Neutral Citation Number: [2024] EWCA Civ 1601

Case No: CA-2024-002519
CA-2024-002569

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Kamara and Upper Tribunal Judge Hirst
JR-2024-LON-002556

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SINGH
and
LORD JUSTICE BAKER

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
(1) EK	
(2) SK	
(3) MIK and MAK (by EK as their litigation friend)	**Respondents**
- and -	
KENT COUNTY COUNCIL	**Intervener**

- -
- -

Sir James Eadie KC, **Jack Anderson**, **Paul Skinner** and **Alexander Laing** (instructed by **the Treasury Solicitor**) for the **Appellant**
Charlotte Kilroy KC, **Michael Gration KC**, **Rachel Jones, Agata Patyna** and **Lucy Logan Green** (instructed by **Joint Council for the Welfare of Immigrants**) for the **Respondents**
Hugh Southey KC and **Edward Devereux KC** (instructed by **Bevan Brittan LLP**) for the **Intervener**

Hearing date: 17 December 2024

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Underhill :

INTRODUCTION

1. This appeal arises out of the illegal and dangerous smuggling of migrants in small boats across the Channel and vividly illustrates the human, as well as legal, problems to which it gives rise. In order to explain what we have to decide, I must start with a short summary of the facts and the procedural history: I will return to some of the detail later.

2. The Claimants are a mother and father (anonymised as "EK" and "SK") and their two young sons ("MIK" and "MAK"), aged nine and six. They are Turkish nationals of Kurdish ethnicity. It is their case that the father faces persecution in Turkey on account of his political activities. They travelled to Europe some time earlier this year to seek asylum. The details of their journey are not known, but they spent some time in Belgium and then crossed into France. After spending a little time in the "jungle" outside Calais on 19 July 2024 they boarded a small boat, provided by people-smuggling "agents", in order to cross the Channel and enter the UK illegally. As a result of a violent incident the parents became separated from the children and were left behind when the boat left. It is not suggested that the separation was in any way deliberate.

3. On their arrival in the UK without their parents the children were put in the care of Kent County Council ("KCC"), which in pursuance of its duties under section 20 of the Children Act 1989 placed them with foster-parents. Enquiries by the authorities here and in France eventually established the respective identities and whereabouts of the children and the parents, and on 25 July they had their first conversation by video-phone.

4. The parents are of course desperate to be reunited with their children as soon as possible, but they want that to occur in the UK and not in France. On 2 August 2024 a French charity put them in touch with the Joint Council for the Welfare of Immigrants ("JCWI"); and on 21 August, on its advice and with its assistance, they made an application to the Home Office for entry clearance on the basis of family reunion. The application explained the urgent compassionate circumstances. On 2 or 3 September the parents submitted their biometrics, as required by the entry clearance process, in Paris.

5. At some point during this period, though we do not have the details, an asylum claim was made in the UK on the children's behalf. The parents have not claimed asylum in France.

6. On 26 August 2024 JCWI wrote a pre-action protocol letter to the Home Secretary asking for the parents' application for entry clearance to be prioritised and warning her of their intention to commence proceedings if that did not occur. Responses from the Home Office dated 10 and 11 September said that the application would be

expedited, although it does not appear that it was at that stage assigned to a decision-taker.

7. On 30 September 2024 the Claimants commenced the present proceedings in the Immigration and Asylum Chamber of the Upper Tribunal (the children claiming through their mother as their litigation friend) seeking judicial review of the Secretary of State's "ongoing failure … to admit [SK] and [EK] to the UK and grant them entry clearance". That failure is said to be in breach of the children's rights under articles 3 and 8 of the European Convention on Human Rights ("the ECHR") and contrary to the Secretary of State's duty under section 55 of the Borders Citizenship and Immigration Act 2009. The relief sought is as follows:

> "(1) An urgent interim order for EK and SK to be admitted to the UK/granted EC [entry clearance];
>
> (2) A declaration that the SSHD's failure to admit EK and SK to the UK/grant EC is unlawful and in breach of Articles 3 and/or Article 8 ECHR and s. 55 BCIA 09;
>
> (3) A mandatory order that EK and SK be admitted to the UK/granted EC forthwith;
>
> (4) Alternatively to (3) a mandatory order that the SSHD take a lawful decision on EC in accordance with the declarations in paragraph (2) within 24 hours or other timeframe deemed appropriate by the Tribunal.
>
> (5) Damages"

8. On 11 October 2024 the Secretary of State filed her Summary Grounds of Defence. I need not summarise them here, but her essential case was that the application was premature: she had not made a decision about entry clearance because, although it was of course important for the children to be reunited with their parents as soon as possible, she needed to explore the possibility of that occurring in France rather than the UK.

9. On 31 October 2024 there was an urgent hearing before Upper Tribunal Judge Kamara to determine the application for permission to apply for judicial review and the Claimants' application for interim relief. The Claimants were represented by Ms Michelle Knorr and the Secretary of State by Mr Jack Anderson. In bare outline the parties' cases were as follows. It was the Claimants' case that the failure of the Secretary of State to allow reunification in the UK was causing the children distress and psychological damage to such an extent as to constitute inhuman treatment within the meaning of article 3 of the Convention or in any event an unjustifiable interference with their, and their parents', article 8 rights; and accordingly that an interim order should be made for the parents' immediate admission to the UK. It was the Secretary of State's case, as already noted, that the substantive application was premature and in any event that the grant of interim relief was unjustified: the separation did not constitute a breach of article 3 and there were strong reasons why the family should be reunited in France rather than the UK. She relied in particular on the risk that, if it became known that parents would be automatically be admitted to

join young children, people smugglers would cynically arrange for children and their parents to be separated and the children to be sent ahead alone. Discussions about reunification in France had already begun with the French authorities and needed to be pursued before she could make a decision.

10. The Judge gave her decision at the conclusion of the hearing, with reasons to follow. She granted the Claimants' application for interim relief by requiring the Secretary of State "to make arrangements to admit [EK and SK] to the UK as soon as reasonably practicable". She also granted permission to apply for judicial review and gave directions for a hearing of the claim at the earliest available date: that is now fixed for 9 January 2025.

11. The Secretary of State says that, although expressed as interim relief, the Judge's order in practice grants the Claimants the final relief that they seek in the claim, since once they are in the UK the prospects of being able to remove the family, at least until the determination of the asylum claim, are remote. The following day she applied for a stay until 72 hours after the receipt of the Judge's reasons. In the event the formal order, which incorporated the Judge's reasons, was issued on 4 November.

12. Pending the determination of her application for a stay, the Secretary of State did not take steps to admit the parents, and on 13 November 2024 she filed an Appellant's Notice appealing against the order for interim relief (though not against the grant of permission to apply for judicial review) and applying to this Court for a stay.

13. At a further hearing on 14 November UTJ Hirst heard the Secretary of State's application to the Upper Tribunal for a stay. She also heard an application by the Claimants for an order requiring compliance with the order of 31 October. She refused the stay and ordered the Secretary of State to make arrangements by 4 p.m. on 15 November to admit the parents to the UK. However, in order to preserve the Secretary of State's opportunity to pursue her application for a stay in this Court, she directed that the arrangements need not take effect before 5 p.m. on 19 November. On 15 November the Secretary of State filed a further Appellant's Notice appealing against that order.

14. On the morning of 19 November 2024 Elisabeth Laing LJ granted the stay sought by the Secretary of State and adjourned the application for permission to appeal in both appeals to an expedited hearing, with the substantive appeal to follow if permission were granted (a so-called rolled-up hearing).

15. The hearing before us is the rolled-up hearing directed by Elisabeth Laing LJ. I should say at this stage that I would grant permission to appeal, and I will refer henceforward simply to the appeal. The Secretary of State has been represented by Sir James Eadie KC, leading Mr Jack Anderson, Mr Paul Skinner and Mr Alexander Laing, and the Claimants by Ms Charlotte Kilroy KC and Mr Michael Gration KC, leading Ms Rachel Jones, Ms Agata Patyna and Ms Lucy Logan Green. On 3 December I granted an application by KCC for permission to intervene by filing written submissions. In response to a subsequent invitation from the Court they have been represented before us by Mr Hugh Southey KC and Mr Edward Devereux KC, both of whom made short but helpful oral submissions.

16. Since the making of UTJ Kamara's order on 31 October 2024 there have been further developments of two kinds.

17. First, discussions with the French authorities about reunification in France have continued. The Secretary of State has sought permission to rely on further evidence, principally, though not only, about those discussions.

18. Second, on 28 November KCC commenced proceedings in the Family Court, under the inherent jurisdiction, seeking "such orders as are appropriate, including an order for a return of the children to France". KCC have made it clear that that language does not mean that it takes a positive position that reunification of the children and their parents should occur in France rather than the UK; however, in view of the continuing absence of entry clearance for the parents to come to the UK it believed that it was necessary to initiate a process that might lead to what is, subject to the outcome of these proceedings, the only potential alternative route to reunification. There have since been two hearings before Garrido J, and both the Secretary of State and the parents have been made parties to the proceedings. A hearing is listed for 21-23 January 2025 to determine various legal issues, including whether children with outstanding asylum claims in the UK can be subject to an order returning them to a safe third country (as to this, see the decision of Gwynneth Knowles J in *A Local Authority v A Mother* [2024] EWFC 110 (Fam); and a final hearing is listed for 18-20 February 2025. The family proceedings have generated some further disclosure, and KCC has filed a witness statement referring both to its care of the children generally and as to the proceedings. KCC also on 28 November made a formal request to the French authorities for co-operation in achieving the return of the children to France using the 1996 Hague Convention machinery under the auspices of the International Child Abduction Contact Unit ("ICACU").

19. It was common ground that the correct course for us in the circumstances of this case was to consider first whether UTJ Kamara made any error of law on the basis of the material before her; and, only if she did, to proceed to consider whether the application for interim relief should nevertheless be granted, taking into account the further material now before the Court. Although an appeal against UTJ Hirst's order is also before us, its outcome is dependent on the appeal against the earlier order, and it does not require separate consideration.

THE ORDER OF UPPER TRIBUNAL JUDGE KAMARA

THE EVIDENCE

The Claimants' Evidence

20. The relevant evidence adduced by the Claimants before UTJ Kamara can be sufficiently summarised as follows.

21. *The circumstances in which the parents and the children became separated*. Both parents describe in their witness statements how, while they were embarking on the boat, they came under attack from a group of migrants who had not paid to be taken and wanted to come on board. EK was still in the water and was in difficulties; SK, who was already on board with the children, got out to help her. The boat left before they could re-embark. The incident was witnessed by the children who were very

distressed and thought EK was going to drown. There are also accounts of how the children remember the incident in the witness statements of the foster carers and of EK's sister, a Dutch national who came to the UK immediately after the separation to help trace the children and spoke to them then and subsequently. Their memories, as recorded, unsurprisingly differ in detail from the parents' accounts but it is clear that they were extremely frightened and distressed and feared that both parents were dead. One of the children reports having seen another child drowned during the attack.

22. *How they found each other.* The parents and children were traced by the combined efforts of agencies both in the UK and in France, with the assistance of EK's sister and a cousin who lives in the UK. The details do not matter for present purposes, but it is obvious that it was an extremely worrying time both for the children, who continued to fear that their parents were dead, and for the parents themselves. They finally made contact after five days.

23. *Why the parents want to be reunited in France rather than the UK.* EK in her witness statement described how the parents decided to come to the UK to claim asylum. She says:

> "52. In Belgium, we stayed with my relative who is from the same village as us. … [He] told us that in Belgium there is conflict between Belgium people and people speaking French. Kurdish people are also mistreated. We were subjected to discrimination our whole lives in Turkey and could not have a future in Belgium where the same would happen.
>
> 53. [He] told us that these two cultures did not like each other, and this scared me.
>
> …
>
> 57. We stayed in Belgium for one week then [SK] and I decided to come to France. We purchased train tickets to go from Belgium to Lille France. In Lille we learnt there were agents in Calais. We saw from the news that Kurdish people were being killed in France. Also, that Turkish intelligence is very strong in France and political homicides towards Kurdish people in France are very high. [SK] and I knew that we would not take any risk and had to leave."

SK's witness statement also refers to the tensions between the Flemish and French-speaking communities in Belgium, though not to the fear of violence in France. The Secretary of State suggests that it is implausible that the parents decided only at such a late stage to seek asylum in the UK rather than in Belgium or France; but it is unnecessary to resolve that question. The bundle for the hearing included a press article about an attack on a Kurdish cultural centre in Paris in December 2022 in which three people were killed.

24. *The parents' attempts to obtain entry clearance.* A witness statement from Ms Gosai, the solicitor at JCWI with responsibility for the case, sets out the correspondence between it and the Home Office. The gist of her evidence is that, despite continual pressure, the Home Office appeared to show no urgency in prioritising the case. An

important point is that on 12 September she was told that a decision-maker had not at that point been assigned to the case; in fact it does not seem that this occurred until 30 September. I need not give further details since Sir James Eady acknowledged in his oral submissions that the Home Office had not acted as promptly as it should have when it first became aware of the circumstances in which the parents were applying for entry clearance. The delay is of the order of two months.

25. *The effect of separation on the children*. Evidence about how the children are coping with separation is given in the witness statements of the parents (who speak to them on the phone twice daily), the foster-carers and EK's sister (the children's aunt). Extracts from KCC's social services records were also before the Judge. There were also two reports Dr Susannah Fairweather, a consultant child psychiatrist with particular expertise in the mental health of refugees and asylum-seekers of all ages: she has not herself seen the children, but she is able to give an opinion based on the social services documentation and the witness statements. It is clear from all this evidence that, as one would expect, both children have experienced serious trauma from the whole experience of the initial incident in which they were parted from their parents and believed that they had been killed and the prolonged subsequent separation and remain extremely distressed. The impact is worsened by the uncertainty about when they will be reunited with their parents: they were initially reassured that this would occur soon (though that in itself frightened them because they thought that they would be coming by boat with all the dangers of which they were now aware), but the longer that that does not happen the more distrustful they become. They are now often more distressed than comforted by their daily calls. There have been behavioural problems, in particular with the younger child. Dr Fairweather's opinion in her report dated 24 September is that the psychological harm to both children, and the risks of them presenting with long term emotional and behavioural difficulties and long-term psychiatric sequelae, will be severely elevated the longer that the separation continues; and in her subsequent report dated 23 October she says that "from my psychiatric perspective reunification must happen in a matter of days". She had not seen or spoken to the children herself. She makes it clear that she would be willing to carry out an in-person assessment but she expresses the view that that would itself be an additional source of stress and she does not believe that it would be likely to alter the opinion that she was able to reach based on the social services documentation and witness statements which she had seen.

The Secretary of State's Evidence

26. The witness statement of Julia Farman, Head of the Family Reunion team within UK Visas and Immigration (a unit within the Home Office), dated 29 October 2024, contains a summary account of what steps had been taken since the receipt of the parents' entry clearance applications on 21 August. The statement concludes:

> "15. I understand from Home Office Officials based in France that the question has been asked to French Officials as to whether there is a viable option to relocate the children to France as a precursor to exploring reunification options in France for the family. French officials have advised Home Office Officials that it is challenging to advise on options whilst they are unaware of SK and EK's whereabouts and situation and have asked for assistance from the UK authorities

> to help identify their exact whereabouts. It is understood that SK and EK have not progressed an asylum claim in France.
>
> 16. At present my team are considering SK and EK's application to reunite with the children, noting the challenging contexts that families usually using this route are currently facing living in areas of conflicts, as my statement covers above. It is also being mindful of the position in northern France and the actions of traffickers, and whether in making this decision in isolation for two people, we are not creating a means by which traffickers can manipulate families to place their young children on a boat without their parents/guardians, thus forcing the children to make an unsafe journey come to the UK."

I should say that there is a dispute about whether the Home Office should have had difficulty in informing their French counterparts of the parents' whereabouts, as reported in para. 15: as to this, see para. 38 below.

27. Dr Meirav Elimelech, the Deputy Director of the Asylum and Protection Unit in the Home Office, gave a witness statement also dated 29 October 2024 "Elimelech 1". The essential passages for the purpose of the issues before us read as follows:

> "11. In regard to whether the SSHD should exercise discretion to grant EK and SK Entry Clearance outside the Immigration Rules, in reliance on Article 8 and Section 55 BCIA, the SSHD has serious concerns as to the implications of a grant of leave. Whilst the circumstances that led to EK and SK being separated from their children are not clear in this case, with at least two differing accounts having been given, there is undoubtedly a clear and significant risk that would follow. Officials assess that there is a real risk that allowing parents to enter the UK because their children arrived in the UK unaccompanied on a small boat, will lead to more children being placed on small boats, unaccompanied.
>
> 12. Due to increasingly overcrowded boats making the journeys all the more dangerous, Organised Crime Groups (OCGs) that organise channel crossings will undoubtedly be incentivised to split families forcibly, and cause children to be separated from their parents, and their lives risked during the crossing."

After explaining the particular dangers to children in small-boat crossings, with details of a number of deaths which have occurred in recent years, Dr Elimelech continues:

> "18. The SSHD accepts that in certain circumstances children may be able to reunite with their parents in the UK where there are exceptional and compelling circumstances but that will

> require a consideration of all the relevant circumstances of the individual case as well as relevant policy considerations.
>
> 19. For these reasons, the SSHD needs to consider the best interests of not just MIK and MAK, but of all other children who may be sent to the UK unaccompanied, or children that will be placed in danger by their parents or gangs putting them on overcrowded small boats to cross the Channel. Whilst the best interests of children affected by any immigration decision are a primary consideration, they are not the only consideration. Enquiries are still being made to ascertain the best interests of MIK and MAK in this case. The SSHD maintains that she must retain the ability to assess wider risks and precedents when she is being asked to exercise her discretion to grant entry to the UK on an exceptional basis."

The Submissions and the Judge's Reasons

28. I have summarised the gist of the parties' cases on the issue of substance at para. 9 above, and I need not repeat them here. The Secretary of State also made submissions about the inappropriateness of granting the relief sought on an interim basis.

29. I should set out UTJ Kamara's reasons for her decision in full:

> "1. This application is focused on the situation of the minor applicants MAK and MIK, aged 6 and 9, who arrived in the United Kingdom on 19 July 2024 by small boat, unaccompanied owing to highly distressing events in Calais that led to them becoming separated from their parents EK and SK, who remain in France.
>
> 2. The authorities of both the United Kingdom and France were informed of events without delay and there is no dispute as to the family relationship between the applicants. On 21 August 2024, the adult applicants applied for entry clearance to the United Kingdom, in order to be reunited with their children. While the respondent agreed to expedite those applications, no decisions have yet been made.
>
> 3. I have carefully considered the respondent's argument that to make a mandatory order in the form requested would amount to final relief and thereby dispose of the claim. It is not in dispute that in the normal case, the role of the Upper Tribunal is not to substitute its own decision for that of the Secretary of State even in cases involving vulnerable minors.
>
> 4. The test for interim relief in a judicial review was common ground. Firstly, there must be a serious issue to be tried with a real prospect of success, applying the summary of the law set out in *Zalys* [2020] EWHC 2029 (Admin) at [12]. At [14] there is reference to a 'more stringent' test of a 'a particularly strong

case,' which applies in a case, such as this, where a mandatory order will in effect amount to a form of final relief.

5. I find that the applicants have such a real prospect of success. Firstly, permission has been granted for the applicants to proceed with their judicial review claim. Secondly, there is a positive obligation under Article 8 ECHR for the respondent to take prompt steps to facilitate reunification between the minor applicants and their parents. Thirdly, the applicants are particularly young and were separated from their parents unintentionally and in traumatic circumstances. The cases of *Mayeka v Belgium* (2008) 46 EHRR 23 and the 'Syrian baby case,' referred to in *RSM* [2018] EWCA 18 at [84] establish that in extreme circumstances immediate steps are required to effect family reunification.

6. I am satisfied that the minor applicants' case is a particularly strong one. While the minor applicants have undoubtedly been adversely affected by their dangerous voyage to the United Kingdom without their parents, further harm has been caused by the failure to promptly facilitate reunification. The supporting evidence of the harm caused to the minor applicants is contained in the witness statements from the children's foster carers as well as in the reports of Dr Susannah Fairweather, a consultant child and adolescent psychiatrist. While Mr Anderson raised a concern about the focus of the expert's report, there was no challenge to the description of the effects on the children, which make for upsetting reading. The expert's view that further delay would increase the levels of distress was not undermined by Mr Anderson in his submissions.

7. In addition to the evidence as to the vulnerability of the minor applicants, another factor which makes this a particularly strong case is the absence of any steps taken to reunify the family between the applicants' arrival in the United Kingdom and the adult applicants' applications for entry clearance. Even once those applications were made, there was a delay of over a month in allocating the case to a decision maker. At present, no indication has been given as to when a decision might be expected, despite the confirmation that the applications have been expedited. Mr Anderson relied on the evidence of Julia Farman regarding the volume of applications, the existence of a dedicated team for children and the need to consider the delay in the context of other applicants who might be in desperate circumstances in unsafe countries. This, without more, does not reduce the strength of the applicants' case.

8. The respondent has, late in the day, proposed that the minor applicants could be removed to France to unite with their parents, notwithstanding that they have lodged asylum claims

> in the United Kingdom. This is not a serious suggestion in the absence of a process in place to do so and given the unavailability of the Dublin III arrangements. Discussions with France are at a very early stage and there appears to have been no understanding of the legal barriers to taking this step. Nor has consideration been given to the fact that the adult applicants have expressed subjective fears for their own safety of remaining in France.
>
> 9. The respondent relies on concerns raised in a statement from Dr Elimelech that to grant the applicants interim relief would result in a risk of gangs intentionally separating children from their parents. I find that there is no obvious logic to this view and it amounts to little more than speculation.
>
> 10. I find that the circumstances of the minor applicants are sufficiently compelling to make a mandatory order even if this has the effect of bringing matters to an end.
>
> 11. Secondly, it has to be assessed whether the balance of convenience favours such a grant or the maintenance of the status quo, applying *R (Medical Justice) v SSHD* [2010] EWHC 1425. I conclude that the balance of convenience lies with the granting of the interim relief application because of the reliable and consistent evidence of the serious emotional harm already caused to the applicants by the continued separation from their parents. Furthermore, the evidence as to the best interests of the minor applicants all point to family reunification taking place in the United Kingdom as quickly as possible. Indeed the expert evidence is of further harm being caused the longer reunification takes.
>
> 12. I have considered whether the respondent is likely to be prejudiced by the order and find that while there is some prejudice, the order will not preclude the respondent from subsequently exploring the removal of the family unit to France. There is no evidence that this order would open the floodgates to others.
>
> 13. Lastly, I consider that granting the mandatory order is the only way in which the children's best interests are protected and in which further harm is avoided."

Conclusion

30. Although those reasons are succinct and clear, in my view they are flawed in at least two fundamental respects, which correspond to the Secretary of State's third and sixth grounds of appeal.

31. First, I believe that the Judge was wrong in principle in para. 8 of her reasons to dismiss the Secretary of State's case that she was entitled to explore the possibilities

of returning the children to France as "not a serious suggestion". No doubt, as she says, return under the Dublin Regulation is no longer available, and, that being so, there was no established process that could be invoked. But that did not preclude the French authorities from agreeing to their return on a voluntary basis, and there was no reason to assume that the discussions, which Ms Farman had said had already been initiated, might not bear fruit. It is important to bear in mind that this was an application for interim relief, made at a stage before the filing of Detailed Grounds or full evidence, and one where, as the Judge acknowledges at para. 3, the threshold for the grant of relief was very high. I could understand it if the Judge had adjourned the application for a short period in order to obtain further details of what was proposed, though the preferable course would probably have been to direct an expedited final hearing; but in the light of the Secretary of State's evidence she should not have made what she herself accepted was "a mandatory order [which] has the effect of bringing matters to an end". As I read it, she was influenced by the fact that the possibility of such a return had only been raised at a very late stage; but it still needed to be taken seriously.

32. Second, I believe that it was wrong in principle for her in para. 9 to dismiss as speculative and illogical the basis of the Home Office's concern that the grant of entry clearance – or indeed admission of any kind – to the parents in this case would, as Dr Elimelech put it, "incentivise [organised crime groups] to split families forcibly, and cause children to be separated from their parents, and their lives risked during the crossing". Her evidence on the point, and the similar evidence of Ms Farman, was no doubt speculation – though "prediction" might be a more neutral word – in the sense that the risk that she identifies has not yet eventuated. But that does not mean that it was of no value. Both Dr Elimelech and Ms Farman have professional experience of how the people-smuggling gangs operate and are well-placed to assess how they are likely to respond to changes in immigration practice. If their assessment is reasonable, the risk which they identify has to be given very serious weight. The Judge does not say why she regards the evidence as having no obvious logic. In her later witness statement from which I quote at para. 43 below Dr Elimelech does explain more fully why the gangs might regard it as to their advantage to put children on the boats at the expense of adults. I accept that the evidence before the Judge was not so full, but it is a serious matter summarily to dismiss the evidence of experienced officials on an important matter of public policy, and as I have said, there were options open to the Judge to explore the question more fully before granting what was in effect final relief. Ms Kilroy suggested that the Judge's thinking was that the grant of entry clearance in a case where, as here, the parents had been accidentally separated from their children would not lead the gangs to believe that it would be granted in a case where they had been separated intentionally. If that was indeed the Judge's thinking, I do not believe that it carries any real weight. It must be doubtful whether the gangs would even appreciate the distinction. But even if they did it would not follow that they would expect the UK authorities to treat the two situations differently: in either case the separation would have occurred without the complicity of the parents, and still less of the children.

33. The grounds of appeal make other criticisms of the Judge's reasoning, but I need not deal with them since those addressed above are sufficient to find that it is seriously flawed. I should, however, mention one of the other grounds, which was that it was not open to the Judge to substitute her decision for that of the Secretary of State, as

she appeared to believe that she was doing (see para. 3 of her reasons). That submission raises some potentially far-reaching questions, including about the effect of section 31 (5A) of the Senior Courts Act 1981. It is not necessary for us to consider those questions on this appeal, but I should say that I should be reluctant to hold that the Judge had no jurisdiction, however strong the case, to make an order in the terms that she did. One relevant consideration may be that she did not in fact direct the Secretary of State to grant the parents entry clearance but only to admit them to the UK, which is not the same thing. (Since drafting the foregoing I have seen Singh LJ's judgment, which reinforces my reluctance to accept the Secretary of State's submission.)

RE-MAKING THE DECISION

THE FURTHER EVIDENCE

34. As noted above, in the light of that conclusion it falls to us to consider for ourselves whether the Claimants should be granted the interim relief sought; but in doing so we should take into account the evidence relating to developments between 31 October and the date of the hearing before us. I start by summarising that evidence.

The Secretary of State's Evidence

35. The Secretary of State relies on three further witness statements from Dr Elimelech dated 13 November, 5 December and 13 December 2024 ("Elimelech 2", "Elimelech 4" and "Elimelech 5"[1]) and a statement from Dr Daniel Hobbs, Director General of the Migration and Borders Group in the Home Office, dated 18 November 2024. These statements are principally concerned with the progress of discussions with the French authorities about the possibility of reuniting the children with their parents in France, but they also amplify the evidence about the risk that the grant of entry clearance will incentivise the people-smuggling gangs to separate children from their parents, I take those two points in turn.

36. As to the discussions with the French authorities, Elimelech 4 gives a helpful account of them which brings together and updates (to 4 December 2024) the contents of Elimelech 2 and in Dr Hobbs' witness statement. The first meeting (as opposed to email/telephone contacts) between UK and French officials to discuss the case was on 29 October, when officials of the Home Office and the Foreign Commonwealth & Development Office ("the FCDO") met officials of the Préfecture of the Pas de Calais: this meeting pre-dated the hearing before UTJ Kamara, but she did not have evidence about it. The Préfet agreed in principle to the reunification of the children and their parents in France subject to the agreement of the Ministry of the Interior.

37. Discussions at high level between the Home Office and the Ministry of the Interior began in early November. Elimelech 2 describes their progress up to 14 November. Para. 14 of Elimelech 4 summarises the position thereafter:

> "… [T]he UK and French Governments have had a series of productive discussions on this matter, with both the Home Secretary and the French Minister of the Interior Bruno Retailleau, unanimously

[1] Dr Elimelech also gave a third statement for the purpose of the hearing before UTJ Hirst, but that is not relevant for our purposes.

> agreeing that UK and France must act together to reunify the children and their parents in France, that the French government stands ready to reunify the children with their parents in France as quickly as possible, and respective sides are pursuing this process expeditiously. The French Minister and the Home Secretary agree that reunification in France should take place given the risk of further children crossing by small boat, which both want to avoid."

With regard to the last sentence, Elimelech 4 also refers at para. 18 to a letter from the Director General for Foreigners in France, Éric Jalon, dated 18 November which states (as translated):

> "We share your analysis of the risks that could result from obtaining permission to enter and remain in the UK in these circumstances. It would be likely to increase the attractiveness and dangerousness of irregular crossings in small boats, contrary to the effort of our two countries to combat this phenomenon, and to French legislation which particularly addresses offences of facilitating illegal entry, movement and residents, when they have the effect of removing foreign minors from their family environment or their traditional environment."

Those passages demonstrate the political will on the part of the French authorities to achieve reunification in France. However, the Ministry of the Interior made it clear that the French Ministry of Justice would also need to be involved in its implementation.

38. As regards progress in implementation, there has been a problem because the French authorities needed to know the whereabouts of the parents in order to make the necessary child protection assessments. JCWI did not wish to share this information directly with the Home Office but had consented to their contact details being given to the French authorities. That was done at the end of October but it appears that contact had not been made as at 5 December (or indeed 12 December – see para. 46 below). The parents had in fact given an address in Paris in witness statements dated 25 September. That is now confirmed to be their current address; but the Home Office was not aware that that was the case and does not appear to have shared it with the French authorities. It is not necessary to apportion blame for any of this apparent confusion, but I proceed on the basis that the assessment process has not yet begun.

39. Dr Elimelech explains that there was a meeting on 3 December 2024 between a Home Office team, including herself and counsel specialising in international family law, and officials of the French Ministry of Justice: a minute of the meeting has been disclosed. The French officials explained that once the parents had been contacted local social services would conduct an assessment of their ability to care for the children: normally that would take about three months, but in the present case it would be expedited, though that would depend on whether the parents were co-operative. If the parents were not co-operative, or the assessment found that they were unable to care for their children, consideration could be given to placing the children in French institutional care. That would require a process under article 33 of the Hague Convention: judicial input would probably be needed and liaison with the courts in the UK, and the process would inevitably be longer.

40. Para. 27 of Elimelech 4 reads:

> "While the main barrier so far is the willingness of the parents to engage and accept reunification of their children in France, I can confirm that any and all barriers to returning MIK and MAK to France to their parents are being worked through at pace, by all relevant Officials in the Home Office, Ministry of Justice and the FCDO. I can reaffirm our commitment to returning MIK and MAK with their parents in France expeditiously."

41. Elimelech 5 records, at para. 7, that the Home Secretary and the Minister of the Interior met on 9 December 2024:

> "They discussed the present case and detailed the upcoming hearings, and Minister Retailleau re-affirmed his support for the Home Secretary's position and concerns regarding the case. Both ministers reiterated their concern about the precedent this case presented, and were in agreement that the children should be reunited with their parents in France."

It also says, at para. 9:

> "There are various opportunities scheduled for engagement with the French authorities over the next week, and these opportunities are being used to raise the importance of this case and the need to facilitate reunification of the children with their parents as soon as possible. This case is being progressed at every level of meetings held between UK and French Officials and ministers."

42. The effect of that evidence, in summary, is that there is a clear political will at the highest level of the French government to facilitate the reunification of the family in France. It follows that there would be no difficulties about the admission of the children to France as such. However, there are assessment procedures which it is necessary to go through before reunification with the parents can be achieved. How long that will take depends on the co-operation of the parents and the outcome of the assessment. But the implication of what was said at the meeting of 3 December is that if the parents co-operate the assessment should take substantially less than three months; and it is clearly realistic to expect that the result will be known in good time before the scheduled final hearing in the family proceedings.

43. Turning to the dangerous consequences that the Secretary of State fears if the parents are admitted to the UK, paras. 16-21 of Elimelech 4 read:

> "16. In my first witness statement, at paragraphs 11-13, I set out very real concerns as to the danger of Channel crossings. At paragraph 9 of Upper Tribunal Judge (UTJ) Kamara's reasons for granting interim relief, it has been said that there is no obvious logic to those concerns and that they are little more than speculation.
>
> 17. The first of those concerns, which I provided a citation for, was that the crossings in the Channel are on increasingly overcrowded

boats, making the crossing more dangerous. This has led to 2024 being the deadliest year for small boat crossings.

18. It is the Home Office's considered assessment based on our experience with the gangs which organise these crossings and in assessing risks of migrant behaviours being impacted by changes in admissions to the UK that:

a. The SSHD being ordered to admit relatives from a safe third country due to one or more of their children having arrived irregularly by small boat will incentivise more children to be sent by their parents unaccompanied; there are many motivations for them to do this. There is an obvious financial incentive to this, as families will have to pay less money to the Organised Criminal Groups (OCGs) for fewer people to be smuggled across the Channel. There is also the undeniable fact that there is an increased chance that this tactic proves to be more successful as the children, especially young children, are on average smaller and weigh less than adults and so the channel crossing via a small boat will be more likely to make it to UK waters without sinking.

b. Admitting parents of minor children in the UK will increase the risk that children are placed on boats unaccompanied. If migrants are aware that sending a young child unaccompanied by an adult will make it more likely that a court will direct urgent reunification in the UK, without the sponsor's asylum decision having to be made, then this is further incentive for behaviour that endangers children.

19. The second of those concerns, which I provided multiple citations for in my first witness statement, was the specific risk to children who have been and are currently being placed on those small boats. I provided examples throughout recent months of deaths of migrants, and that included a number of children. It is unclear how these deaths, including the deaths of children, are speculative.

20. I sought to explain the logic of the concerns in paragraphs 14-16 of my first Witness Statement by pointing to examples where officials have seen changes in particular migrant behaviours and behaviours of OCGs in response to the behaviour of French Law Enforcement. I shall now elaborate that officials have seen the change in migrant behaviours in response to changes in policy e.g.

a. In December 2022 the UK and Albania reached a joint agreement on tackling illegal migration which led to 1,888 returns of Albanian nationals in the year 2022. Following this, Albanian arrivals in the UK decreased dramatically in 2023.

b. "In the year ending June 2024, there were 2,648 Albanian applications. This was 78% fewer than the year ending June

> 2023 when there were 12,194 Albanian applications, linked to the high number of Albanian small boat arrivals in summer of 2022."
>
> 21. As an update, since my previous witness statement, I am now aware of four more unaccompanied children under the age of 12 who have arrived in the UK via small boats, though their parents do not appear to have been separated from them in France. In addition, I am aware of another 12-year-old who arrived accompanied by an 18-year-old sibling having been separated from a parent in France. It is therefore of utmost urgency to the SSHD and her duty to safeguard and promote the welfare of children, that everything possible is done to stop children being placed on small boats, and putting their lives at risk."

KCC's Evidence

44. KCC filed a witness statement from Anne Nerva, the Service Manager in the East Kent Children in Care Service, dated 10 December 2024. This summarises the position then reached in the family proceedings and the various communications which KCC has had with the French authorities, including the involvement of ICACU. It also sets out KCC's approach to the assessment of the children's best interests in the context of its duties under the 1989 Act. At paras. 27-38 it sets out its current position on what those best interests are. Its overall position, unsurprisingly, is that the reunification of the children with their parents as soon as safely and practically possible is in their best interests. It is not however in a position to take a definitive position on whether reunification should occur in the UK or in France. That depends on a number of matters on which it does not yet have full information, including which course is likely to result in the least delay. Para. 38 reads:

> "To date ... given the positive indications the Home Office received from French authorities about the ability of the children to enter France and the uncertainty about the outcome of the judicial review proceedings in the Upper Tribunal and in the Court of Appeal, KCC has focused efforts on reunification in France. It does not, however, rule out reunification in the UK if the evidence shows that it would be in the children's best interests."

45. Ms Nerva also exhibits her witness statement dated 28 November 2024 filed in the family proceedings. This gives an account of the children's overall "presentation" based on the reports of her social work team and the foster-carers. Ms Nerva emphasises the deeply traumatic effect of the experiences which the children have undergone, as already summarised at para. 25 above, and that they continue to present with difficulties: there are episodes where they are "emotionally dysregulated", and their behaviour can be angry or challenging, and they do not always want to speak to their parents on the phone. But she also draws attention to some positive developments. They are in the care of very experienced foster-carers who have been looking after them with great care and sensitivity: there are no plans for the placement to change. They are in good health and eating and sleeping well. They are both going to school, which they enjoy and where they are described as coming on "leaps and bounds". MIK already spoke some English, but MAK is beginning to be able to

speak it too and is becoming less dependent on his brother. They have been able to make several visits to an elder second cousin and her family who live outside London, which have been very important to them. EK's sister from the Netherlands has also visited them.

The Claimants' Evidence

46. The Claimants filed a further statement from EK dated 12 December 2024. This covers several points, not all of which are now material to our decision. So far as relevant, they can be summarised as follows:

- *Allegations of non-co-operation.* EK rebuts the suggestion that they have ever sought to conceal their whereabouts. As regards the French authorities, she says that she and SK are open to hearing from them but that so far they have not been contacted and that it was only recently that they were aware that reunification in France was even being considered.

- *Reasons why the children should not be returned to France.* EK emphasises the time that the children had already been in the UK before the prospect of reunification in France was suggested and the importance for them of continuity and stability and not having to move country again. She speaks very warmly of the support and care that the children have received from their foster-carers and from KCC social workers, with whom she would not want them to lose contact. She explains that their accommodation in Paris will only be available in the short term and would not be suitable for the children.

- *Position of the Kurdish community in France.* EK repeats that there have been many attacks on Kurdish immigrants in France and that she does not feel safe there.

EK also exhibits transcripts of conversations with the children's social worker and the foster parents which give accounts of challenging and emotional behaviour from MAK attributable to his anger at the separation from his parents. But it is fair to say that the conversations also support some of the more positive points made by Ms Nerva, in particular how much the children enjoy school.

47. Ms Gosai has filed a witness statement of the same date. Again, it covers some points that are not now material. She explains in detail JCWI's position about the disclosure of the parents' whereabouts, emphasising that there has been no question of deliberate evasion. She exhibits further press articles about the attack on the Kurdish cultural centre 2022 in which three people were killed, and refers to another attack in 2013. She points out that this material suggests that Turkish intelligence office was involved in the 2013 attack. She quotes extracts from the social work records which show the same mixed picture about the children's emotional state as described by Ms Nerva.

DISCUSSION AND CONCLUSION

48. The starting-point for the consideration of the claim for interim relief is that its effect would be to grant the substance of the final relief sought in the proceedings – that is, the admission of the parents to the UK at least until they have had an opportunity to claim asylum and to have that claim determined. It was common ground before us that the grant of relief would only be justified in such a case if the case that their continued exclusion was unlawful was particularly strong. We were referred to the statement of the applicable approach at paras. 12-14 of the judgment of Saini J, in *R (Zalys) v Secretary of State for the Home Department* [2020] EWHC 2029 (Admin), to which UTJ Kamara referred. It may be necessary in a future case to examine the relevant principles more fully; but I am content to proceed on that basis.

49. Ms Kilroy questioned whether the present case did in truth fall into that category, since if the French authorities were in due course willing and able to offer reunification in France the Secretary of State could seek to return the entire family at that stage. That is in my view unrealistic. It is clear that the imperative underlying the current situation is that the parents and children are separated and the importance of achieving reunification. It is impossible to be confident that the approach of the French authorities would be the same in the different scenario where reunification had been achieved. Nor, understandably, did she suggest that the Claimants would not seek to challenge a decision of that kind.

50. The argument that the continued denial of admission to the parents is unlawful depends on the effect on the children of their continued separation from their parents, which is said to constitute a breach of both article 3 and article 8 of the ECHR. I will consider the claim under article 8 first.

51. The initial trauma which the children suffered by the horrifying experience of being separated from their parents on the beach, having to make the dangerous trip to a strange country on their own, and their fears over the following days that their parents were dead, was not in any way the responsibility of the state. And even if the Secretary of State had decided as soon as reasonably possible to grant the parents' application for entry clearance, which was made on 21 August 2024, there would still have been a period of many weeks' separation, which would have continued the trauma. However, I am prepared to accept that the continuing absence of a decision can properly be regarded as an interference with the article 8 rights of the children (and indeed the parents, but their case is inevitably less compelling than that of the children).

52. The question then is whether that interference is justified by reference to any of the interests specified in article 8.2. The immediate cause of the continuing absence of a decision is the Secretary of State's pursuit of the possibility of the reunification of the family occurring in France rather than in the UK; but that only constitutes a potential justification on the basis of her assessment that granting admission to the UK in the present case would risk incentivising the people-smugglers or their clients in the future to deliberately put small children on boats without their parents. Such a risk would certainly engage the reference in article 8.2 to "the protection of the rights and freedoms of others".

53. In my opinion this Court is obliged to accept the Secretary of State's assessment of that risk, now more fully set out and explained in the further evidence of Dr Elimelech, as reasonable and legitimate – and certainly in the context of a summary process involved in an application for interim relief. It is based on the experience of officials who are far better placed than we can be to make judgments about the likely behaviour of the people-smuggling gangs and their clients. I place weight also on the fact that the French authorities, who were under no legal obligation to agree to reunification in France rather than the UK, have agreed to do so in this case because they share the fears of the UK government about the risk to other children: see para. 37 above.

54. In my opinion also the wish to avert that risk is clearly capable in principle of justifying the Secretary of State in pursuing the possibility of reunification in France notwithstanding that that process would inevitably take longer than a straightforward grant of entry. No humane person would take lightly the impact on the children of any prolongation of their separation from their parents beyond the minimum period necessary. But the Secretary of State has to balance the harm to them against serious policy considerations designed to prevent the risk of far worse harm to others. It is worth repeating that the initial separation is not of her making: on the contrary, she is having to address the consequences of a situation created the illegal and dangerous activities of the people-smugglers – and, it has to be said, by the parents in seeking to take advantage of those activities rather than seeking asylum in Belgium or France. Also, without wishing in any way to minimise the children's distress, it must be recognised that they are being very well looked after by experienced foster-carers in a stable and appropriate environment, and they are in daily contact with their parents. In that context the continuation of their separation does not weigh as heavily in the balance as it otherwise might. In reaching that conclusion, I of course take into account the obligation in section 55 of the 2009 Act to safeguard and promote the welfare of the children, but although the best interests of a child must be a primary consideration, they are not paramount.

55. Ms Kilroy submitted that even if Dr Elimelech's evidence were accepted the eventuation of the risk was uncertain, and that it was wrong to subject the children to the certain harm of prolonging the separation in order to avoid an uncertain future harm to others. I do not accept that. It is necessary to take into account the relative scale and gravity of the two harms. If the gangs do alter their behaviours as predicted, many children will be separated from their parents, and some may die as a result.

56. My conclusion that the pursuit of reunification in France can in principle justify the interference with the children's article 8 rights resulting from their continued separation from their parents does not mean that it will do so indefinitely. It is necessary to assess both the chances of a successful outcome and the timescale within which it may be achieved. As to timesclale, it is clear from the Secretary of State's evidence as summarised above that there is a reasonable prospect of reunification in France being achievable within the time-frame of the family proceedings; and, that being so, it would in my view be wrong to undermine the process now by requiring the Secretary of State to admit the parents.

57. The only obvious reason why reunification might not be possible within that time frame, or something close to it, would be if the parents fail to co-operate with the authorities in France. I see no reason to proceed on the basis that that will occur. I

realise of course that they would prefer to be admitted to the UK and to seek asylum here. But that does not mean that they will not choose to seek asylum in France if it becomes clear that that is the surest way of achieving early reunification with their children. Even if, as Ms Kilroy urged on us, their belief that France is not a safe country is genuine, the evidence on which they rely falls far short of establishing that that is the case, as they may come to appreciate. I note also that EK believes that a further move will be disruptive to the children, but that might be judged to be a problem worth facing for the sake of early reunification. In short, I do not believe that speculation about the conduct of the parents is a proper basis for determining the prospects of reunification in France.

58. A feature of the case that has given me some pause is the Secretary of State's delay in pursuing the enquiries on which she now relies as the justification for not having made a decision to admit the parents. As I have said, Sir James accepted that she could have initiated those enquiries as soon as the application for entry clearance was made – that is, in late August – instead of some two months later. No doubt that may reflect the pressures of work in the Home Office, to which Ms Farman alluded in her evidence, but it is very regrettable. However I have concluded that that historical failure is not a sufficient reason to abort a process which reflects an important policy objective designed to reduce risks to other children.

59. For those reasons I do not believe that interim relief should be granted on the basis of article 8 of the ECHR.

60. I turn to the case based on article 3. I can deal with this shortly, because I do not believe that there is a strong case – let alone a particularly strong case – that the suffering which the children are undergoing as a result of any action or inaction on the part of the Secretary of State reaches the threshold for a breach of article 3. We are not of course concerned with the trauma attributable to the events of 19 July or the period of separation immediately following but only with the prolongation of the separation thereafter. As regards the distress which the children are suffering on that account, I repeat what I say in para. 53 above. Ms Kilroy referred us to the decisions of the European Court of Human Rights in *Mayeka v Belgium* [2006] ECHR 1170 and *Tarakhel v Switzerland* [2014] ECHR 1185, but the facts in those cases were very different.

61. For those reasons, despite Ms Kilroy's persuasive submissions I would allow the Secretary of State's appeal and set aside UTJ Kamara's order of 30 October granting interim relief. It is very sad that the separation of the children and their parents will continue for what it now seems inevitable will be at least several more weeks; but for the reasons that I have given the Secretary of State has legitimate reasons for withholding the grant of entry clearance. The parents can of course increase their chances of early reunification, albeit in France, by co-operating with the authorities there as soon as they make contact.

62. This appeal has been concerned only with the specific question of whether the Secretary of State should be ordered to admit the parents to the UK at this stage. I should make clear that nothing that I have said should inhibit the Court in the family proceedings from making any decision that it believes appropriate. (In that connection, I should record that in a note submitted shortly before the hearing, as a result of disclosure recently received from KCC, Ms Kilroy contended that, for

reasons which I need not summarise, the family proceedings may constitute an abuse of the process. She did not develop those submissions orally, but in any event that is not a matter which we could or should consider on this appeal.) The parties will no doubt give careful consideration as to the future of the judicial review proceedings themselves.

Singh LJ:

63. I agree that this appeal should be allowed for the reasons given by My Lord, the Vice-President. I add a few words on the question of jurisdiction which was raised on behalf of the Secretary of State.

64. The relevant provisions of section 31 of the Senior Courts Act 1981 ("the 1981 Act"), in their current form, are as follows:

> "(5) If, on an application for judicial review, the High Court makes a quashing order in respect of the decision to which the application relates, it may in addition—
>
> (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
>
> (b) substitute its own decision for the decision in question.
>
> (5A) But the power conferred by subsection (5)(b) is exercisable only if—
>
> (a) the decision in question was made by a court or tribunal,
>
> (b) the quashing order is made on the ground that there has been an error of law, and
>
> (c) without the error, there would have been only one decision which the court or tribunal could have reached.
>
> (5B) Unless the High Court otherwise directs, a decision substituted by it under subsection (5)(b) has effect as if it were a decision of the relevant court or tribunal."

65. The original wording of section 31(5) contained no reference to the possibility of the court itself substituting its own decision for that of a lower court or tribunal. It provided simply that "the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court." The current wording was introduced by section 141 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and, although it has been tweaked since, remains substantially the same. It was in the 2007 Act that Parliament provided for the possibility that the High Court could substitute its own decision for that of a lower court or tribunal. It is at least arguable

that the intention of Parliament was to *extend* the powers of the court, not to restrict them.

66. Reliance was placed in the submissions for the Secretary of State on the judgment of Elisabeth Laing LJ in *R (RRR Manufacturing PTY Ltd) v British Standards Institution* [2024] EWCA Civ 530, at paras 88-89:

> "*ii. What are the court's powers when it quashes a decision?*
> 88. The position at common law, broadly, was that if the court quashed a decision, it would remit the case to the decision-maker for the decision-maker to reconsider the case, even when the answer was obvious (*Barnet London Borough Council ex p Shah* [1983] 2 AC 309). Parliament has now somewhat changed that position. Section 31(5)(b) of the 1981 Act gives the court a limited power, when it makes a quashing order, to substitute its own view for that of the decision maker. The court may only exercise that power, however, when the quashed decision is that of a court or tribunal, and, without the error, the court or tribunal could only have reached one decision (section 31(5A)). On conventional principles of statutory construction, that express limitation means that it is not open to a court, when it makes its decision on the merits of an application for judicial review in cases in which the defendant is not a court or tribunal, to quash a decision and substitute its own view for that of the decision-maker.
>
> *iii. Did the Judge err in law in making a mandatory order?*
> 89. Neither counsel could think of a case in which a court has, without deciding whether or not a public authority has acted unlawfully in relation to a decision which is challenged in existing proceedings, required a public authority to exercise a power on a future occasion in a particular way. As I have just explained, even when it has quashed a decision because it is unlawful, a court has limited powers to usurp the powers of a public authority by making a particular decision, which, in normal circumstances, it would be for the public authority to make in the future, after remittal by the court. A fortiori, a court has no such power when it has not even decided that the decision which is under challenge is unlawful. In this case, no future decision had been made, and no decision about its lawfulness could therefore be made. The Judge erred in law in making the mandatory order in this case. What is more, there are no circumstances in which such an order would be lawful."

67. As the Vice-President has said, it is not necessary to reach a concluded view on this issue for the purposes of the present appeal but the issue may become important in other cases. I would not myself necessarily accept the full breadth of what is said by Elisabeth Laing LJ in the passage I have cited, in particular the final sentence of para 89, that "there are no circumstances in which such an order would be lawful."

68. I note that what Elisabeth Laing LJ said on this issue was not determinative of the appeal in the case before the Court and therefore does not form part of the *ratio*. As Nugee LJ noted at para 111, the question (which was the subject of ground 2 in that appeal) did not in fact arise in that case, since the appeal was unanimously allowed on ground 1. Nugee LJ said that he was reluctant to say that the kind of order that was made could never be made "as it is seldom sensible to say never". Snowden LJ simply agreed with the judgments of Elisabeth Laing LJ and Nugee LJ on ground 2: see para 95.

69. It is not clear to me to what extent there was full argument on the impact of the legislative changes which were made to section 31 of the 1981 Act in 2007. I am not presently convinced that, in enacting the amendments made by the 2007 Act, Parliament intended to effect a radical departure from the position which had been expressed by Lord Scarman in *R v Barnet LBC, ex parte Shah* [1983] 2 AC 309, at 350. It is one thing to say that a court may not "substitute" its own decision for that of the body being reviewed save in the limited circumstances set out in section 31(5) and (5A). It does not necessarily follow that the court has no power to make a mandatory order, or an interim mandatory order, where justice requires that in other circumstances. The breadth of the terms of section 37(1) of the 1981 Act would suggest that it may do so: "The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so."

70. In practice it is not rare for an interim mandatory order to be made, for example in housing cases, where a homeless family may have to be provided with accommodation overnight; or immigration cases, where, for example, a person has been wrongly removed from the jurisdiction and the court requires that person's return to the UK pending determination of the substantive merits of a claim for judicial review: see the famous case of *M v Home Office* [1994] 1 AC 377.

71. I would prefer to leave the important issue of jurisdiction to be determined by this Court in a case where it is necessary for the outcome of the appeal and only after full argument.

Baker LJ:

72. I agree with both judgments.