum screening interview conducted a day or so after the claim for asylum had been made; a Notice of Intent, ordinarily issued shortly after the screening interview which requested representations within 7 days; decision letters (on inadmissibility and removal to Rwanda) issued shortly following the expiry of the period permitted for representations; and directions for removal to Rwanda issued at the same time as the decision letters. This sequence of steps can be gleaned from the Inadmissibility Guidance. The timetable for the steps is not set out in that policy, save that the 7-day period for representations is in the standard form Notice of Intent which is part of the Inadmissibility Policy document. However, a short timetable, as described above, was applied in practice for each of the individual Claimants: see the narratives for each Claimant in Section C of this judgment.

383. There is no dispute on the general principles. A duty to act fairly may be implied into a statutory framework. That depends upon the context, the nature of the decision and its impact on the individual, and other relevant factors. Promises made by the decision-maker and practices they adopt may give rise to a legitimate expectation that a decision will be taken in a particular way. Procedural fairness may often require that a person who may be significantly adversely affected by a decision will have the opportunity to make representations before the decision is taken. If an opportunity to make representations is to be effective the decision-maker may need to provide that person with information on "the gist of the case which he has to answer". See generally *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, per Lord Mustill at page 560; *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 per Lord Neuberger PSC at §179; *R (Citizens UK) v Secretary of State for the Home Department* [2018] 4 WLR 123 per Singh LJ at §§68 – 71; and *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 per Underhill LJ at §§45 and 59 – 60.

384. The focus of the Claimants' submission was the inadmissibility decision under paragraph 345A of the Immigration Rules, and the certification decision under paragraph 17 of Schedule 3 to the 2004 Act, and the decision taken in each case for the purposes of the removal decision under paragraph 345C of the Immigration Rules that Rwanda is a safe third country, as defined at paragraph 345B of those Rules. For the purposes of the decision under paragraph 17 of Schedule 3 to the 2004 Act the Home Secretary must be of the opinion that the State to which she proposes to remove the asylum claimant

> "… is a place –
>
> > (i) where the person's life and liberty will not be threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion, and
> >
> > (ii) from which the person will not be sent to another State otherwise than in accordance with the Refugee Convention."

(see sub-paragraph (c)). Under paragraph 345B of the Immigration Rules a country is a safe third country "for a particular applicant" if

> "(i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;
>
> (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;
>
> (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected in that country; and (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country."

385. The submissions for the Claimants were to the following effect.

(1) The procedure adopted by the Home Secretary, which provides for a short timetable for the decision-making process, is inappropriate for decisions under paragraph 17 in Part 5 of Schedule 3 to the 2004 Act. Decisions under Part 5 do not (unlike decisions under Parts 2 – 4 of Schedule 3) rest on any presumption that the State concerned will comply with the Refugee Convention. Rather, in each case where a decision is made under paragraph 17, that matter must be considered afresh.

(2) For the purposes of making representations in respect of proposed decisions under paragraph 17 of Schedule 3 and/or paragraph 345C of the Immigration Rules the person subject to the decision must have an opportunity to make representations on the criteria in paragraph 17(c) and in paragraph 345B. For that opportunity to be effective, the Home Secretary must provide the person with all the material she has relied on to decide that Rwanda is a safe third country (including the material she relied on to reach the conclusion that Rwanda would abide by its obligations under the MOU and the notes verbales).

(3) A 7-day period to make representations (the period referred to in the Notice of Intent) is far too short – that period could never be sufficient to prepare and submit representations on the matters at (2) above. Further, the Home Secretary's policy (as set out in the Inadmissibility Guidance) provides no flexibility – it says nothing as to the possibility that time permitted for representations could be extended.

(4) Representations on the matters required cannot sensibly be made unless each person has access to lawyers to help him prepare the representations.

(5) The consequence of the unfair procedures at (1) – (4) above is that any use of standard removal directions (which assumed a minimum of 5-days' notice of removal) would impede access to court. Insufficient time for representations having been permitted before decisions were made will mean that it will take longer to prepare applications for judicial review.

386. The Home Secretary accepted that procedural fairness required an opportunity to make representations. Her submission was that each of the individual Claimants had, by the time of the 5 July 2022 decisions, had a fair opportunity to make representations, and each had made representations. As to the position in principle, the Home Secretary's submission was initially summarised in a note dated 13 September 2022 provided (with our permission) after the hearing of the first set of cases. The material part was as follows

> "7. As to what procedural fairness requires in this context … the Secretary of State should inform the Claimant of, and allow him or her an opportunity to make representations on, the following matters:
>
> (1) The Secretary of State is considering whether the Claimant was previously present in or had a connection to one or more safe third States and what the name of each such State was.
>
> (2) The Secretary of State is considering whether to declare the asylum claim inadmissible and to remove the Claimant to Rwanda.
>
> (3) The Secretary of State considers that Rwanda is a safe country.
>
> (4) The Secretary of State will consider whether there is any reason specific to the Claimant why Rwanda would not be a safe third country in the individual circumstances of the Claimant."

Other parties filed written submissions in response to this Note. Those submissions accepted the premises quoted above, but contended that the Home Secretary had failed to meet that standard.

387. During the hearing of the Asylum Aid claim in October 2022, and following questions from the court, the Home Secretary revised her position: she no longer accepted that fairness required the opportunity to make representations on the matter at (3) above – i.e. on her conclusion that "Rwanda is a safe country". This change of position came towards the end of the hearing, and we permitted all parties (those who were present at the October hearing, and those who had been present at the September hearing) to file written submissions in response to the Home Secretary's revised position: see the Order made on 17 October 2022. In their written submissions, *AS* (CO/2098/2022) and the *AAA* claimants (CO/2032/2022) contended that it had been unfair to permit the Home Secretary to change her position at a hearing which they had not attended. We disagree. We note that, in fact, counsel for these Claimants were present at the hearing of the Asylum Aid claim. Those counsel did not attend in person, instead they had applied (and been permitted) to attend remotely, but that was a matter of choice for them and their clients. More importantly, those Claimants have had and have taken the opportunity to make written submissions in response to the Home Secretary's change of position.

388. In these cases, the overall decision affecting any of the Claimants covered, broadly, two areas. There was the decision on whether the Claimant's asylum claim was

inadmissible because he could have enjoyed sufficient protection in a safe third country (i.e. the decision under paragraph 345A(iii)(b) of the Immigration Rules). In practice, in the present cases, that involved consideration of whether the Claimant could have claimed asylum in one of the countries he passed through on his way to the United Kingdom and if so, whether there were exceptional circumstances which prevented him from making an asylum claim. Then there was the decision to remove the individual Claimant to Rwanda (paragraph 345C of the Immigration Rules), and to make the certificate under paragraph 17 of Schedule 3 to the 2004 Act. Each of these decisions required the Home Secretary to consider whether generally, Rwanda would meet its obligations under the Refugee Convention (see paragraph 345B(ii) – (iii) of the Immigration Rules) and, specifically whether it would treat the Claimant in accordance with the requirements of that Convention (see paragraph 345B(i) of the Immigration Rules, and paragraph 17(c)(i) – (ii) of Schedule 3 to the 2004 Act).

389. Against that background, the core of the procedural fairness obligation is two-fold. *First*, it is to enable the Claimant to have an opportunity to explain why his asylum claim should not be treated as inadmissible. In each of the present cases that meant giving the Claimant the opportunity to explain why he had not claimed asylum in the safe third countries (i.e. the various EU Member States) each passed through *en route* to the United Kingdom. Once representations on that matter had been provided the matter of whether those representations amounted to "exceptional circumstances preventing an [asylum claim] being made", was a matter for the Home Secretary's assessment. Contrary to the submission made by some of the Claimants, fairness did not require that the Claimants have the opportunity to make representations in response to some form of provisional view that such circumstances existed. What fairness requires in the context of a decision under paragraph 345A(iii)(b) of the Immigration Rules is an opportunity for the Claimant to provide any explanation he has for not making an asylum claim before reaching the United Kingdom. Fairness did not require the opportunity to make representations in response to the Home Secretary's evaluation (or provisional evaluation) of that explanation.

390. *Secondly*, procedural fairness requires a Claimant to have the opportunity to explain why, in his case, his right to life and liberty would be threatened if he were removed to Rwanda. That must be an opportunity for him to put forward reasons why his specific situation is such that he should not be removed to Rwanda. In the present cases, the Notices of Intent given to each Claimant requested representations on each of these matters (see the "standard form" Notice of Intent, in the Inadmissibility Policy at paragraph 33 above). Therefore, in the present context: (a) fairness did not require the Home Secretary to provide each Claimant with all the information she relied on to form her general opinion on Rwanda – for example that Rwanda meets the criteria at paragraph 345B(ii) – (iv) of the Immigration Rules; and (b) fairness did not require that each Claimant have the opportunity to make representations on those matters.

391. The Claimants have made several submissions to the contrary, but none is compelling. The primary point made is to the effect that, so far as concerns the paragraph 345C decision on removal taken by reference to the notion at paragraph 345B of what is a "safe third country", there is no material distinction between paragraph 345B(i) on the one hand, and paragraph 345B(ii) – (iv) on the other. This point has been put in a number of ways, either disputing that any real distinction exists between generic

matters affecting the whole country (i.e. criteria (ii) – (iv)) and matters particular to a claimant (criterion (i)) or, on the assumption the distinction does exist, disputing that the distinction is material because any generic failing (i.e. the country fails to meet any of criteria (ii) – (iv)) would inevitably prevent a removal decision under paragraph 345C, and so is a matter on which a claimant ought to be permitted to make representations. The further submission made by the Claimants rests on the Home Secretary's use of the power at Part 5 of Schedule 3 to the 2004 Act. As stated above, use of the power to certify under paragraph 17 of Schedule 3 to the 2004 Act is an essential component of the Home Secretary's Rwanda policy: see at paragraph 12 above. Absent such certification, a person who has made an asylum claim in the United Kingdom cannot be removed until the claim (and any appeal arising from it) has been determined. The submission here is consequent on the generic submission that in these cases the Home Secretary has used the paragraph 17 power for an improper purpose, and use of the paragraph 17 power requires a case by case decision on the criteria at paragraph 17(c) and therefore, each time the power is used there must be a fresh decision on whether, generally, Rwanda meets its obligations under the Refugee Convention. The Claimants contend this means that each Claimant must have the opportunity to make representations on the general position on Rwanda, not simply on matters relating to him that may affect his treatment were he to be removed there. The *AAA* Claimants go so far as to submit that if fairness does not require an opportunity to make representations on the general issue (either by reason of their submission on Schedule 3 to the 2004 Act, or on a proper application of paragraphs 345B and C of the Immigration Rules) that would "create a legal black hole".

392. A distinction does exist between the criteria at paragraph 345B of the Immigration Rules. Criterion (i) is formulated by reference to the asylum applicant's own circumstances and characteristics, criteria (ii) – (iv) are framed by reference to the general position in the country in question. The real issue is whether that distinction is material for the purposes of setting what is required by law for fair exercise of the paragraph 345C power to remove to a safe third country. Our conclusion is that the distinction between what an asylum claimant may be able to say about his own circumstances and how those might be relevant to whether he is removed to a particular country, and whether that country, generally, complies with its obligations under the Refugee Convention does determine the extent of the legal requirement of procedural fairness in this context. Procedural fairness requires that an asylum claimant should have the opportunity to make representations on matters within the criterion at paragraphs 345B(i) of the Immigration Rules. Those are matters relevant to any decision to remove (self-evidently) and matters the asylum claimant is uniquely placed to consider and explain. Matters known to the asylum claimant may be a relevant consideration; the Home Secretary must take it into account; and the duty to act fairly must apply to require the claimant to have an opportunity to make representations. The same applies to the criteria at paragraph 17(c) of Schedule 3 to the 2004 Act which are also directed to the specific position of the asylum claimant. Criteria (ii) – (iv) within paragraph 345B of the Immigration Rules are different, and require evaluation of whether, generally, the relevant country complies with its obligations under the Refugee Convention. Those matters will go well beyond the circumstances of any one asylum claimant; they are also criteria which the Home Secretary, given the resources available to her, is well-placed to assess. We do not consider that the duty that the Home Secretary act fairly in exercise of the power at paragraph 345C of the Immigration Rules requires an asylum claimant to have the

opportunity to make representations on these matters. It is not enough to say that criteria (ii) – (iv) are relevant to the decision to remove and since the asylum claimant is the subject of that decision he must have a legal right to comment on those matters before the decision is made. That is a non-sequitur. The scope of the obligation to act fairly is measured in specifics. This is not to say that any individual faced with the possibility of removal to a third safe country could not seek to persuade the Home Secretary that one or other of criteria (ii) – (iv) was not met, and that if such representations were made, the Home Secretary should have regard to them. But such representations would not be made in exercise of any legal right arising out of an obligation to ensure procedural fairness. Further, to the extent that an asylum claimant may wish to make such representations he has sufficient information about what such representations must be directed to, by reason of paragraph 345B itself. That explains the matters the Home Secretary must consider. The legal duty to act fairly does not require the Home Secretary provide him with all the material available to her; the legal duty to act fairly does not in the present context require that an asylum claimant be put in the position to second-guess the Home Secretary's evaluation on criteria (ii) – (iv).

393. The further submission, made by reference to paragraph 17 of Schedule 3 to the 2004 Act adds nothing. As explained above, the submission that the Home Secretary, when exercising her power under paragraph 17, may not resort to prior general assessment, rests on a false premise. That is not the point of distinction between the powers in Part 5 of Schedule 3 and those in Parts 2 – 4 of that Schedule. Nor does our conclusion on the scope of application of the duty to act fairly establish any "legal black hole". The decisions taken in exercise of paragraph 345C of the Immigration Rules are subject to challenge on an application for judicial review on all the usual public law grounds.

394. The conclusion on the scope of the right to make representations also addresses the other general complaints of procedural unfairness. For the purposes of taking a decision under paragraph 345B of the Immigration Rules (or any decision under paragraph 17 of Schedule 3 to the 2004 Act) the Home Secretary is not, as a matter of law, required to provide each Claimant with all material she has relied on to conclude that, generally, Rwanda will comply with its obligations under the Refugee Convention. The Claimants' submissions (a) that in no case could 7 days be a permissible period within which to require representations to be made; and (b) that effective representations could be made only with the assistance of a lawyer, both rested on the premise that the duty to act fairly required that claimants be given the opportunity to make representations on Rwanda's general compliance with Refugee Convention obligations and for that purpose had to be provided with all material available to the Home Secretary. When that premise falls away, as we have concluded it does, those submissions fall away with it.

395. Furthermore, it is also right to note for the future that the generic issues raised by the Claimants as to why relocation to Rwanda would be unlawful have now been determined by this court (subject to any appeal) and subject to any relevant new information emerging. Any issue of procedural fairness in future cases will necessarily be addressed to the facts of those cases and the reasons why the individual could not claim asylum on route to the United Kingdom and why removal to Rwanda would not be appropriate for that individual.

(2) Other procedural failures raised by the individual Claimants

396. The Claimants make several criticisms of some of the questions asked at the screening interview. They also complain about matters such as the lack of legal advice in advance of the interview or complain that the interview was rushed, or they did not understand the interpreter.

(i) Screening interviews.

397. The Claimants were people who had claimed asylum. They attended a screening interview. There was nothing unfair in them being asked questions about their journey to the United Kingdom and why they did not claim asylum before reaching the United Kingdom. Those were questions of fact which did not require legal advice to answer.

398. Necessarily, screening interviews occurred before the relevant team in the Home Office addressed the question of whether the asylum claim might be inadmissible – as explained in the Inadmissibility Guidance one purpose of the screening interview was to obtain information relevant to whether the claim might be inadmissible. There was nothing procedurally unfair in the information provided in the screening interview then being used to determine whether or not to send a Notice of Intent indicating that the individual's asylum claim might be declared inadmissible or that they might be removed to another country.

(ii) The notices of intent.

399. The Claimants complain about the use of the Notices of Intent. We do not consider that there is anything procedurally unfair about the fact that the claimants in these cases did not have legal advice before the notice of intent was issued. Nor do we consider that the information in notices provided was inadequate to permit relevant representations to be made, consistent with the Home Secretary's duty to act fairly. Each Claimant was told that he was a person who it was thought might have been able to claim asylum in a specific named country or countries, and that the Home Secretary was considering removing him to the named countries or to Rwanda. The information on which countries they had passed through was information that largely came from the Claimants themselves.

400. The sequence of events in each case is set out above (in Section C). AS (CO/2098/2022) complained about lack of disclosure, including not being provided with a record of the screening interview. We do not consider that there was any sort of procedural shortcoming; AS, who had already been granted asylum in Greece and had claimed it in Germany, was well-able to address the relevant factual matters, and indeed his lawyers made representations on his behalf.

(iii) Interpretation facilities

401. Some Claimants have criticised the interpretation facilities available, at the screening interviews, and when the Notices of Intent were given to Claimants (the evidence on these claims is disputed). This, it is said, impeded the ability to provide information and make representations. However, as set out above, each Claimant was, at some stage, told that he might be removed to Rwanda and either needed to see a solicitor or give reasons as to why he should not be removed there. Ultimately, each Claimant did

make representations (both in relation to the decisions on inadmissibility and removal and in support of any human rights claims that were raised), and did so effectively. Even if it is correct that some interpreters provided for some Claimants did not speak the correct dialect, such errors by the Home Secretary (if that is what they were) were not material, looking at the decision-making process in each case in the round.

402. Claimants also complained about the limited time available to make representations. We are satisfied that, given the nature of the representations that the duty to act fairly requires that the Claimants have the opportunity to make, a period of seven days to make representations was adequate. Claimants can seek further time (and can continue to make representations and submit evidence until the decision is taken). We do not consider that any of the Claimants has established any procedural unfairness in this regard.

(iv) Access to legal advice.

403. There have been criticisms of the lack of access to legal advice. Given the scope of the right to make representations in this context, we do not consider that procedural fairness requires that a person who is at risk of action under the Inadmissibility Guidance be provided with legal representation for the right to make representations to be an effective right. It is essentially a matter of fact as to why he did not claim asylum in a third country on route to the United Kingdom. It is essentially a matter of fact for him to give his reasons why he should not be removed to Rwanda.

404. We have, however, heard submissions on this issue. In deference to those submissions we make the following additional observations relevant to the circumstances of the individual Claimants.

405. The evidence is that each asylum claimant, as part of his induction when he arrives at an immigration detention centre, is informed of the duty solicitor advice scheme. In addition, there is evidence in some cases that welfare officers within the detention centres advised individual Claimants how to obtain access to a lawyer. On the facts of the individual Claimants in this case, five of the eight whose cases have been considered did have access to legal advice, and made representations before the expiry of the seven days for submissions expired or, in any event, before the decision was taken: see above in relation to AHA, AT, AAM, RM and AS. There is no basis in these cases for considering that there could have been any procedural unfairness arising out of the time limits for making representations or any issues with lawyers.

406. So far as concerns the other three, AAA was told that he might be taken to Rwanda and that he should contact a solicitor and the duty solicitor scheme was explained to him. NSK was told about the duty solicitor scheme. HTN complains about the lack of legal representation and says that if he had such representation he could have been referred for a medico-legal report. He accepts, however, that he was told he could get help to find a solicitor at the welfare office. He went there and asked for a solicitor and his details were given to a solicitor and he received two calls but after that there was no further contact. He told the welfare officer he needed a new solicitor.

407. AAA and NSK did not have legal representation to start with and did not make representations until after the inadmissibility decisions had been notified to them, respectively. HTN had had access to a lawyer but that lawyer had not made

representations for him and he had to seek a new lawyer. In all three cases, after the inadmissibility decision was taken, representations were then made with the assistance of lawyers. Nonetheless, we do not consider on all the evidence that there was any procedural unfairness in relation to the arrangements relating to the provision of the notice of intent or the arrangements relating to obtaining legal advice in the case of AAA, NSK or HTN. In each case steps were taken to inform each of them of the contents of the notice of intent, including with the use of interpreters, and they were told about means of obtaining legal representation. In any event, the inadmissibility decisions are to be quashed for other reasons. AAA, NSK and HTN have had lawyers instructed for some time and have made detailed representations on their cases. Those representations, and all other potentially relevant material, will need to be considered by the defendant. In all the circumstances, we do not consider that there has been any procedural unfairness and, in any event, we do not consider as a matter of discretion, that any remedy is called for in that regard.

(v) Should decisions have been delayed?

408. AAA submits that the Home Secretary should have delayed taking the decisions of 5 July 2022 to give him further time to obtain a further psychological report. Given that, for the reasons in Section C of this judgment, those decisions will be quashed it is not necessary to express a conclusion on this complaint.

409. AT submits that the Home Secretary should have informed him that she was proposing to take the 5 July 2022 decision and, if she had done so, he would have asked her to delay any decision to allow him to provide a psychological report that was in the process of being finalised.

410. We do not consider the Home Secretary was obliged to inform AT that a decision was about to be taken. The Notice of Intent had informed him that a decision could be taken after the period for representations had expired. That was sufficient warning.

411. In AAM's case, representations had been made and a Rule 35 report provided to the Home Secretary. In the representations made on 1 July 2022, at paragraph 27, AAM's solicitors stated that they were putting the Home Secretary "on notice" that they were working to obtain further evidence from a medical expert and hoped to have that available by 5 July 2022. However, it was not incumbent on the Home Secretary to wait for any further evidence that might (or might not) be produced.

412. In NSK's case, representations, and a rule 35 report had been received, and reports on trafficking from Mr Harvey and Dr McQuade. In a letter of 1 July 2022, the solicitors indicated that "further evidence will shortly be forthcoming" and referred to a scarring report, a psychiatric report, and potentially further reports from Mr Harvey and Dr McQuade. Here too, it was not incumbent on the Home Secretary to wait to see what, if any, further evidence might be produced.

413. The same applies in relation to RM. He had submitted medical evidence and there was no requirement to wait to see if further evidence would be submitted.

(3) The complaint that the Home Secretary's policy was "systemically" unfair

414. Asylum Aid's claim is that the procedure followed by the Home Secretary to take the decisions under the Immigration Rules and the 2004 Act was systemically unfair. The focus of that complaint is the 7-day period to make representations in response to the possibility of inadmissibility and removal decisions (14 days if the asylum claimant is not in detention). In substance the case put by Asylum Aid follows the complaints made by the individual Claimants in CO/2032/2022: see above at paragraph 385.

415. Ms Kilroy KC submitted that on analysis the arrangements involved six decisions concerning a range of factual and legal issues and the decision-making process was complex. The first three decisions involved whether the individual passed through a country or countries on route to the United Kingdom and could have claimed asylum there, whether that country or countries were safe and whether the journey to the United Kingdom was a dangerous one made after 1 January 2022. The fourth decision concerned the question of whether Rwanda was safe for the individual. The fifth and six decisions concerned decisions on any human rights claim and any certification that that claim was clearly unfounded.

416. Ms Kilroy submitted that the fourth decision involved, in each individual case, considering all the evidence about the general safety of Rwanda and the individual's own circumstances and submitted that the individual must have the opportunity of, amongst other things, obtaining expert evidence about conditions in Rwanda. The Home Secretary would have to provide all the information relevant to the assessment of the conditions and general safety in Rwanda. Where, as here, she relied on assurances such as those in the MOU or the *Notes Verbales*, the Home Secretary would need to provide all relevant information and the individual would have to have the opportunity to challenge the evidence before a decision on inadmissibility or removal was made. The individual would need to have the benefit of expert evidence to test whether there was a sound basis for believing that assurances would be fulfilled. As Ms Kilroy concisely summarised her submissions in oral argument, in relation to the fourth decision, the Home Secretary must provide to the individual everything on which she relied to demonstrate that Rwanda was safe and information on key matters that undermined that conclusion. Furthermore, that obligation continued in each individual case irrespective of what the court might rule in this case.

417. The premise underlying Ms Kilroy's submission was that the duty to act fairly required the Home Secretary to permit representations on all the criteria in paragraph 345B of the Immigration Rules and, so that effective representations could be made, required the Home Secretary to provide each Claimant with all material she relied on to reach the conclusion that, generally, Rwanda would comply with its obligations under the Refugee Convention and the MOU. Given the breadth of the information that needed to be provided, the issues that would arise would, she submitted, need expert evidence and legal representations, Ms Kilroy submitted the 7-day period to make representations was plainly inadequate, such that the Inadmissibility Policy (which includes the standard form Notice of Intent referring to the 7-day period to make representations) was unlawful. In addition, she submitted that the lack of time for representations prior to the decisions being made meant that standard form removal directions, allowing five days' warning of removal, would amount to

unlawful obstruction of access to a court. Since there was so little time to make representations in advance of the decisions the warning period prior to removal had to be longer to permit a proper opportunity for legal challenges (for example, seeking interim relief) to be formulated and filed.

418. The question of the lawfulness of policies or practices was considered, and the existing case law reviewed, by the Supreme Court in *R(A) v Secretary of State for the Home Department* [2021] 1 WLR 3931. That case concerned guidance for disclosing information about child sex offenders. The material part of the policy provided that if an application for disclosure raised concerns, police should consider if representations should be sought from the subject of the disclosure to ensure that the police had all necessary information to take a decision on disclosure. The argument was, amongst others, that the guidance created an unacceptable risk of unfairness (see paragraph 23 of the judgment of Lord Sales and Lord Burnett CJ with whom the other Justices agreed).

419. The Supreme Court considered that the test was whether the policy in question positively authorised or approved unlawful conduct by others. If the policy directed them to act in a way which contradicted the law, it was unlawful. That called for a comparison of what the relevant law requires and what a policy statement says officials should do. See generally, paragraphs 38 and 41 of the judgment. That approach applied where it was said that a policy gave rise to unfairness: see paragraph 65. If it were established in a particular case that there had been a breach of the duty of fairness in that individual's case, that would be unlawful. Where the question was whether a policy was unlawful, as is clear from paragraph 63 of the judgment:

> "… that issue must be addressed by looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen from the outset that a material and identifiable number of cases will be dealt with in an unlawful way."

The Supreme Court accepted that the approach set out by Lord Dyson MR at paragraph 27 of his judgment in *R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341, summarised the principles in a way that was consistent with the approach identified in its judgment. Lord Dyson had said this:

> "27. I would accept Mr Eadie's summary of the general principles that can be derived from these authorities: (i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid

> unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts. I would enter a note of caution in relation to (iv). I accept that in most contexts the threshold of showing inherent unfairness is a high one. But this should not be taken to dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals."

As the Supreme Court in *A* noted, however, the core question was whether the system had the capacity to react appropriately to ensure fairness (see paragraph 68).

420. So far as the principle of access to justice is concerned, the principle and its operation is described in *R (Unison) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos. 1 and 2)* [2020] AC 869, and *A* at paragraphs 80 to 83. One point to note in the present case is that the access to court submission is parasitic on the unfair system submission. Ms Kilroy accepted that if the period permitted for representations before the decisions was lawful, then removal directions within the standard form would be lawful.

421. We have, above, stated our conclusion that in these cases the obligation to act fairly did not require the opportunity to make representations on the criteria at paragraphs 345B(ii) – (iv) of the Immigration Rules or provision by the Home Secretary of the material she relied on to conclude, generally, that Rwanda would meet its international law obligations (whether under the Refugee Convention or under the MOU). That removes the premise for Ms Kilroy's unfair system submission. In consequence, the premise for the access to court submission also falls away. So far as may be relevant, we note that the individual Claimants in these cases were able to seek judicial review. We also note, in passing, that of the 50 individuals referred to in evidence filed on behalf of Asylum Aid, 20 had brought claims (which includes at least some of the claimants in the linked cases before us), the position in relation to eight was not known, and 22 had not brought claims. We do not rely upon those figures for our conclusion. But that evidence does not appear to us to demonstrate that the arrangements prevent access to justice.

422. Since the above is sufficient to dispose of Asylum Aid's claim, we need make only the following brief observations on further matters raised by Ms Kilroy during her submissions.

423. One part of that submission was that it should have been stated on the face of the Inadmissibility Policy that the 7-day period provided in the Notice of Intent to make representations could be extended. One part of the Home Secretary's submission was that extension of time could be requested and, as a matter of discretion, granted. On the facts of the various cases before us we have seen examples both of occasions when extensions of time were sought and granted, and of occasions when such requests were made but were refused. Clearly, it would have been preferable, purely from the perspective of practice, for the possibility of an extension of time to be expressly mentioned somewhere in the policy. However, the lack of such a statement is not sufficient to render the policy unlawful. Most importantly there is nothing in the policy that prohibits an extension of time in an appropriate case; the question is whether the system has the capacity to react appropriately to ensure fairness. In this case, the system does have such a capacity; a point demonstrated by

the extensions of time that were granted in some of the cases before us. Further, whilst it might as we have said, have been preferable as matter of practice for something to be said on the face of the policy, that is not in this case a condition of legality. Drafting perfection or something close to it is not the benchmark for the legality of the policy.

424. The next matter concerns the approach to evidence when the challenge, like the Asylum Aid challenge, is brought by an NGO, not by one or more persons directly affected by the operation of a policy. Ms Kilroy's submission was that because the complaint was a complaint of systemic unfairness, evidence of occasions when the system had not operated unfairly was irrelevant to the merits of her case. She based this submission on the judgment of the Court of Appeal in *R(FB) v Secretary of State for the Home Department* [2022] QB 185. That submission rests on a misunderstanding of the issues in that case.

425. *FB* was a challenge to the lawfulness of the Home Secretary's guidance document "*Judicial Review and Injunctions*" which, among other things, contained provisions on the process for removing persons without the right to enter or remain in the United Kingdom. In broad terms, the system provided: (a) for service of a removal notice with reasons for that decision; which (b) triggered a short notice period during which removal could not occur; followed by (c) a removal window within which the person could be removed at any time without further notice. The Court of Appeal considered two appeals, one from the Upper Tribunal, the other from the Administrative Court. The Court of Appeal identified a fundamental flaw in the policy. Once the person subject to immigration control was within the removal window he could be removed at any time. The very short notice period (either 72 hours or 5 days, depending on the type of case), meant that any representations that the person sought to make to prevent removal during the notice period would not, realistically, be the subject of a decision until the removal window was running and the person subject to immigration control was at risk of immediate removal. That, concluded the Court, was an error on the face of the policy. The combination of the short notice period followed by the removal window meant that there was "a real risk" that the right of access to a court would be impeded. All members of the Court emphasised that the finding of unlawfulness rested on an inherent defect on the face of the policy. The combination of the short time frame and the operation of the removal window inevitably created an impediment to access to a court. Thus, the conclusion reached by the Court of Appeal rested on that defect in the policy not, specifically, evidence of how the policy had operated in practice. In the context of that case evidence that in some instances the policy had not operated to permit removal when representations made remained outstanding did not address the inherent defect the court identified.

426. That conclusion, in the circumstances of that case, is no general prescription that a court must approach a systemic challenge without reference to evidence of what happens in practice. The significance attaching to such evidence will depend on the nature of the systemic failing alleged. It would be odd indeed if such evidence were to be disregarded in all cases, as a matter of course, particularly since system challenges are routinely made based on what are referred to as "case studies" – i.e. accounts by third parties, often solicitors, of problems they say their clients have faced. If such evidence is capable of supporting a systemic challenge, evidence of

occasions when the system has worked without difficulty must, in principle, be capable of being relevant to rebut the claim of systemic failing. All will depend on the nature of the systemic failing alleged, and how, in light of the principle set out by the Supreme Court in *R (A) v Secretary of State for the Home Department* (above) that failing should be evaluated. At times, Ms Kilroy's submission appeared to be the effect that while "case study" evidence will always be capable of supporting a systemic challenge, evidence of occasions where the system had not resulted in error was, in all instances, irrelevant. That is wrong. The approach in *FB* rests entirely on the nature of the systemic error in that case.

427. The final matter concerns the need for the present claim, brought by Asylum Aid. One striking feature of the present litigation is that there was no argument advanced by Asylum Aid that either could not or was not also advanced by one or more of the individual Claimants. But not only that. Following questions raised by the court it became apparent that a large proportion of the "case study" evidence concerned the circumstances of persons who were individual Claimants before the court, or who had commenced claims that had been stayed pending resolution of these proceedings, or had been discontinued for pragmatic reasons.

428. Although there may be occasions when organisations such as Asylum Aid may appropriately advance systemic challenges relying on "case study evidence", the present occasion is not one of them. A large number of those who have been the subject of inadmissibility and removal decisions have commenced proceedings. Difficult issues such as those raised in this case, will always be better decided in claims brought by persons directly affected by the decisions taken. The facts of their cases will, to the extent necessary, be properly established and provide a solid foundation for conclusions on the legal issues. The "case study" approach will in our view always be second best. The circumstances of the case studies can rarely be tested, often because the studies have been anonymised. That was a feature of Asylum Aid's evidence in these proceedings and it was only in response to questions raised by the court that it became apparent that many of those who were the subject of the case studies were Claimants in other cases filed with the court.

429. In the circumstances of these proceedings, Asylum Aid's claim was unnecessary. While in the period immediately following the Home Secretary's decisions to remove asylum claimants to Rwanda, it may have been appropriate for Asylum Aid to file its claim, once it became apparent that claims covering the same ground had been filed by Claimants who were the subject of those decisions it ceased to be appropriate for Asylum Aid to continue to pursue this claim. The mere fact that these decisions are matters of intense public controversy is not sufficient reason for organisations not directly affected by those decisions to present themselves as claimants.

E. Decision on standing

430. The Home Secretary contests the standing of three of the Claimants in CO/2032/2022: the Public and Commercial Services Union ("the PCSU"); Detention Action; and Care4Calais. None of these Claimants suggests it has standing to pursue either the complaints made under the Human Rights Act 1998 (none is a "victim" for the purposes of section 7 of that Act), or any of the complaints that are specific to the facts of the cases of any of the individual Claimants. However, each contends that it

does have standing to pursue all the remaining generic complaints, including the complaint that the Home Secretary's general approach when taking the inadmissibility and removal decisions, was procedurally unfair. All parties made their submissions on this issue by reference to the general statements of principle set out in the judgment of the Divisional Court in *R (Good Law Project and others) v Prime Minister and others* [2022] EWHC 298 (Admin) at paragraphs 16 – 29.

431. The PCSU is a trade union recognised to represent Home Office officials working in the Third Country Unit and the Detained Barrier Casework Team. The submission for the PCSU was that it had "associational" standing; its members include the civil servants who take inadmissibility and removal decisions on behalf of the Home Secretary. The PCSU submitted that its members were "directly affected" by the Home Secretary's Rwanda policy, and/or that the requirement, as part of their day-to-day duties as civil servants, that they take decisions on the application of the policy, had a "real impact on their working conditions and well-being".

432. These matters do not suffice to give the PCSU standing to challenge the decisions in issue in this case. The typical example of associational standing is when an organisation sues on behalf of its members who do, individually, have standing. For example, in a case where the claimant is a trade union, the challenge might be to a policy affecting its members' terms and conditions of work: see/compare, the facts in *R v London Borough of Hammersmith and Fulham ex parte NALGO* [1991] IRLR 249, per Nolan LJ at paragraphs 25 – 28. That is not this case. The PCSU's members are not "directly affected" by the Rwanda policy in any sense relevant for the purposes of bringing a claim for judicial review. Ordinarily, the persons "directly affected" by the decisions of public authorities are those who are the subject of such decisions (in these proceedings, the individual Claimants), not those such as the members of the PCSU, who take the decisions. On any analysis, PCSU's submission on standing amounts to the submission that any person working for a public authority has sufficient interest to challenge any decision taken by that public authority if she had some role in taking the decision. This would provide the PCSU (or any other trade union representing persons employed by a public authority) a roving mandate to commence judicial review proceedings directed to any decision of which at least some of its members disapproved. The submission was put in terms of the "well-being" of the PCSU's members, but the substance of the matter is disagreement with the Home Secretary's policy. It would not be uncommon for those who work in the public sector to disagree with one or more of their employer's policies; the stranger thing would be if no such disagreement existed. However, the PCSU's members do not, by reason of their place of work or duties, have any greater standing, in the legal sense of the words, than any other member of the public. As their representative body, the PCSU can be no better-placed. Furthermore, the individual claimants in CO/2032/2022 are able to, and have, raised all the grounds of challenge that the PCSU sought to raise. They claimed that those grounds, along with the other grounds specific to their individual cases, rendered the decisions in their cases unlawful. Those claimants are far better placed than the PCSU to bring such a claim. For that separate, and additional reason, we find that the PCSU does not have standing in case CO/2032/2022: see, generally, paragraph 62 of the judgment in *R (Good Law Project Limited) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin), [2021] PTSR 1251, paragraph 62 of *R (Jones) Commissioner of Police of*

the Metropolis [2019] EWHC 2957 (Admin), [20120] 1 WLR 519 and paragraph 28 of the judgment in the *Good Law Project* case.

433. The submission for Detention Action and Care4Calais is that each has surrogate standing – i.e., each has sufficient interest because they represent the interests of others who are not themselves well-placed to bring the action. In the circumstances of the present litigation, that submission is undermined by the presence (in the same claim, CO/2032/2022) of the individual Claimants. In this instance, the Home Secretary's inadmissibility and removal decisions were directed to a discrete group – i.e., the 47 men who were the subject of the original decisions, and who were given removal directions for Rwanda for 14 June 2022. We doubt, therefore, that the present context is one in which surrogate standing classically arises. Compare the example given by the Divisional Court at paragraph 20 of the judgment in the *Good Law Project* case, when organisations such as the Child Poverty Action Group have challenged changes to the rules on social security or other benefits, when the change is of universal application. In a context such as that, a notion of surrogate standing makes absolute sense, and is entirely consistent with the substance and purpose of section 31(3) of the Senior Courts Act 1981. While the class of persons affected by a decision of that type could in principle be identified, that class would be very wide, membership of the class might ebb and flow, and the practical impact of the decision on any single member of the class might not provide sufficient practical incentive for that person to start proceedings. The present context is very different. Each member of the affected class is the subject of separate decisions which in part rest on the merits of that person's own circumstances. Each member of the class stands to be significantly affected by those decisions. There is no argument raised in this case that cannot properly be pursued by any or all of the individual Claimants. A significant number have commenced claims for judicial review – either as claimants in CO/2032/2022 or as a claimant in any of the other claims now before us, or stayed pending these proceedings. We have no doubt that, on the facts of this case, where there are individual claimants raising all the grounds of challenge that those two organisations wish to bring, along with the other grounds specific to their individual cases, those claimants are better placed to bring this claim in the light of the case law referred to in paragraph 432 above. For that reason, neither Detention Action nor Care4Calais has standing to pursue the generic grounds. We do not need to deal with the question of whether they have standing on public interest grounds as they state at paragraph 727 of their written submissions that they do not fall within the category of public interest claimants.

434. One practical matter that Detention Action and Care4Calais pray in aid is that any claim commenced by a person who was subject of decisions by the Home Secretary could be frustrated if the Home Secretary either withdrew her decisions or withdrew removal directions issued consequent on such decisions. The risk that removal directions might be withdrawn is not to the point. Such withdrawal would affect any claim for interim relief (as was the position in this litigation – a number of the individual claimants now parties to CO/2032/2022 were added after the Home Secretary withdrew removal directions issued in respect of persons originally named as claimants in the case), but would not affect a claimant's ability to challenge the Home Secretary's substantive decisions. A decision by the Home Secretary to withdraw her substantive decisions (something which did not happen in this case, even when the 5 July 2022 decisions were made the May and June decisions were

not withdrawn) would go to the suitability of that person to continue as a claimant – the court will often set its face against determination of complaints that, having been overtaken by events, have become academic. But even if that is so, that would not mean that in those circumstances, an organisation such as Detention Action or Care4Calais was a suitable claimant for the purposes of determining those same legal issues particularly where there were, or would be likely to be other, individual claimants better able to raise all the potential grounds of challenge.

435. Nothing that we have said should be understood as suggesting that the work of organisations such as Detention Action or Care4Calais is anything other than important. It is also admirable that such organisations provide practical and financial support for persons who are subject to immigration control and wish to challenge decisions the Home Secretary has taken. Our only conclusion is that for the purposes of these proceedings, neither organisation has the standing to pursue matters as a claimant.

F. Disposal

436. All claims came before us as rolled-up hearings. We have heard full argument on them, and we grant permission to apply for judicial review on all grounds of the claims for all Claimants, save (a) where particular grounds in relation to particular Claimants have been stayed) and (b) where we have concluded that Claimants lack standing to pursue claims for judicial review (i.e., the PCSU, Detention Action, and Care4 Calais, all in CO/2032/2022).

437. The inadmissibility and removal decisions were not unlawful by reason of any of the generic grounds of challenge or by the general claims of procedural unfairness (i.e., the matters considered at Sections B and D of this judgment).

438. However, the way in which the Home Secretary went about the implementation of her policy in a number of the individual cases before us, was flawed. For the reasons above, primarily in Section C of this judgment, the following decisions (specifically identified in section C above) taken in relation to the following individual Claimants were flawed and will be quashed:

(1) AAA (CO/2032/2022), the decisions on inadmissibility and removal, and the human rights decision;

(2) AHA (CO/2032/2022), the decisions on inadmissibility and removal;

(3) AT (CO/2032/2022), the decisions on inadmissibility and removal, and the human rights decision;

(4) AAM (CO/2032/2022), the decisions on inadmissibility and removal, and the human rights decision;

(5) NSK (CO/2032/2022), the decisions on inadmissibility and removal, and the human rights decision;

(6) HTN (CO/2104/2022), the decisions on inadmissibility and removal, and the human rights decision;

(7) RM (CO/2077/2022), the human rights decision; and

(8) AS (CO/2098/2022), the human rights decision.

To this extent (only) the claims for judicial review succeed. If the Home Secretary wishes to apply her policy to any of these Claimants, she must first reconsider the decisions in all these cases.

ANNEX A

Claim No.	Claimant	Date filed	Status
CO/2032/2022	AAA and others	8-Jun-22	MOM/MYM stayed[i]; JM stayed. Remainder determined
CO/2072/2023	AB	10-Jun-22	Part stayed[ii] part determined
CO/2077/2024	RM	10-Jun-22	Part stayed[iii] part determined
CO/2080/2025	ASM	13-Jun-22	Part stayed[iv] part determined
CO/2098/2026	AS	13-Jun-22	Part stayed[v] part determined
CO/2104/2027	HTN	13-Jun-22	Determined
CO/2056/2028	ASYLUM AID	9-Jun-22	Determined
CO/2094/2029	SAA	13-Jun-22	Part stayed[vi]
CO/2095/2030	NA	13-Jun-22	Part stayed[vii]
CO/1371/2031	MB	19-Apr-22	
CO/1588/2032	F	3-May-22	
CO/2353/2034	BAH	1-Jul-22	Stayed by consent
CO/2541/2035	A	14-Jul-22	
CO/2103/2036	AB	13-Jun-22	Stayed[viii]
CO/2111/2037	AND	13-Jun-22	Part stayed, part transferred to KBD[ix]

CO/2112/2038	APY	13-Jun-22	Part stayed, part transferred to KBD[x]
CO/2113/2039	ADS	13-Jun-22	Part stayed, part transferred to KBD[xi]
CO/2125/2040	AAHR	14-Jun-22	Stayed[xii]
CO/2126/2041	OC	14-Jun-22	Stayed[xiii]
CO/2129/2042	AC	14-Jun-22	Stayed[xiv]
CO/2213/2043	A	20-Jun-22	
CO/2197/2044	O	20-Jun-22	Application to stay
CO/2346/2045	A	1-Jul-22	Stayed by consent
CO/2351/2046	A	1-Jul-22	Application to stay
CO/2507/2022	H	12-Jul-22	Application to stay
CO/2779/2022	J	2-Aug-22	Application to stay
CO/2814/2022	M	4-Aug-22	Application to stay
CO/2880/2022	A	8-Aug-22	Application to stay
CO/2987/2022	AAX	7-Aug-22	Application to stay
CO/3025/2022	A	19-Aug-22	Application to stay
CO/3044/2022	S	19-Aug-22	Stayed by consent

[i] Order 3 August 2022 at §3
[ii] Order 3 August 2022 at §5
[iii] Unlawful detention claim stayed: Order 3 August 2022
[iv] Order 3 August 2022 at §5. Unlawful detention claim also stayed
[v] Unlawful detention claim stayed: Order 3 August 2022
[vi] Order 3 August 2022 at §5. Unlawful detention claim also stayed
[vii] Unlawful detention claim stayed: Order 3 August 2022
[viii] Order 28 June 2022
[ix] Stay, Order 24 June 2022; transfer, Order 20 July 2022
[x] Stay, Order 24 June 2022; transfer, Order 20 July 2022
[xi] Stay, Order 24 June 2022; transfer, Order 20 July 2022
[xii] Order 15 July 2022
[xiii] Order 15 July 2022
[xiv] Order 15 July 2022