In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2021-LON-001003

In the matter of an application for Judicial Review

The King on the application of
OH

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Stephen Smith

HAVING considered all documents lodged and having heard Mr Alex Goodman and Mr Raza Halim of counsel, instructed by Duncan Lewis, for the applicant, and Mr Z. Malik KC, instructed by the Government Legal Department, for the respondent, at a hearing on 9 May 2022

IT IS ORDERED THAT:

(1) The claim for judicial review is dismissed for the reasons given in the attached judgment.

(2) The Applicant do pay the Respondent's reasonable costs of this claim, to be assessed on the standard basis if not agreed.

(3) Permission to appeal is refused. I have considered with care each of the proposed grounds of appeal. I refuse permission to appeal because, in my view none of them have a realistic prospect of success and there is no other compelling reason why permission to appeal should be granted.

Signed: *Stephen H Smith*

Upper Tribunal Judge Stephen Smith

Dated: **15 September 2022**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *15 September 2022*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2021-LON-001003

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

15 September 2022

Before:

UPPER TRIBUNAL JUDGE STEPHEN SMITH

- -

Between:

THE KING
on the application of OH
(ANONYMITY DIRECTION MADE)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr A. Goodman and Mr R. Halim
(instructed by Duncan Lewis Solicitors), for the applicant

Mr Z. Malik KC
(instructed by the Government Legal Department) for the respondent

Hearing date: 9 May 2022

- -

J U D G M E N T

- -

Judge Stephen Smith:

(1) By this application for judicial review, the applicant seeks to challenge a decision dated 2 July 2021 to refuse his application for permission to work, submitted as the dependent to his wife's claim for asylum. The basis for the challenge, which the applicant pursues on a single ground with the permission of Bourne J (sitting as a Judge of the Upper Tribunal), is that the Secretary of State's policy of treating asylum seekers and their

dependents differently for the purposes of granting permission to work is contrary to Articles 8 and 14 of the European Convention on Human Rights ("the ECHR").

(2) The Secretary of State's policy is contained in guidance issued to her officials. The version in force at the time of the decision under challenge was entitled *Permission to work and volunteering for asylum seekers, version 10.0, published for Home Office staff on 4 May 2021.* I shall refer to it in this judgment as "the PTW guidance".

(3) In this judgment, "dependents' access to the labour market" (and variations of it) means the access of dependents of asylum seekers to the labour market, and the term "dependents" means dependents of asylum seekers, unless otherwise stated.

(4) Bourne J granted the applicant anonymity. I consider that it is appropriate to maintain that order, primarily on account of the applicant's wife's status as a refugee.

FACTUAL BACKGROUND

(5) The applicant is a citizen of Iraq. He attended the College of Medicine at Baghdad University, qualified as a doctor in 2011 and worked for a time for the Iraqi army. He and his family fled Iraq to the UK in 2016. He claimed asylum, but his claim was refused and an appeal against the refusal was dismissed by the First-tier Tribunal on 10 March 2017. He made further submissions which were refused as a fresh claim, the appeal against which was dismissed on 24 September 2020. The applicant's wife and family had been listed as dependents to those claims.

(6) The applicant's wife, who is also a doctor, subsequently made a claim for asylum in her own capacity, based on her *sur place* activities. The applicant was listed as a dependent to that claim. While her asylum claim was pending, both she and the applicant applied for permission to work in the medical profession, on 11 and 6 April 2021 respectively. Since neither the applicant nor his wife met the criteria to be granted permission to work under the Immigration Rules concerning asylum seekers' access to the labour market, they each invited the Secretary of State to exercise discretion in their favour. The Secretary of State exercised her discretion in the case of the applicant's wife, and she was granted permission to work on 18 May 2021.

(7) By his request for discretion to be exercised in his favour, the applicant claimed that there were exceptional circumstances, namely medical qualifications and experience, which, he said, would provide much needed assistance to the NHS at this time.

(8) There appear to be two decisions refusing the applicant's application for permission
to work.

(9) The first is dated 14 May 2021. It states:

> "Thank you for your letter requesting permission to work.

> You have asked whether you make take employment while your application for asylum is being considered.
>
> I have refused your request for permission to work at this stage because you do not have an asylum claim as a main applicant, and there is no provision to grant permission to work to dependents of an asylum seeker even where the claim or further submission has been outstanding for more than 12 months.
>
> Therefore you may not take employment in the United Kingdom, nor may you be self-employed or engage in business or professional activity."

(10) By a decision dated 2 July 2021, the application was again refused, with the following operative reasoning:

> "I have refused your request for permission to work at this stage because you are not the main applicant on the asylum claim.
>
> Therefore you may not take employment in the United Kingdom, nor may you be self-employed or engage in business or professional activity."

(11) It is not clear why there were two, largely identical decisions. The Statement of Facts and Grounds says, at paragraph 9, that the applicant's permission to work application "was eventually refused on 2 July 2021" without further elaboration. The second decision is the one under challenge.

(12) Since this application for judicial review was brought, the applicant's wife was granted asylum. On 24 November 2021, the applicant, as her dependent, was granted leave to remain (and, therefore, permission to work) "in line" with her status. I address whether this renders the claim academic below.

PROCEDURAL BACKGROUND

(13) By an order dated 11 November 2021, Bourne J granted the applicant permission to bring these proceedings solely in relation to ground 4, which contends that the policy of treating main applicants and their dependents differently as regards permission to work breaches Article 8 ECHR read with Article 14 ECHR, giving the following reasons:

> "As to Ground 4, it is arguable that the Respondent's policy as to whether the dependants of asylum applicants are permitted to work is within the ambit of ECHR Article 8, and that such persons have a 'status', for the purposes of Article 14. The only justification advanced for the policy is the aim of 'protecting the domestic labour force'. Whilst the Tribunal will have to bear in mind the high threshold for interfering with the Secretary of State's judgment in matters of that kind, it is arguable that a lack of any discretion engages Article 14 and is not proportionate."

(14) Permission was refused on grounds 1 to 3 and the applicant did not apply to renew his application orally in relation to those grounds, which related to the exercise of discretion outside the Immigration Rules (ground 1), a failure to give sufficient reasons (ground 2), and a claimed failure to apply the PTW guidance (ground 3). In refusing permission, Bourne J said:

> "The other grounds are not arguable as it appears that the Guidance only concerns asylum applicants rather than dependents and therefore that there is indeed no discretion in favour of dependents."

LEGAL FRAMEWORK

(15) Section 1(2) of the Immigration Act 1971 ("the 1971 Act") provides that those without the right of abode in the United Kingdom may only "live, work and settle" in the United Kingdom "by permission":

> "Those not having [the right of abode] may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act."

(16) Section 3(2) of the 1971 Act makes provision for the Secretary of State concerning the creation of immigration rules, and a process for parliamentary oversight. It provides, where relevant:

> "(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*…" (emphasis added)

(17) The Secretary of State enjoys a residual discretion to grant leave, or vary conditions of leave outside the Immigration Rules or applicable guidance.

(18) Section 24B(1) and (2) of the 1971 Act makes it a criminal offence for a person to work if they do so at a time when they are disqualified from doing so by reason of their immigration status, and knew, or had reasonable cause to know, that they were so prohibited:

> "(1) A person ('P') who is subject to immigration control commits an offence if—
>
> - P works at a time when P is disqualified from working by reason of P's immigration status, and
>
> - at that time P knows or has reasonable cause to believe that P is disqualified from working by reason of P's immigration status.

(2) For the purposes of subsection (1) a person is disqualified from working by reason of the person's immigration status if —

(a) the person has not been granted leave to enter or remain in the United Kingdom, or

(b) the person's leave to enter or remain in the United Kingdom —

(i) is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

(iii) is subject to a condition preventing the person from doing work of that kind."

(19) Section 24B(9) of the 1971 Act makes provision to treat a person on "immigration bail" within the meaning of Part 1 of Schedule 10 to the Immigration Act 2016 ("the 2016 Act") as if the person had been granted leave to enter the UK, but provides that any condition as to the person's ability to work in the UK to which the person's immigration bail is subject, is to be treated as though it were a condition of the person's leave.

(20) Paragraph 2(1) of Schedule 10 to the 2016 Act provides that if immigration bail is granted to a person, it must be granted subject to one or more of the conditions there listed. Sub-paragraph (b) provides that such a condition may restrict their work, occupation or studies in the United Kingdom.

Permission to work for asylum seekers

(21) Paragraphs 360 and following in Part 11B of the Immigration Rules makes provision for asylum seekers to be granted permission to work:

"360 An asylum applicant may apply to the Secretary of State for permission to take up employment if a decision at first instance has not been taken on the applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in the Secretary of State's opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant.

360A If permission to take up employment is granted under paragraph 360, that permission will be subject to the following restrictions:

(i) employment may only be taken up in a post which is, at the time an offer of employment is accepted, included on the list of shortage occupations published by the

United Kingdom Border Agency (as that list is amended from time to time);

(ii)no work in a self-employed capacity; and

(iii)no engagement in setting up a business."

(22) Paragraphs 360B to 360E make further provision concerning the length of time for which such permission will be valid ("this shall only be until such time as his asylum application has been finally determined"), and the corresponding position of those who make further submissions under paragraph 353 of the Immigration Rules. Nothing in paragraphs 360 to 360E addresses the position of, or otherwise makes provision for, dependents of asylum seekers.

(23) I summarised the relevant provisions of the rules in the following terms in *R (on the application of C6) v Secretary of State for the Home Department (asylum seekers' permission to work)* [2021] UKUT 94 (IAC) at [31]:

> "Put simply, asylum seekers (a term I shall use in this context to include those awaiting a decision on further submissions under paragraph 353) may only access the labour market when their claim has been under consideration for at least 12 months, provided the delay was not their fault, and once granted, permission to work is restricted to roles on the SOL. The SOL is maintained by the Home Office, on the advice of the Migration Advisory Committee, an independent, non-departmental public body that advises the Secretary of State on migration issues."

(24) "SOL" means the "shortage occupation list", which was described by Bourne J in *R (oao IJ (Kosovo)) v Secretary of State for the Home Department* [2020] EWHC 3487 (Admin) in these terms, at [31]:

> "The SOL is a list of skilled jobs, many very specialised. It includes various categories of doctors, nurses and therapists, teachers in a few specified subjects, IT professionals, social workers, engineers, chefs with a certain level of expertise and artists of a number of specified kinds. The Migration Advisory Committee estimates that it covers about 1% of UK employment."

The PTW guidance

(25) Under the heading *About this guidance*, the PTW guidance states at page 4:

> "This guidance tells you about handling requests for permission to work from **asylum seekers, failed asylum seekers, and those who have submitted protection based further submissions**. It applies to applications which fall to be considered under part 11B, paragraphs 360 to 360E of the Immigration Rules and it explains the policy, process and procedure which must be followed when considering such

applications. It also covers volunteering." (emphasis added)

(26) See also page 5:

> "This guidance explains how caseworkers must consider applications under Part 11B, paragraphs 360 to 360E of the Immigration Rules for permission to work **from those who have lodged an asylum claim or further submission which remains outstanding**. It also provides guidance on the fact that asylum seekers can undertake volunteering at any stage of the asylum process." (Emphasis added)

(27) The PTW guidance later summarises the underlying intention of the policy reflected by the Immigration Rules concerning asylum seekers' access to the labour market and sets out practical instructions arising from the process of granting or refusing applications.

(28) At page 11, under the heading *Dependents*, the PTW guidance states:

> "There is no provision in the Immigration Rules to grant permission to work to dependants of an asylum seeker or failed seeker even where the claim or further submission has been outstanding for more than 12 months. Where permission to work is granted to the main claimant caseworkers need to make clear that this permission does not extend to any dependants."

(29) At page 16, under the heading *Application of discretion*, it provides:

> "Where the Immigration Rules are not met, it will be justifiable to refuse an application for permission to work unless there are exceptional circumstances raised by the claimant. If caseworkers consider that the circumstances of an application are exceptional they should refer the matter to a technical specialist to review whether the matter should be considered on a discretionary basis (under our residual discretion flowing from Section 3 of the Immigration Act 1971). Such discretion would allow a grant of permission to work, notwithstanding the requirements of the Immigration Rules. What amounts to exceptional circumstances will depend upon the particular facts of each case. A grant of permission to work on a discretionary basis is expected to be rare and only in exceptional circumstances.
>
> In cases involving victims and potential victims of trafficking the primary objectives of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) will be a relevant consideration, particularly with regards to their physical, psychological and social recovery. The caseworker should consider all the factual information and evidence submitted ensuring it is fully addressed particularly where a decision has been taken to consider the application on a discretionary basis."

Discrimination contrary to Article 14 ECHR

(30) Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his
> home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(31) Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

SUBMISSIONS

(32) The hearing before me lasted for a full day with detailed oral and written submissions. What follows here is necessarily only a summary of the submissions advanced by each party.

(33) Mr Goodman sought to characterise the position concerning the access to the labour market enjoyed by asylum seekers and their dependents as being one whereby work is prohibited by condition, rather than granted by permission. The immigration bail regime contained in Schedule 10 to the 2016 Act creates a *sui generis* form of leave to remain, with no set conditions. Mr Goodman submitted that, since a positive decision is required by the Secretary of State to impose a work restriction as a condition of immigration bail, the default position is that whether an asylum seeker or a dependent enjoys the right to work is an issue that is "at large", and not automatically subject to a restriction. In Mr Goodman's submission, the distinction between the right to work being prohibited by a condition, rather than granted by permission, is a crucial feature of the post-2016 Act legal landscape with which the PTW guidance fails to engage. But for a positive decision of the Secretary of State to restrict their right to work, asylum seekers and their dependents are not subject to any restrictions on their underlying ability to work and enjoy the ability to do so without restriction.

(34) Relying on *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, Mr Goodman submitted that the PTW guidance was therefore apt to mislead decision makers. It failed to refer to the Secretary of State's discretion. It was based on the erroneous premise that positive provision for dependents' access to the labour market had to (and yet could not) be made under the rules, rather than such permission being restricted by a discretionary power to impose conditions as part of a grant of immigration bail. That explained, he submitted, why the express

focus of the PTW guidance was on asylum seekers and not their dependents, as the guidance was based on the incorrect footing that permission to work was prohibited by condition rather than granted by permission.

(35) As to Article 14 ECHR, Mr Goodman submitted that dependents' access to the labour market enjoyed "more than a tenuous connection" to Article 8(1) private life rights, to adopt the terminology of paragraph 104 of *R (JCWI) v Secretary of State for the Home Department* [2020] EWCA Civ 542. Even dependents of asylum seekers enjoy the ability to engage in voluntary work, thereby linking them to the labour market in any event. Further, in *IJ (Kosovo)*, Bourne J held that the claimant asylum seeker's ability to access the labour market was within the ambit of Article 14. Asylum seekers and their dependents are in an analogous situation for the purposes of Article 14 and, as conceded by the Secretary of State, treated differently on account of their "other status". There was no justification for the difference between the applicant and his wife; both were qualified medical practitioners. Any justification the Secretary of State purported to rely on merely went to the perceived desirability of the underlying policy, not the justification of the difference in treatment (see the discussion of Dr Miv Elimelech's evidence at paragraph 105, below). The decision was disproportionate.

(36) For the Secretary of State, Mr Malik KC relied on his skeleton argument dated 22 April 2022, which addresses the four questions identified by Bourne J in *IJ (Kosovo)* pertaining to discrimination under Article 14 ECHR. He submitted that, in contrast to the position concerning asylum seekers under the approach adopted by Bourne J in relation to the claimant in *IJ (Kosovo)*, dependents have no underlying access to the labour market. The 1951 Refugee Convention and the Immigration Rules each recognise the qualitative distinction between primary applicants for asylum and dependents, and in contrast to primary claimants for asylum, their dependents do not have any treaty-based entitlement to access the labour market. He relied on the observations of Hickinbottom J (as he then was) in *R (Rostami) v Secretary of State for the Home Department* [2013] EWHC 1494 (Admin) at [111] that "we are simply not in Article 8 territory here" and submitted that that demonstrates the hurdle the applicant has to demonstrate to satisfy that his position as a dependent is even within the 'ambit' of Article 8. Mr Malik recognised that *Rostami* concerned the engagement of Article 8, rather than its ambit, but submitted that it nevertheless demonstrated the gulf between the applicant's contentions, and the reality of the scope of the rights guaranteed by Article 8.

(37) Responding to Mr Goodman's oral submissions concerning the impact of the 2016 Act immigration bail regime, Mr Malik submitted that they went beyond the restricted grant of permission by Bourne J. The applicant had not pleaded a general common law challenge to the PTW guidance by reference to the criteria in *A* and had not applied to renew the grounds upon which permission was refused on the papers. In any event, Mr Malik submitted that the applicant's submissions misunderstood the character of a grant of immigration bail. The mere absence of a condition of immigration bail prohibiting work does not amount to a positive entitlement to do so.

DISCUSSION

The issues to be resolved

(38) My analysis will address the following issues:

a. Whether the claim is academic;

b. Scope of the challenge, by reference to the ground for judicial review upon which the applicant enjoys permission;

c. Whether the Secretary of State's "policy of treating main applicants and dependents differently as regards permission to work breaches Article 8 read with Article 14 ECHR".

Is this claim academic?

(39) Given the applicant now enjoys permission to work on account of his wife being recognised as a refugee, it could be said that he has already secured the relief he sought by bringing this application through other means. However, neither party sought to contend that the claim was "academic", and both invited me to address the substantive arguments advanced in the proceedings. While there have been a number of cases addressing the position of asylum seekers' permission to work, it does not appear that the issue insofar as it relates to dependents has been addressed on the basis challenged by the applicant in these proceedings, yet potentially large numbers of individuals are affected. The issues raised in this judicial review are, in principle, capable of affecting other such cases, and the resolution of the claim does not turn on facts unique to this applicant. I therefore exercise my discretion to hear and determine the claim on an exceptional basis, pursuant to the guidance in *R (oao Zoolife International Limited) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) at paragraph 36. My analysis will refer to the applicant as though he does not enjoy the right to work, addressing the position he was in immediately before this post-permission development.

Scope of the challenge: procedural rigour

(40) The applicant enjoys permission to make this application for judicial review on the discrete and limited basis set out in ground 4 at paragraphs 27 to 38 of the Statement of Facts and Grounds. Ground 4 as pleaded focusses on Articles 8 and 14 of the ECHR: whether dependents' right to work is within the ambit of Article 8; whether there is a difference in treatment between asylum seekers and their dependents in relation to accessing the labour market; and whether there is an objective and reasonable justification for the difference in treatment. Although at paragraphs 10 to 13 of the Statement of Facts and Grounds, in Part D entitled *Legal Framework*, Mr Halim, who settled the grounds, outlined the offence-creating provisions of the 1971 Act and the immigration bail regime now contained in the 2016 Act, nothing in ground 4 as pleaded draws on those provisions. Mr Goodman's oral submissions before me went considerably beyond the limited scope of permission, as correctly identified by Mr Malik in his oral submissions.

(41) Although paragraph 28 of the Statement of Facts and Grounds quotes one aspect of the criteria enunciated in *A* for establishing whether a policy adopted by a public authority is lawful, paragraph 63 of *A*, that does not transform ground 4 into the territory of a broader, general common-law challenge of the sort encompassed by Mr Goodman's broad submissions. The extract from paragraph 63 of *A* relied upon by paragraph 28 of ground 4 was as follows, in italics:

> "The test for whether a policy is unlawful is '*whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way*'."

(42) Ground 4's reliance on the above extract was in the context of setting up the substantive challenge contained in that ground, namely whether the policy of treating main applicants and dependents differently in relation to granting permission to work breaches Article 8 ECHR read with Article 14 ECHR. The grounds placed no broader reliance on the remaining criteria in *A* for challenging a policy promulgated by a public authority. There is nothing in ground 4 challenging what Mr Goodman contends at paragraph 23 of his skeleton argument is the "misleading picture" said to be painted by the PTW guidance concerning its mandatory terms and what he submits is the general absence of any prohibition in the Immigration Rules concerning the right to work. Nor does ground 4 challenge the PTW guidance on the basis that it directs decision makers to refuse permission to work applications from dependents "without the underpinning of any statutory authority or the imprimatur of Parliament or the Immigration Rules", as also contended at paragraph 28 of Mr Goodman's skeleton argument.

(43) There was no application to amend the grounds or advance new grounds. The focus of ground 4 as pleaded lies in a series of established authorities concerning the ambit of Convention rights relating to Articles 8 and 14 ECHR, and the application of those principles to the position of dependents in the context of an examination of the PTW guidance.

(44) I note that by a purported "Reply" to the Summary Grounds of Defence dated 15 November 2021, sealed on 16 November 2021, the applicant sought to advance broader arguments concerning the correct construction of immigration bail, and some of the other submissions which strayed beyond the grounds. This document cannot have the effect of expanding the scope of the grounds upon which the applicant enjoys permission for at least two reasons.

(45) First, it was received by the Upper Tribunal *after* Bourne J granted limited permission in relation to ground 4. The order granting permission was dated 11 November 2021, thereby pre-dating the Reply by several days. The reply was not considered by Bourne J, and save for these observations, it does not appear to have been the subject of any judicial consideration.

(46) Secondly, there is no provision in the rules or practice direction for an applicant to reply to an Acknowledgement of Service. In *R (oao Elizabeth Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin), Lang J

said the following about a post- Acknowledgement of Service ‘reply’ that sought to introduce new grounds and submissions:

> “79. On 12 February 2019, the Claimant then filed a document entitled "C Reply to D and IP SGR's" which was not a reply, but instead raised new points and extensively challenged the adequacy of the Council's assessment of the cumulative environmental effects of the two Sites.
>
> 80. In my judgment, it was impermissible for the Claimant to seek to add to her grounds in this manner. Under CPR Part 54, there is no provision for the Claimant to file a Reply, or any other response, to the Summary Grounds of Defence filed in a judicial review claim. If the Claimant wished to add to her grounds, she should have applied to amend her Statement of Facts and Grounds, and the Council and IP would have been given a chance to respond. However, even if she had done so, she would have had to seek an extension of time, as the 6 week time limit for challenging the decision on 22 November 2018 had expired by 12 February 2019.
>
> 81. Since the Claimant was not entitled to file a Reply or any other response to the Summary Grounds of Defence, it was a matter for the discretion of the permission Judge whether to have any regard to the Claimant's document. It is apparent from the reasons given by Thornton J. that she only gave permission on the original Ground 1, as pleaded in the Statement of Facts and Grounds.”

(47) I adopt and apply the observations of Lang to the present proceedings.

(48) I will therefore focus on those issues in my substantive analysis, below, and will not permit the applicant to expand the scope of these proceedings by stealth. My substantive analysis entails applying the guidance in *A* concerning testing legislation and policy against Convention rights. That some of the criteria in *A* are engaged is not a licence to introduce bases of claim that are not pleaded in the sole ground upon which the applicant enjoys permission, even if it may be said that some support may be found elsewhere within *A* for the putative additional grounds.

(49) I conclude this part of my judgment by observing that I have nevertheless engaged, in detail, with the full spectrum of Mr Goodman’s submissions in the preparation of this judgment. This required the expenditure of considerable judicial resources after the hearing on issues which ultimately were outside the permitted scope of the challenge.

(50) If one reads the following extract of Hickinbottom LJ’s concurring judgment in *Hickey v Secretary of State for Work and Pensions* [2018] EWCA Civ 851 with appropriate modifications for judicial review proceedings heard in this tribunal, the observations at paragraph 73 are apposite:

> “Whilst it is important that this court – like all other courts – is not a slave to form, the Civil Procedure Rules set out

> procedural requirements, and not mere aspirations. They do so for good reason. The time of both parties and the court can be wasted if issues are not identified clearly and succinctly in the grounds of appeal, supported by relevant circumstances giving rise to the appeal and the appellant's arguments or submissions as set out in a skeleton argument. Without such proper focus, it is impossible for appeal courts to deal with their prodigious workloads efficiently and effectively."

(51) Against that background, I turn to the substantive challenge.

Ground 4: whether the Secretary of State's policy of treating main applicants and dependents
differently as regards permission to work breaches Article 8 read with Article 14 ECHR

(52) The essential question that lies at the heart of ground 4 is whether the PTW guidance's omission of an express reference to the possibility of exercising discretion in relation to dependents, as opposed to primary claimants for asylum, would inevitably lead to or result in some decisions which were unlawful in that they involved unlawful discrimination contrary to Article 14 ECHR.

(53) At paragraphs 76 to 78 of *A*, the Supreme Court outlined the approach to testing legislation and policy against ECHR rights. Drawing on *R (oao Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, which concerned a challenge to an immigration rule imposing an English language requirement and the corresponding guidance issued by the Secretary of State to her officials, the Supreme Court observed at paragraph 77 of *A* that, in *Bibi*:

> "As regards the rule, it was accepted that it might be applied in a way that was incompatible with the article 8 rights of a British partner in an individual case, but **in order to strike it down as unlawful it was held that it was necessary to show that it would be incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases.**" (emphasis added)

(54) The relevant immigration rule was upheld. In relation to the guidance that was also under challenge, the Supreme Court's operative conclusion in *Bibi* was summarised by the court in *A* in these terms:

> "On the other hand, the court was of the view that the policy was unlawful and required amendment, because **if it were followed it would inevitably result in some decisions which were unlawful** in that they involved a disproportionate interference with article 8 rights…" (emphasis added)

(55) At paragraph 78, the court noted the formulation adopted by Lord Mance in *In re Northern Ireland Human Rights Commission's Application for Judicial Review* [2019] 1 All ER 173 at paragraph 82:

> "It [is] sufficient that it will inevitably operate [incompatibly

> with Convention rights] in a legally significant number of cases." (modifications supplied)

(56) I should record that the court observed at paragraph 77 that in the Convention-based challenges advanced in *Bibi*:

> "The test of lawfulness applied in relation to the policy, therefore, was the same as in *Gillick*."

(57) The reference to *Gillick* was to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, which was the primary focus of the Supreme Court's analysis of the policy then under challenge, at paragraphs 55 to 75. At paragraph 34, the court identified the essential question at the heart of *Gillick*, which concerned the lawfulness of guidance to doctors concerning the provision of contraceptive services to girls under the age of consent, in these terms:

> "Lord Scarman identified the question in the appeal in this way in an important passage: 'It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way'." (See page 181F)

(58) At paragraph 34, the court held that that "*permits*" should be read to mean "sanction" or "positively approve".

(59) Drawing the above analysis together, I will address ground 4 by performing a textual analysis of the PTW guidance itself (c.f. *Gillick* at page 180D, quoted at paragraph 33 of *A*: "The first question in the appeal is simply: what is the true meaning of this text?"). I will then determine whether the text, meaning ascertained, will "inevitably operate incompatibly with Convention rights in a legally significant number of cases".

What is the true meaning of the text?

(60) It is necessary first to determine the meaning of the PTW guidance. This is not solely an exegetical exercise; in *Gillick* at 180D Lord Scarman added to the "first question" identified above the following guidance:

> "The question to be asked is: what would a doctor understand to be the guidance offered to him, if he should be faced with a girl under 16 seeking contraceptive treatment without the knowledge or consent of her parents?"

(61) Mr Goodman's submissions rested on the premise that the PTW guidance will be applied by caseworkers equally to the dependents of asylum seekers as it is to a primary claimant for asylum. I raised with the parties at the outset of the hearing whether that was a correct construction of the guidance, since its express scope appears to fall short of its sphere of application including the dependents of asylum seekers, for the reasons I set out below. Mr Goodman submitted that that was not a reading of the policy that "jumps out" at the reader; the impugned decision, he submitted, applied the PTW guidance, thereby demonstrating its

functional applicability to applications for permission to work from dependents and primary claimants for asylum alike.

(62) In my judgment, the following factors are relevant. The PTW guidance is operational guidance issued to Home Office staff concerning applications made for permission to work under paragraphs 360 to 360E of the Immigration Rules. The scope of paragraphs 360 to 360E therefore illuminates the scope of the corresponding operational guidance: the PTW guidance is intended to guide officials in their consideration of applications under the Immigration Rules made by asylum claimants and those who have made further submissions. The rules, of course, make no provision for the dependants of asylum seekers to apply for permission to work.

(63) The express purpose of the guidance is limited to primary claimants for asylum and those who have made fresh claims in their personal capacity: see the scope of the policy quoted at paragraphs 25 and 26, above, to which I have added emphasis in order to highlight the restricted scope of the guidance.

(64) I also note that the *Application of discretion* paragraphs ("the discretion paragraphs") themselves refer to an application being made by "the claimant" and make no express reference to dependents of asylum seekers or primary claimants. While it may be said that that is precisely the omission the applicant challenges, at this stage the focus for my consideration is what is the meaning of the text. The discretion paragraphs provide practical guidance to caseworkers concerning operational decisions which fall within the scope of the guidance. That the scope of the discretion paragraphs correlates with the stated scope of the guidance, and of the Immigration Rules whose practical application the guidance is intended to assist, underlines the intended scope of the overall guidance itself.

(65) I accept that the PTW guidance refers to the position of dependents, as I set out and quote at paragraph 28, above. However, as Mr Goodman accepted, the paragraph entitled *Dependents* at page 11 of the guidance merely describes the import of the Immigration Rules concerning permission to work for dependents, and is factually accurate:

> "There is no provision in the Immigration Rules to grant permission to work to dependents of an asylum seeker or failed asylum seeker…"

(66) I find that the technical scope of the PTW guidance does not extend to applications for permission to work from the dependents of asylum seekers or those who have made fresh claims. It seeks to provide operational guidance to officials of the Secretary of State concerning the application of paragraphs 360 to 360E of the Immigration Rules, which themselves do not make provision for the dependents of asylum seekers to be granted permission to work. I find that the policy gives operational guidance on applications for permission to work made by asylum seekers and those who have made fresh claims. It does not seek to provide operational guidance concerning applications for permission to work for dependents of asylum seekers other than to observe that the Immigration Rules do not make provision for dependents to be granted

permission to work.

(67) However, while the scope of the PTW policy is stated to be restricted to asylum seekers and those who have made fresh claims, I accept Mr Goodman's submissions that, in practice, the PTW guidance will be read as though it applies to primary claimants and dependents alike. I reach this conclusion for the following reasons.

(68) First, it addresses the position of dependents, albeit to clarify their exclusion from the scope of any grant of permission to work: see page 11. There is also an entry entitled "dependents" in the contents page. The guidance instructs caseworkers to "make clear" that permission to work, when granted, does not extend to any dependents.

(69) Secondly, the form of words found in the *Dependents* paragraph (see paragraph 28, above) was adopted and echoed in the Secretary of State's decision dated 14 May 2021. Both the 14 May 2021 decision and page 11 of the guidance feature the following form of words:

> "[t]here is no provision in the Immigration Rules to grant permission to work to dependants of an asylum seeker or failed seeker even where the claim or further submission has been outstanding for more than 12 months."

There is therefore considerable force to Mr Goodman's submission that the Secretary of State's caseworker must have approached the PTW guidance as addressing the applicant's status as a dependent.

(70) Thirdly, the Secretary of State's evidence is that dependents are allowed to volunteer.
See paragraph 10 of Miv Elimelech's statement dated 7 February 2022:

> "Dependents of asylum seekers are allowed to volunteer; it is only paid work that they are prevented from undertaking."

See also paragraph 42 of Mr Malik's skeleton argument to similar effect. However, save for the PTW guidance's provision concerning the ability of "asylum seekers" to volunteer (see page 18 of the PTW guidance), there is no other policy to which I have been taken addressing the position of dependents and their ability to volunteer. The working assumption adopted by the Secretary of State, including by the written evidence of Dr Elimelech, therefore, appears to be that the ability of dependents to volunteer derives from (or is at least clarified by) the PTW guidance. In my judgment, that is indicative of the practical, understood scope of the policy.

(71) As Mr Goodman submitted, I should assess the intended scope of the guidance by how it would be read and understood in practice. I find that caseworkers are likely to approach the scope of the guidance as applying to applications for permission to work for asylum seekers and their dependents alike. There is no other guidance dealing with the position of dependents that has been drawn to my attention, and the only guidance concerning the ability of those without permission to work to volunteer is to be found in the PTW guidance. The Secretary of State's practice, as confirmed by Dr Elimelech, is that dependents of asylum seekers are

allowed to volunteer. The PTW guidance devotes a full page of operational instructions to volunteering. In practice, that must be the guidance that is applied when considering the ability of dependents to volunteer.

(72) The above findings relate only to overall scope of the PTW guidance as it is likely to be understood by the Secretary of State's officials. I turn now to how it is likely to be understood by officials in relation to requests for the exercise of discretion by dependents of asylum seekers.

(73) The footing on which Mr Goodman's submissions are founded rests on a degree of mental gymnastics: on the one hand, he contends that caseworkers will adopt an expansive view of the PTW guidance, such that it will be applied in circumstances broader than its stated scope. However, on the other hand, Mr Goodman contends that caseworkers will nevertheless restrict the application of the discretion paragraphs to primary claimants for asylum and fresh claims. It is difficult to see why, if caseworkers impute to the guidance a broader view of its scope on the whole, they will isolate the discretion paragraphs to the express, narrower scope.

(74) In my judgment, there is a significant possibility that caseworkers reading the PTW guidance as though it applies to dependents would also view the discretion paragraphs as though they apply to both primary claimants for asylum and fresh claims, and dependents alike. If caseworkers are likely, in practice, to view the PTW guidance as applying to a wider class of persons than its stated scope, namely as though it provides operational guidance concerning dependents as well as primary claimants, then so too are they likely to read and interpret the discretion paragraphs in that broader way. The guidance concerning discretion is stated to apply "where the Immigration Rules are not met". By definition, dependents of asylum seekers will be unable to meet the Immigration Rules. While that sentence goes on to say, "unless there are exceptional circumstances raised by *the claimant*", it later refers to the "residual discretion flowing from Section 3 of the Immigration Act 1971"; it is reasonable to assume that the Secretary of State's officials will be aware that such discretion is capable of being exercised in relation to any person without the right of abode.

(75) My primary conclusion, therefore, is that the meaning of the text as it will be understood in practice by caseworkers is that the PTW guidance applies to dependents of asylum seekers and that, by the same token, dependents are included as potential beneficiaries of an exercise of discretion by the discretion paragraphs.

(76) However, in the alternative, I will approach my analysis on an alternative footing whereby, despite adopting a broader reading of the overall PTW guidance, the discretion paragraphs nevertheless will be read as excluding the possibility of discretion being exercised in relation to dependents. Since the applicant does not have permission to advance broader *A*-based grounds challenging this claimed omission in the policy under the common law, or on grounds relating to the claimed failure to consider an exercise of discretion on public law grounds (permission having been refused on that basis and not renewed: see ground 1), I will approach this ground through the lens of ground 4 alone. For the

purposes of doing so, I assume (but do not find) that the guidance permits, encourages, sanctions or positively approaches caseworkers to decline to consider whether to exercise discretion in relation to dependents. The question for my consideration is whether that requirement (assuming it existed) breaches Articles 8 and 14 of the ECHR; not whether such requirements would offend broader public law principles, or whether the legal premise of the PTW guidance is flawed, since the applicant does not enjoy permission to challenge the guidance on such grounds.

Whether the PTW guidance breaches Articles 8 and 14 ECHR

(77) In *JCWI*, the operation of Article 14 was described in these terms by Hickinbottom LJ:

> "81. It is now well-established and uncontroversial that article 14 is not a free-standing provision generally proscribing discrimination on the grounds of a relevant status, but it relates only to the enjoyment of one of the substantive ECHR rights – in this case, article 8.
>
> 82. However, for article 14 to be engaged, it does not require a breach of that substantive right, for otherwise it would add nothing to the protection given by those rights and would be at most a mere reinforcing provision. Nevertheless, it must have some relationship with a substantive right. Citing authority going back to *Abdulaziz, Cabales and Balkandali v United Kingdom* (ECtHR Application Nos 9214/80, 9473/81 and 9474/81) (1985) 7 EHRR 471 at [71], in *Stec v United Kingdom* (ECtHR Application Nos 65731/01 and 65900/01) (2005) 41 EHRR SE18 at [38] the Grand Chamber of the ECtHR put it this way:
>
> > 'The Court recalls that article 14 complements the other substantive provisions of the [ECHR]. It has no independent existence since it has effect solely in relation to the 'enjoyment of the rights and freedoms' safeguarded by those provisions.... The application of article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the [ECHR]. It is necessary but it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the [ECHR] articles...'.
>
> The formulation of the requirement that the facts of the case fall 'within the ambit' of one or more of the substantive rights set out in the ECHR has been generally adopted (see, e.g., *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] AC 557 at [10] per Lord Nicholls of Birkenhead)."

(78) In *IJ (Kosovo)* at paragraph 81, Bourne J adopted the summary by Murray J in *R (JP) v Secretary of State for the Home Department* [2020] 1 WLR 918, at paragraph 145, of the four questions relevant to an assessment of Article 14. The questions should not be "rigidly compartmentalised." They are:

i) Are the matters complained about within the ambit of a right protected by the European Convention on Human Rights?

ii) Has there been a difference in treatment between two persons who are in an analogous situation (or, in this case, a failure to treat differently two persons whose situations are different)?

iii) Is that difference (or lack of difference) of treatment on the ground of one of the characteristics listed, or an "other status" referred to in, Article 14?

iv) Is the differential treatment objectively justified, in the sense that it had a legitimate aim to which it bore a reasonable relationship of proportionality?

i) Are the matters complained about within the ambit of Article 8?

(79) The requirement for there (simply) to be a "more than tenuous connection" with the core values protected by the substantive ECHR right concerned was summarised in the *JCWI* case in these terms, at paragraph 104:

> "The Strasbourg authorities indicate that, where a positive measure of the state is being considered, it is sufficient that that measure has more than a tenuous connection with the core values protected by the substantive article (here, article 8). I appreciate that this is not a classic positive modality case; but it does involve a positive measure by the state in the form of the Scheme. Whilst perhaps generous to the Joint Council, I shall proceed on the basis that that 'more than tenuous link'is the appropriate test. It certainly reflects the generous width of the concept of 'ambit' consistently applied by the ECtHR."

(80) It is not necessary to determine whether the PTW guidance entails so-called positive or negative modalities, which is the terminology adopted in some of the authorities; indeed, Mr Goodman's skeleton argument discourages me from adopting that approach (see paragraph 29). The central question is whether the ability (or otherwise) of dependents of asylum seekers to access the labour market is within the ambit of Article 8 ECHR. The ambit of an ECHR right is, by definition, broader than the scope of the substantive right in question, and, as identified by Hickinbottom LJ, a generous width of the concept has consistently been applied by the ECHR.

(81) It follows that to be within the ambit of an ECHR right, the issue in question must nevertheless bear a relationship with the core values guaranteed by the substantive ECHR right in question in order for the required "more than tenuous" link to be present. The starting point for such analysis must be the scope of the Article. In *R (oao Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 152, Maurice Kay LJ, with whom Rimer LJ and Sir Stanley Burnton LJ agreed, said:

> "Art. 8 does not embrace a general right to work, I do not

> consider that the protected right to respect for private life embraces the right of a foreign national, who has no Treaty, statutory or permitted right of access to the domestic labour market, to an entitlement to work."

As Dr Elimelech puts it at paragraph 10 of her witness statement:

> "Provisions for certain asylum seekers and failed asylum seekers to undertake work in certain circumstances were introduced in accordance with the UK's international obligations and the Supreme Court's judgment in *ZO (Somalia)* [2010] UKSC 36. …there is no parallel obligation in respect of dependents…"

(82) Mr Goodman took me to no international obligations to which the United Kingdom is subject, or other Treaty-based, statutory or other rights to work enjoyed by the dependents of asylum seekers. In contrast to the position of primary claimants for asylum, in relation to whom the United Kingdom was previously subject to obligations under EU law, and now has conferred a continuing entitlement for permission to work under the conditions described above as a matter of domestic law, dependents enjoy no such underlying entitlement.

(83) In *R (oao Rostami) v Secretary of State for the Home Department* [2013] EWHC 1494 (Admin), Hickinbottom J considered a challenge to paragraphs 360A to 360D of the Immigration Rules advanced on EU law, Article 8 and common law (*R (oao Alvi) v Secretary of State for the Home Department* [2012] UKSC 33) grounds. The challenge failed. Relevant for present purposes is the court's dismissal of the Article 8 limb of the claim, at paragraph 111:

> "We are simply not in article 8 country here."

(84) Mr Goodman submitted that since *Negassi* and *Rostami* concerned the engagement of Article 8 and not its ambit they were of little assistance. He emphasised that whether Article 8 ECHR is engaged is a narrower and entirely different question to whether the PTW guidance falls within the *ambit* of the Article. I accept that the questions of engagement and ambit are distinct, and to that extent there is limited force in Mr Goodman's submissions. However, I consider that the fact that the refusal of permission to work to a person with no Treaty, statutory or permitted right to work (such as this applicant) is incapable of engaging Article 8 is highly relevant to the question of whether the required "more than tenuous" link is present. The applicant needs to demonstrate more than a tenuous link to a substantive ECHR right which does not embrace a general right to work.

(85) Both parties relied on the analysis of Bourne J in *IJ (Kosovo)* which concerned the restriction of the right to work enjoyed by an asylum seeker who had been identified as a victim of trafficking. The restriction of IJ's permission to work to posts on the SOL was held to engage Article 14 by reference to Article 8. I accept Mr Malik's submissions that status of the claimant in *IJ (Kosovo)* as an asylum seeker, as opposed to a dependent, was a crucial feature of the court's reasoning. Bourne J held as follows:

> "91. …this is not a case of a simple refusal of permission to a person with no right to work. Rather it involves a decision which simultaneously grants a right to work but imposes a limit on it."
>
> "92. …when the state confers a right to work but in terms qualified or limited by the SOL rule, that has a more than tenuous connection with the individual's article 8 rights even if it does not infringe them."

(86) The applicant in these proceedings is a case of a simple refusal of permission to work to a person with no right to work at all. As Mr Malik states at paragraph 25 of his skeleton argument, the United Kingdom has not conferred a right to work, even in qualified terms, to the dependents of asylum applicants.

(87) Mr Goodman invited me to reject that submission on the basis that "identifying nice points of factual distinction" (skeleton argument, paragraph 35) cannot assist the Secretary of State, and that merely distinguishing *IJ (Kosovo)* on its facts fails to engage with a proper analysis of the ambit of Article 8. I disagree: the distinction between primary claimants for asylum, who previously enjoyed EU law-derived rights to access the labour market and now enjoy that right pursuant to domestic provision and the Immigration Rules, and dependents, is a crucial distinction. Asylum seekers enjoy the right to work, albeit subject to restrictions. Their dependents do not.

(88) I accept that in some cases a "dependent" will only notionally be so, since it may have been possible for that individual to have made a claim independently in their own capacity, but instead did not and were treated as a dependent to a claim made by the principal claimant. That, of course, is not the position in these proceedings: the applicant claimed asylum in his own capacity, later made a fresh claim, and enjoyed substantive appeals against the refusal of each; there has been no suggestion in these proceedings that his present status as a dependent has somehow required him to relinquish or otherwise not pursue a (further) claim he could have advanced in his own capacity, and that he has consequently lost the ability to apply for permission to work as a primary claimant for asylum on that basis. A dependent with an independent claim may make a claim for asylum in their own right: see paragraph 349 of the Immigration Rules. Such a dependent who becomes a primary claimant will enjoy the ability to apply for permission to work and will, accordingly, fall squarely within the PTW policy. The hypothetical distinction between claimants and dependents with independent claims is therefore incapable of impacting the question of whether dependents such as this applicant with no independent claims are within the ambit of Article 8. I return to the distinction between primary claimants and their applicants below.

(89) Drawing this analysis together, I find that *IJ (Kosovo)* supports the Secretary of State's position. The operative reasons which led to the court finding that the restrictions imposed by the Secretary of State on the claimant's right to access the labour market were within the ambit of Article 8 rested on her status as a primary claimant for asylum. The

position of dependents is readily distinguishable, as Mr Malik points out.

(90) Mr Goodman also relied on *Sidabras v Lithuania* (2006) 42 EHRR 6, which concerned employment restrictions imposed by Lithuania on those of its citizens who, prior to independence, had worked for the Lithuanian branch of the KGB. Highlighting paragraphs 48 and 49 of the judgment, Mr Goodman emphasised the Strasbourg Court's focus on the core interests protected by Article 8, namely a person's ability to develop relationships with the outside word (at [48]) and the stigma caused by the restrictive measures (at [49]). I do not consider *Sidabras* to assist the applicant. The claimant was a citizen of Lithuania who otherwise enjoyed the unrestricted right of access to the labour market, but for the restrictive measures applied to former KGB officers. The court at paragraph 47 described the measure as a "far reaching ban on taking up private-sector employment"; the PTW policy cannot be described in those terms. The starting point is that the applicant, in contrast to the claimant in *Sidabras*, does not enjoy *any* form of right of access to the labour market. It is not the PTW guidance that prohibits the applicant from accessing the labour market; as a person without the right of abode, he enjoys no rights to access the labour market at all. *Sidabras* is, therefore, of no assistance to the applicant.

(91) I find that the inability of dependents to asylum claims to access the labour market is not within the ambit of Article 8 ECHR.

ii) Has there been a difference in treatment between two persons who are in an analogous situation (or, in this case, a failure to treat differently two persons whose situations are different)?

(92) In the alternative, I will consider the second question pertaining to Article 14 ECHR.

(93) I do not consider dependents to asylum claims to be in an analogous situation to primary claimants for asylum.

(94) First, as set out above, dependents do not have any rights to access the labour market. Since this challenge concerns the non-emphasis of the Secretary of State's residual discretion in relation to dependents, this is a relevant distinction. Whereas the PTW guidance emphasises that the restrictions that attach to the right to work enjoyed by primary claimants for asylum may be disapplied in exceptional circumstances, dependents have no underlying right to work. Their starting point is different. The guidance emphasises the need to consider the exercise of discretion in relation to a class of persons who enjoy a right to work, as regards the conditions for that right to be exercised. By contrast, dependents have no underlying right to work; an exercise of discretion in relation to dependents would entail conferring a substantive right to work on a class of persons with no underlying right whatsoever.

(95) Secondly, a person claiming asylum claims to have a well-founded fear of being persecuted. By contrast, a dependent with no independent claim does not. There is nothing before me that suggests the applicant's wife's claim for asylum was made on terms which objectively may be understood as being a further claim for international protection by the applicant in his own capacity; the applicant is a twice failed asylum

seeker and fresh claimant. While Mr Goodman's skeleton argument asserts at paragraph 46 that the applicant was "recognised in his own right as a refugee on 24 November 2021" and that he was not granted refugee leave "in line" with that of his wife, there is no broader support for that contention elsewhere in these proceedings. The Secretary of State's letter dated 24 November 2021 informing the applicant of the decision to recognise him as a refugee anchors his status to that of his wife as the primary claimant for asylum. It states:

> "You asked to be treated as a dependant on the asylum application of Mrs [A]. Their asylum application has been carefully considered and this letter is to advise you of the outcome of that decision[.]
>
> It has been decided that Mrs [A] qualifies for asylum. It has also been decided that as their dependant, you have also been recognised as a refugee and granted leave until 21st November 2026."

(96) That is entirely consistent with he applicant's description of the process, at paragraph 15 of his skeleton argument dated 1 October 2021:

> "In December last year, [Mrs A] was compelled to claim asylum in her own right, after threats were made to her in the UK. She informed the police and provided a statement to them. [Mrs A] had her asylum interview on 15 February 2021 and is currently waiting for a decision. At the interview, the Home Office officer told me and [Mrs A] that she will be the main applicant and that I am dependent on her asylum claim, along with our children. My solicitor also separately advised that I should put in further representations in relation to my family life in the UK, which we did on 16 February 2021."

(97) This approach is consistent with paragraph 349 of the Immigration Rules, which states, where relevant:

> "If the principal applicant is granted refugee status or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in their own right will be also considered individually in accordance with paragraph 334 above."

(98) A primary claimant for asylum enjoys statutory protection against *refoulement* pending the final determination of their claim (see section 77 of the Nationality, Immigration and Asylum Act 2002); a dependent with no independent claim does not. While a dependent enjoys corresponding protection from removal by virtue of paragraph 329, where a dependent cannot objectively be understood as making a request for international protection in their own capacity, that paragraph should not be understood to be an emanation of the duty of *non-refoulement*. So much is clear from *G v G* [2021] UKSC 9 at [131]:

> "… where an application for international protection can

objectively be understood as a request for international protection by a dependent, then I consider that paragraph 329 is am emanation of the duty not to *refoule* a refugee…"

(99) Dependents (such as this applicant) who cannot objectively be understood as having made a request for international protection in their own capacity do not benefit from the prohibition against refoulement. The principle applies even during the examination of an asylum claim (see *MSS v Belgium and Greece* (2011) 53 EHRR 2 at paragraph 56; *OA (Somalia) Somalia CG* [2022] UKUT 33 (IAC) at paragraph 106(e)). It follows that during the examination of the principal claimant's claim for international protection, such a dependent of a principal claimant for international protection does not benefit from the prohibition against *refoulement*, and but for any considerations pertaining to family unity and Article 8 ECHR, could legitimately be expected to return to the country of origin. The same simply cannot be said of the primary claimant for international protection who has nowhere else to go in the interim. Of course, there may be compelling Article 8 ECHR and pragmatic reasons to permit a dependent to remain in the host country pending the examination of the principal claimant's claim, of the sort identified by Hickinbottom LJ at paragraph 81 of the Court of Appeal's judgment in *G v G*. But for present purposes, I find that a dependent such as this applicant who cannot objectively be understood as having made a claim for international protection would, in principle, be able to return to the country of origin, or otherwise leave the UK, pending the primary claimant's asylum claim being examined. This is a crucial distinction, since asylum seekers have nowhere else to go pending the examination of their claims, and their ability to access the labour market exists against that background. The same cannot be said in relation to dependents with no independent claim.

(100) I find that a dependent such as this applicant who cannot objectively be understood as having made a claim for asylum in their own capacity is not in an analogous position with a primary claimant for asylum.

iii) Is that difference (or lack of difference) of treatment on the ground of one of the characteristics listed, or an "other status" referred to in, Article 14?

(101) The respondent accepts that the status of a dependent of an asylum applicant in comparison to a primary claimant for asylum falls within "other status" referred to in Article 14.

iv) Is the differential treatment objectively justified, in the sense that it had a legitimate aim to which it bore a reasonable relationship of proportionality?

(102) This question does not arise in light of my analysis above, but I will nevertheless consider it in the alternative. It requires consideration of whether the differential treatment is objectively justified, in the sense that it had a legitimate aim to which it bore a reasonable relationship of proportionality.

(103) It is necessary to recall that the primary difference in treatment between claimants for asylum and their dependents arises from the Immigration Rules. The rules make provision for asylum seekers and fresh claimants to access the labour market, with conditions, whereas no provision is

made for dependents. Mr Goodman submitted that the scope of the relevant provisions of the Immigration Rules were of no relevance, since the distinction in these proceedings lies between a claimant for asylum and her spouse, the applicant, and the rules draw no distinction between spouses. I reject that submission; the rules make provision for primary claimants for asylum and fresh claimants to access the labour market, under certain conditions, and make no provision for dependents. The rules are plainly the source of the distinction.

(104) Echoing my observations about procedural rigour above, these proceedings are not a backdoor challenge to the scope of the Immigration Rules' provision concerning access to the labour market by asylum seekers and their dependents. Such a challenge could only be brought before the High Court in any event. At its highest, the difference in treatment is simply the PTW guidance's lack of emphasis that the Secretary of State's residual discretion extends to the dependents of asylum seekers rather than only primary claimants and fresh claimants.

(105) At paragraph 10 of her statement, Dr Elimelech emphasises the following policy objectives pursued by the Secretary of State in her differential treatment of primary claimants and dependents, which may be summarised as follows:

a. It is aimed to meet the legitimate aim of immigration control by taking into account the availability of asylum support and the wider assistance available to asylum seekers and their dependents;

b. It prioritises the economic well-being of the UK in its task of adopting policies to protect the local labour market;

c. It reflects the fact that the UK is not under any international obligation to grant the right to work to dependents of asylum seekers;

d. Dependents of asylum seekers are allowed to volunteer; it is only paid work that they are prevented from undertaking;

e. Provisions for certain asylum seekers and failed asylum seekers to undertake work in certain circumstances were introduced in accordance with the UK's international obligations and the Supreme Court's judgment in *ZO (Somalia)* [2010] UKSC 36. Given that there is no parallel obligation in respect of dependants, the Secretary of State does not consider that it is appropriate to extend the regime to dependents;

f. Asylum seekers and their dependants are not in an analogous situation. Treating them in the same manner for the purpose of permission to work policy is not considered to be in the interest of the economic well-being of the UK;

g. To treat primary claimants and dependents alike would undermine the aim to protect the local labour market. At a general level, it may blur the distinction between economic migrants and asylum seekers and impact the policy of

discouraging those who do not need protection from claiming asylum to benefit from economic opportunities they would not otherwise be eligible for. It may also compromise the integrity of the asylum system.

h. In short, it is not considered to be in the public interest to allow dependants of asylum-seekers same rights and privileges in respect of undertaking paid work as the main Applicant."

(106) As Bourne J noted when granting permission, "the Tribunal will have to bear in mind the high threshold for interfering with the Secretary of State's judgment in matters of that kind…" In *Rostami*, Hickinbottom J described matters pertaining to asylum seekers' access to the labour market as an "area of high policy", in which the State enjoys a wide margin of appreciation, involving particularly important public interest factors and the rights and interests of individuals: see paragraph 94(iv). Hickinbottom J said:

> "Those individuals include not only the Claimant and other asylum seekers, but also individuals who do have a right to work but are or may become unemployed. In such areas, the courts are particularly cautious before interfering with decisions made by the State."

(107) While Mr Goodman sought to characterise the Secretary of State's evidence and submissions on this issue as making "no real attempt" to justify the disparity in treatment, I consider that the above evidence is amply sufficient to justify the PTW guidance's absence of emphasis on the residual discretion enjoyed by the Secretary of State in relation to dependents. Contrary to Mr Goodman's submissions, the Secretary of State's evidence expressly distinguishes between asylum seekers and their dependents. Dr Elimelech's statement at paragraph 10 outlines a number of reasons why the Secretary of State considers that the two are not analogous. She there writes that the UK is not subject to any international obligations in relation to dependents' access to the labour market. I observe, as noted at paragraph 82, above, that while the UK was previously subject to EU law obligations in relation to asylum seekers and fresh claimants, such obligations now exist only as a matter of domestic law, as 'retained EU law'; certainly the legal heritage of asylum seekers' access to the labour market finds its origins in international law. By defining and thereby limiting the access to the labour market of primary claimants for asylum, the Secretary of State has decided where to 'draw the line' in relation to who is entitled to access the labour market, thereby prioritising and preserving the local labour market. Members of the local labour market, of course, enjoy the very right to work that dependents, by definition, do not enjoy. By adopting a restrictive approach to dependents and not emphasising their ability to apply for an exercise of discretion in their favour, the Secretary of State has, in my judgment, taken legitimate steps to reflect the legitimate policy objectives outlined above.

(108) Any difference in treatment between claimants for asylum and their dependents arising from the PTW guidance not emphasising the Secretary of State's residual discretion in relation to dependents is, I find, a legitimate aim. The PTW guidance's non-emphasis of the discretion in

relation to dependents bears a reasonable relationship of proportionality to the legitimate policy objective emphasised above.

CONCLUSION

(109) In light of the above analysis, I find that the PTW guidance will not inevitably operate unlawfully in a legally significant number of cases on the grounds advanced by ground 4. The omission of an express reference to the Secretary of State's residual discretion to consider applications for permission to work from the dependents of asylum seekers or those who have made fresh claims is not unlawful for the purposes of Article 8 read with Article 14 ECHR.

(110) This claim is dismissed.

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