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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Thursday, 1st February, 2018

Before:

MR JUSTICE HOLMAN

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B E T W E E N :

QUEEN ON
THE APPLICATION OF
MOHAMMAD AHMED HUSSEIN AND
MUHAMMAD RAFIQUR RAHMAN — Claimants

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

- and –

G4S — Interested Party

- and –

NATIONAL COUNCIL FOR CIVIL LIBERTIES
("LIBERTY") — Intervenor

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A P P E A R A N C E S

MS S HARRISON QC, MR R HALIM and MR S SIMBLET (instructed by Duncan Lewis) appeared on behalf of the Claimants.

MR T ROE QC, and MS H MASOOD (instructed by Government Legal Department) appeared on behalf of the Defendant.

MR R FURNISS appeared on behalf of the Interested Party (MISS E WHEELER attended for judgment)

THE INTERVENOR did not attend and was not represented, but submitted written submissions by Heather Williams QC and Keina Yoshida.

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J U D G M E N T

MR JUSTICE HOLMAN:

Introduction and the issues which this judgment addresses

1. Two claims for judicial review were listed together for a so-called rolled-up hearing of the application for permission to apply for judicial review, to be followed by the substantive hearing if permission was granted. The hearing was listed with considerable expedition, with two days estimated and allowed. There was perceived to be urgency, although most of the underlying matters complained of have persisted for several years and, indeed, both claimants were released from detention some time ago.

2. Both claimants are adult men of the Muslim faith who were detained at Brook House immigration removal centre (IRC) at Gatwick Airport. Both claimants claim that the conditions and regime at Brook House interfered with their required religious observance as, they say, devout Muslims, and that the conditions and regime have a differential and discriminatory impact upon them as Muslims, not experienced by those of other faiths or of no faith at all. This is said to follow from a combination of the hours of "lock-in" (as the claimants choose to call it) or "night state" (as the defendant prefers to call it) at Brook House when detainees cannot leave their rooms; the required times of Muslim prayer; room sharing; and the presence within the room of a lavatory cubicle without a door. The Secretary of State for the Home Department (SSHD) admits within these proceedings that she has to date failed to discharge her duty under section 149 of the Equality Act 2010 to have due regard to whether these circumstances have a discriminatory impact.

3. One of the claimants, Mr Rahman, being a smoker himself, was placed in a room with other smokers who were permitted to smoke in the room. He says that his room-mates smoked far more than he did throughout the night, such that, even as a smoker, the smoky atmosphere in the room became too much for him to bear. He now claims that it is unlawful of the SSHD and/or G4S Care and Justice Services (UK) Ltd (G4S), who run Brook House, to permit any detainee (himself included) to smoke in the detainees' rooms.

4. In relation to the above issues, I granted permission to both claimants to apply on grounds (V), (VI) and (VII) of their respective amended grounds for judicial review, and to seek the relief in

paragraphs (vii), (viii) and (ix) (which appears as (xi) in the Rahman amended grounds) of paragraph E of the respective amended grounds. I also granted permission to Mr Rahman to apply on ground (VIII) of his amended grounds (headed "Smoking in the IRCs") and to seek the relief in paragraphs (ix) and (x).

5. Both claims also make more wide-ranging challenges which include challenges to the lock-in regime itself; to the presence of lavatories at all within the rooms; to the use of three-men rooms at Brook House; to the layout of the in-room lavatories and the adequacy of curtains or other screening; to the quality and efficacy of the ventilation systems (relevant to both the smoking and the lavatory issues because of odours); to the lawfulness of a regime which relies upon detainees to clean their own rooms and, therefore, lavatories used by other detainees; and to the process or method of allocation of detainees to Brook House, it being said that there are other IRCs whose conditions and regimes have, or may have, a less discriminatory impact upon the religious observance of Muslims.

6. It was very obvious from the outset that many of these issues involved considerable disputes of fact which could only be resolved by extensive oral evidence and, indeed, I was invited by the SSHD just before the hearing began to consider making a site visit to Brook House, which would realistically have required a whole court day. This portmanteau of issues, complaints and claims was way beyond the scope of an expedited two-day hearing.

7. I have identified above the issues and grounds which were the most important ones to these particular claimants upon which I gave permission. As Ms Stephanie Harrison QC submitted on behalf of the claimants, those grounds involve the least disputed facts, and essentially involve issues of law. As a conclusion of the present hearing, I have decided in the exercise of my discretion to refuse permission to these claimants to apply for judicial review on any of their amended grounds, save those identified above. This is essentially a case-management decision upon application of the overriding objective in the Civil Procedure Rules.

8. These two claimants were released some time ago. They have now had the two full and expedited days of court time for submissions which they asked for, plus, of course, the prior reading time and the time now taken in preparation and delivery of this judgment. The remaining wide-ranging issues which they raise are said to be common to a number of other claims or potential claims, including some which are currently stayed. Because a rolled-up hearing was, exceptionally, ordered, there has been no consideration of any of these claims by a judge on paper as there should be. If other claimants wish the court in due time to consider others of these issues, then they must take their place in the queue and be considered in an orderly way to

the extent that any given head of claim is considered sufficiently arguable. I stress, however, that in refusing permission to apply on any of these other grounds, I have not made, and do not by this judgment make, any determination on their merits as to their arguability.

9. The National Council for Civil Liberties ("Liberty") was permitted to intervene in these proceedings by way of written submissions. I was grateful to Heather Williams QC and Keina Yoshida for their erudite and thoughtful written submissions dated 7th December 2017. They go, however, to some of the wider issues upon which I have refused permission, and I will make no further reference to them in this judgment.

The essential facts

(i) Mr Hussein

10. The claimant, Mohammad Hussein, was aged 23 during the period of his detention. He originates from Ethiopia. He arrived in Europe in 2012 and first claimed asylum in Italy. His subsequent asylum and immigration history between then and 2017 is not relevant to the present issues. In July 2017 he travelled for a second time to England and was arrested at Victoria Coach Station. He was detained at Brook House between 26th July and 17th November 2017 whilst his renewed asylum claim was considered and rejected. An attempt to remove him on 3rd October was frustrated. On 17th November Mr Hussein was transferred from Brook House IRC to Colnbrook IRC, and on 29th November 2017 he was released altogether from detention, but subject to reporting conditions.

11. Throughout his time at Brook House, Mr Hussein was placed with two other detainees in a three-bedded room.

(ii) Mr Rahman

12. The claimant, Muhammad Rahman, was aged 35 during the period of his detention. He originates from Bangladesh. He first entered the UK in 2010 on a student visa which was later curtailed when the licence of the college in question was revoked. Several years later he made an asylum claim which was refused and his subsequent appeals dismissed. The SSHD wished to remove him. He was detained at Brook House between 19th September and 13th November 2017 when he was released. Between 25th September and 23rd October, he was placed in a three-bedded room with two other detainees. Before and after those dates, he was placed with one other detainee in a two-bedded room.

(iii) Brook House IRC

13. Brook House was built about ten years ago as an IRC, but modelled on the design of a category B prison. It opened as an IRC in March 2009. I will later briefly refer to the contractual arrangements for Brook House in relation to the "smoking" issue. For the present, it is sufficient to say that under an elaborate Service Agreement, G4S provide, as summarised in Recital (B) to that agreement, "operation, maintenance and management services" at Brook House. In short, it is privately run by G4S on behalf of, and pursuant to a contract with, the SSHD. Brook House is currently an all-male IRC which currently has a capacity of 508 adult males. The precise cultural and ethnic composition of the detainees may obviously vary from day to day, but I was told that usually around 48% are of the Muslim faith.

14. Most of the individual rooms are two-bedded for two occupants each. But 60 rooms were adapted during 2016 by the addition of an extra bunk bed. Since March 2017 these adapted rooms have progressively been used for three occupants; and, as described above, each of these claimants spent all or part of their time at Brook House in three-bedded rooms with two other occupants. The rooms (or at any rate those used by these claimants) are about 12 metres square and measure about 4 metres by 3 metres. Internal to each room in one corner is a lavatory. This is screened by solid side and end walls or partitions, which are not floor to ceiling, but which are mostly above eye level. There is no door but simply a gap through which a person enters or leaves the lavatory cubicle. It is said by the SSHD and G4S that the gap is, or is supposed to be, covered by a curtain fixed by velcro. The reason why there is no solid door, and why velcro and not a more solid curtain rail is used, is said to be the risk of a door frame or curtain rail being used as a ligature point by a detainee attempting to commit suicide which, tragically, some do. I wish to stress that I am sensitive to the important need to minimise that risk.

15. As indicated above, there are in these cases huge disputes about such issues as sight lines and how far a person actually using the lavatory is or is not in sight of others in the room; and whether or not there was in the case of these claimants an effective curtain. Mr Hussein says that during his stay there was none at all in his room. Mr Rahman says that there was a "cloth" in two of the rooms he occupied, but it did not stay up but fell down.

16. There are also huge issues about the adequacy of the ventilation in clearing lavatory and other smells, the windows being fixed closed; and huge disputes about the standard of cleanliness and sanitation of the rooms and the lavatories within them.

(iv) The "lock-in" or "night state"

17. All male IRCs operate a "night state" during which detainees are confined to their rooms. The period of the night state varies between centres. At Brook House it is, and was at the time material to these claims, between 9.00 p.m. and 8.00 a.m., i.e. 11 hours. In some other centres it is, or may be, a shorter period. The effect of the night state is that, between those hours, the detainees are confined to their shared rooms. The communal lavatories and washing facilities elsewhere in the premises are not available to them, and they must use the lavatory within the room for all purposes.

(v) The Muslim prayer timetable

18. Both claimants say that an observant Muslim is required to say prayers five times a day within certain required periods. This is further described in a statement dated 19th January 2018 by Zeeshan Qayum, who is an Imam and the Head of Religious Affairs for the Gatwick IRCs of Brook House and nearby Tinsley House.

19. Very shortly before the hearing, the SSHD issued a formal application, with the statement attached, for that statement to be admitted in evidence. Mr Thomas Roe QC, on behalf of the SSHD, chose not to develop that application at the hearing; but as the SSHD had herself produced it, and as it is signed and dated and contains a statement of truth, I see no reason why I should not rely upon it, and I do.

20. At paragraph 6 the Imam describes the times or periods between, or within, which each of the prayers must be said in the winter and in the summer months according to the rising and setting of the sun. Most germane to the present case are the dawn ("Fajr") and late night ("Isha") prayers and the sunset prayer ("Maghrib"). The Imam says that the Fajr should be said between about 3.00 a.m. and 4.30 a.m. in the summer and 6.00 a.m. and 7.45 a.m. in the winter. The Isha should be said between about 10.30 p.m. and 2.00 a.m. in the summer, and 6.00 p.m. and 2.00 a.m. in the winter. The Maghrib should be said between about 9.30 p.m. and 10.30 p.m. in the summer, and 4.15 p.m. and 6.00 p.m. in the winter.

21. It is immediately apparent that the Fajr always, and the Isha and the Maghrib during the summer months, fall within the period of the night state or lock-in, and, in short, that an observant Muslim who is compulsorily detained at Brook House would be constrained (as the SSHD accepts) to say those prayers in his room which is shared with one or two others (who may or may not be of the Muslim faith, or of any faith at all) and which contains an unclosed lavatory cubicle.

Grounds (V), (VI) and (VII) and the discrimination-based claims

(i) The claim under the Convention.

22. So far as is material, Article 9 of the European Convention on Human Rights provides as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom ... to manifest his religion or belief, in worship, ... practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

23. Mr Roe said that the SSHD does not accept that either claimant is as devout or observant a Muslim as each respectively claims. However, there is no evidence to contradict what each say; and in a matter of personal faith and belief I must, in the context of this case, accept (on the balance of probability) what each say in this regard.

24. At paragraphs 8 to 10 of his statement dated 1st November 2017 (now at bundle 1, pp.C2 to C3) Mr Hussein says:

> "8. There is a room dedicated to those who wish to pray but we cannot use this room at times of lock-in. As a practising Muslim, I must pray my five daily obligatory prayers. However, when we are locked in between 9.00 pm to 8.00 am and 5.00 pm to 6.00 pm, I am unable to use the prayer room to offer my Fajr (sunrise) and Maghrib (sunset) prayers. I would like to undertake these prayers with other Muslims but I cannot do that during the lock-ins. I find it very upsetting that I have to offer prayer in the smelly dirty cell at times of lock-in, as this distracts me from my prayer. The area in which you should conduct prayer is supposed to be clean but this room is not and the environment for prayer is wrong but I have no other option but to force myself to do the prayers in spite of all this ... I wake up at around 5.00 am to offer Fajr prayer and use the toilet and do my prayers and then try to go back to sleep. I have to try not to disturb the others but this is difficult and they can get annoyed.
>
> 9 ...

10. I ask my room-mates to give me five minutes to complete my Maghrib prayer (performed at dusk, before sunset) and request them to be quiet during this time. Sometimes they co-operate, but sometimes they do not and I have to continue my prayer whatever they are doing. It is difficult to offer prayer attentively in these circumstances because my room-mates are making noise or watching TV and I am unable to concentrate on my prayer, which really upsets me."

25. At paragraph 12 of his statement dated 15th November 2017 (now at bundle 1, p.D3) Mr Rahman says:

"12. It is so disgusting that the toilet is in the same room we are sleeping in without any closure to the entrance. I cannot pray in my room as it is not clean, you cannot properly follow Islam with a toilet in the room in which you pray and with this sort of uncleanliness and smell within a cell. I simply cannot concentrate on prayer given the odour and uncleanliness ... The conditions within my cell ensure that I cannot follow Islamic practice as per the teachings of the religion."

26. In his statement dated 19th January 2018 the Imam, Zeeshan Qayum, says at paragraphs 11-13:

"11. Prayer being one of the fundamentals of the Islamic faith, it is very important that all Muslims have to fulfill the order of prayer which is a direct order from God in the holy book the Quran. There are many prophetic statements that Muslims should fulfill the prayer regardless of place and location.

12. As much as it is highly discouraged in Islam that the place of prayer is near to a toilet, in extreme circumstances, prayer can be offered using a prayer mat (when no other option or place is available) which is available from the Chaplaincy department at all times ...

13. There are mosques within the UK who don't have the luxury of having a big beautiful prayer hall at a very far distance from the toilets; they have to make with what they have. In these circumstances as long as the entrance to the toilet is covered and the area is kept clean at all times, then prayer would be permitted ... "

27. Mr Roe submitted that the size and layout of the rooms at Brook House is such that a Muslim within the room need not pray "near to a toilet" and suggested that that submission would be illuminated by a view. But I have seen photographs and plans of the rooms and I cannot accept the submission. The rooms are 12 metres square and approximately 4 metres long and 3 metres

wide. The beds are against the walls on either side, leaving floor space between them in the middle. There is a desk or table with two chairs in front of it beneath the window in the far wall. The floor area available for prayer between the beds and in front of the desk and chairs cannot be more than about two metres from the open entrance to the lavatory cubicle, and about three metres at most from the lavatory pan itself. I accept that adherents not only of Islam, but of other faiths could feel degraded at having to pray, avoidably, within three metres of an exposed and open lavatory pan (there are no seats or lids), especially one which may recently have been used by other people.

28. In my view, this evidence, and in particular that of the Imam, clearly establishes that Article 9 is engaged in this case and that a combination of the required hours of prayer, the lock in, room sharing, and unclosed lavatories within the rooms, does result in an interference with, or a limitation upon, the rights of a Muslim protected by Article 9.

29. Relying upon the observations of Lord Wilson in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 at paragraph 17 Mr Roe submitted that although the facts and circumstances of this claim are "within the scope of" or "ambit of" Article 9, and the Article is thus engaged, there is nevertheless no interference. I cannot accept that submission. Article 9 protects the freedom to manifest one's religion in worship, practice and observance. It must not be subject to any limitations save those which fall within Article 9(2).

30. The Imam states that "it is highly discouraged in Islam that the place of prayer is near to a toilet" and that this should only be done "in extreme circumstances ... (when no other option or place is available) ... "

31. The claimants were compulsorily detained, and then compulsorily locked in between hours during which they were required to say at least one or, depending on the season, two or three prayers. They were thus forced to worship and practise their religion in what are "extreme circumstances" which are "highly discouraged" in the tenets of that religion. Mr Hussein says that it distracted him from his prayer to have to pray in the smelly room and that he was unable to concentrate on his prayers in the presence of noisy room-mates. Mr Rahman says that he could not pray, or pray properly, in a room with a toilet and smell. He simply could not concentrate on prayer given the odour and uncleanliness.

32. During his oral submissions Mr Roe submitted that any interference with the freedom protected by Article 9 was "minimal" in the sense of the legal maxim *de minimis non curat lex*. At paragraph

4 of their written "Secretary of State's supplementary skeleton argument" dated 24th January 2018, Mr Roe and Ms Hafsah Masood repeatedly say that any impact was not "significant".

33. I make clear that I do not by this judgment, after a relatively short hearing during which I have not heard any oral evidence, attach any adjective to qualify or quantify the degree of interference, or to place it on a spectrum. I do not say whether it was minor (but not de minimis), significant, or grave; but in my view it went beyond the de minimis, and constituted an actual interference with the protected freedom.

34. That being so, Article 14 of the European Convention on Human Rights is also engaged. So far as is material, that provides as follows:

> "14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... religion, ... "

35. There is indirect discrimination in these circumstances on the ground of religion. Muslims are required to pray at the stated hours, and the lock-in has the differential and discriminatory consequence that they have to pray in conditions (viz in the shared rooms with the lavatories) in which adherents of other faiths, or of none, do not have to do. However great the impact of the lock-in, the lavatories and room sharing may be on other detainees, it has a greater and discriminatory impact upon practising Muslims because of the requirements of their religion. As the European Court of Human Rights said in *Thlimmenos v Greece* (2001) 31 EHRR 15 at paragraph 44:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

(ii) The claim under the Equality Act

36. As well as infringing rights under the Convention, the combination of the practice of the lock-in, the required hours of prayer, the unclosed lavatories, and room sharing, clearly results in indirect discrimination contrary to section 19 of the Equality Act 2010 unless it can be justified.

37. Section 19(3) lists the relevant characteristics for the purpose of that section as including "religion or belief". Sections 19(1) and (2) provide as follows:

> "19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

38. Patently the SSHD applies a provision, criterion or practice which puts persons who share the protected characteristic of being practising adherents of the Muslim faith at a particular disadvantage when compared with persons who do not share that characteristic. There is thus a burden on the SSHD under section 19(2)(d) to show that the relevant provision, criterion or practice is a proportionate means of achieving a legitimate aim. It thus follows that both under the Convention and under section 19 of the domestic Equality Act 2010 there is a burden upon the SSHD to justify, if she can, the discrimination in point.

Justification and the failure to discharge the public sector equality duty

39. Paragraph 2 of Schedule 18 to the Equality Act 2010 provides that "in relation to the exercise of immigration ... functions" (as then defined in paragraph 2(2)) section 149 of the Act "has effect as if subsection (1)(b) did not apply to the protected characteristic of ... religion or belief ... "

40. Ms Harrison accepts that the present issue falls within the exercise of immigration functions by the SSHD so that on this issue subsection (1)(b) of section 149 of the Act is disapplied. That, in turn, disapplies the whole of subsection (3) of section 149 to the issue in this case.

41. So far as material to the issue in this case, therefore, section 149 of the Equality Act provides as follows:

"149. Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to -

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; ...

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

..."

42. The SSHD has conceded that in exercising her functions at Brook House, insofar as relevant to this case, she has not previously or to date paid the due regard to the need to eliminate discrimination that section 149(1) requires. The high importance of that duty and the manner in which it must be discharged is set out and explained in paragraphs 26, 60 and 61 of the now seminal judgment of McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and the authorities there cited. I incorporate those paragraphs into this judgment by reference, but as it is not in issue that they apply to the duty upon the SSHD under section 149 in this case, I need not set them out. I stress only that the duty is non-delegable; cannot be discharged merely as a "rearguard action"; and is a continuing and "heavy" one.

43. Where a minister has failed for an appreciable period of time to discharge that duty, it is not, in my view, sufficient for a court merely to so state in judgment, even after a concession has been made. A minister who has failed to discharge that heavy duty cannot avoid censure by a concession made in the course of the proceedings themselves. I will accordingly make a declaration substantially in the terms of paragraph (viii) of the relief sought in the respective amended grounds for judicial review; namely to the effect that in continuing to authorise and/or permit the maintenance of the lock-in (or night state) regime at Brook House and/or the conditions of the detention generally and/or in the claimants' cases, the SSHD failed to have any regard to the public sector equality duty under section 149 of the Equality Act 2010.

44. I am not willing to go further and make a mandatory order requiring the SSHD to discharge that duty within 28 days (as contended for in the amended grounds) or any other specified period. The breach of the duty having now been plainly highlighted by this case and declared by this court, I should, in the first instance, assume that the SSHD will now, within a reasonable time, conscientiously and diligently discharge the duty upon her applying the *Bracking* principles.

That will necessarily require a period and process of consultation with a range of officials, G4S, and others, and the proposed period of 28 days is in any event unrealistic and, frankly, absurd.

45. If in due course no changes are made in reaction to this case and judgment and there is a further challenge, the SSHD will need to be able clearly and positively to demonstrate that she has meantime discharged the duty under section 149 in the manner that *Bracking* explains and requires.

Justification

46. Both under Article 9 of the Convention and under the Equality Act the discrimination is unlawful unless it can be justified. The thrust of evidence filed on behalf of the SSHD, and the written and oral submissions of Mr Roe and Ms Masood, are to the effect that any discrimination (which is not, as they would submit, de minimis or insignificant) is justifiable. Explanations are given as to the need for a night state or lock-in; the need for lavatories in the rooms; the need for the lavatories to be screened only by a curtain affixed by velcro; and the need for rooms to be occupied by two, or in some cases three, detainees.

47. It is not for the claimants to suggest how the discrimination may be avoided or mitigated, but Ms Harrison nevertheless suggests that it may be addressed by one or more of a number of measures. These may include not placing practising Muslims at Brook House at all; modifying (whether seasonally or generally) the hours of night state in relation to practising Muslims, or permitting them to leave their rooms at the times of prayer; grouping Muslims in certain wings and having different night state times in those wings; and removing the in-room lavatories, or at least much improving the screening and ventilation of them.

48. However, Ms Harrison makes the bolder and more overarching submission that, in the circumstances of the present case, it is not at the moment open to the SSHD to seek to justify, or advance justification for, the discrimination at all, since she has to date failed to discharge her duty under section 149. Put colloquially (although these are my words not those of Ms Harrison), as the SSHD has not yet thought about the relevant discrimination issues at all, she cannot advance as justification matters which she may later be able to advance once, indeed, she has conscientiously thought about it. Meantime she is merely engaging in a "rearguard action" as proscribed by subparagraph (4) of paragraph 26 of *Bracking*.

49. In making that submission, Ms Harrison relies in particular upon the observations of Baroness Hale of Richmond DPSC (with whom the rest of the court agreed) in *Coll v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093 at paragraph 42. In that case the claimant, a

female serving a sentence of life imprisonment, complained that the relative paucity of approved premises for women relative to men had the sex discriminatory effect that she could not, unlike a man, be placed in approved premises near to her home in preparation for her release into the community.

50. The Supreme Court held this to be direct discrimination. The judge had already found and declared that the Secretary of State had failed to discharge the public sector equality duty, and that finding had not been the subject of challenge in the subsequent appeals. In paragraphs 34 to 42 of her judgment, Baroness Hale described the arguments that had been advanced in relation to justification; but at paragraph 41 she said:

> "41. Despite her criticisms of the aims identified by the Secretary of State and the courts below, [leading counsel for the claimant] accepts that in principle the different provision made for men and women might be justified. Her complaint is that the Ministry of Justice has never properly addressed its collective mind to the problem of providing sufficient and suitable places in APs for women which achieve, so far as practicable, the policy of placing them as close to home as possible. There are other options which could have been considered, including ... "

51. The other options are then described, just as Ms Harrison has suggested alternative options, or combinations of options, in the present case as I have briefly described above. At paragraph 42 Baroness Hale continued:

> "42. Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the Secretary of State to show that the discrimination is justified. Given that the ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim."

52. It is instructive to note the relief actually granted by the Supreme Court in paragraph 45 of *Coll*. The court made a declaration that there was:

" ... direct discrimination against women ... which is unlawful unless justified ... No such justification has yet been shown by the Secretary of State."

I emphasise the word "yet" in that quotation.

53. Ms Harrison submits that, so far as is material, the situation in the present case is on all fours with that in *Coll* and that the SSHD, having failed yet to discharge her public sector equality duty under section 149, cannot yet show justification. Just like the Secretary of State for Justice in *Coll*, the SSHD has not addressed the possible impacts upon practising Muslims, assessed whether there is a disadvantage, how significant it is, and what might be done to mitigate it or to meet the particular circumstances of detainees who are practising Muslims.

54. On behalf of the SSHD, Mr Roe seeks to distinguish *Coll* on the ground that the case concerned, as the Supreme Court held, direct discrimination, whereas the present case concerns an interference which, as I have held, amounts to indirect discrimination. At paragraph 5 of their Supplementary skeleton argument dated 24th January 2018, Mr Roe and Ms Masood submit that:

"In principle whether a limitation on the freedom to manifest one's religion is justifiable cannot logically depend on whether the state thought about this at the time."

55. In their written document they then posited the example of a Christian detainee who said he needed to make a pilgrimage to Canterbury. In his oral submissions, Mr Roe posited the more extreme case of a Muslim sentenced to life imprisonment who said that he must make his pilgrimage to Mecca. Mr Roe submitted that the restriction on his ability to do so is so obviously justifiable that it makes no difference whether, in discharge of the section 149 duty, the minister had thought about it or not.

56. Mr Roe further stresses that section 149 is part of the domestic legislation and no part of the European Convention. He thus submits that insofar as justification under the Convention and Article 9(2) is under consideration, failure to discharge the section 149 duty is irrelevant.

57. I cannot accept any of these arguments or submissions. Paragraph 42 of *Coll* is not laying down (nor am I being invited by Ms Harrison to apply) a rule of law. It merely indicates an approach which may, on the facts and in the circumstances of a given case, be adopted. I cannot see that the approach is confined to cases of direct discrimination, nor why it may not be equally in point in cases of indirect discrimination.

58. Either way, the point is the same. The minister has failed to address his mind to the problem and how it may be mitigated or avoided. Whilst the question of justification may not "logically depend on whether the [minister] thought about this at the time", a minister who did not think about it is likely to be disadvantaged or disabled in demonstrating justification unless and until he has properly thought about it.

59. The example of a Muslim serving a life sentence who claims he must go to Mecca is an extreme one, and many good rules or approaches may founder when pressed to destruction. That does not make them wrong in less extreme circumstances.

60. It is true that section 149 is not part of the Convention, but even under the Convention a minister who has not thought properly or at all about discrimination is unlikely to be able to justify it until he has done so.

61. Mr Roe relies also upon the observations of Mummery LJ in *Elias v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at paragraphs 133, 175, 176 and 178. In that case the Secretary of State for Defence had failed to discharge a similar public sector duty under section 71 of the Race Relations Act 1976. At paragraph 133 Mummery LJ said that the minister:

> " ... has to justify something which he did not even consider required justification. In these circumstances the court should consider with great care the ex post facto justifications advanced at the hearing."

62. That theme permeates paragrahs 175, 176 and 178 of the same judgment. So Mr Roe submits that, on the basis of that authority, ex post facto justification may be relied upon, albeit that the court must consider it with great care.

63. *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, [2012] 3 All ER 1301 concerned direct age discrimination. At paragraphs 59 and 60, in the context of that case, Lady Hale SCJ cited, amongst other materials, *Elias* and clearly contemplated that rationalisation may be ex post facto. *Seldon* was in turn cited in argument in *Coll,* although not referred to in judgment.

64. As I have already said, paragraph 42 of *Coll* is not, as I understand it, laying down a rule of law, but in my view I should adopt the same approach as in *Coll* in the present case.

65. The blunt truth and reality is that the SSHD has never previously thought about the differential discriminatory effect upon practising Muslims of the combination of their required times of prayer, the night state, the unclosed lavatories and the shared rooms. It may in the end be

justifiable, but, as already indicated, there may be a range of steps which the SSHD may be able to take to mitigate or avoid it. Unless and until she, who is the policymaker, has fully and conscientiously considered those steps (and others) and thought this whole problem through, I am quite unable to hold, meantime, that it is justified.

66. For these reasons, I will make a declaration in terms to be drafted and agreed by counsel and modelled upon that in *Coll,* to the effect that the night state or lock-in regime at Brook House in conjunction with the presence of internal unclosed lavatories and shared rooms (i) constitutes indirect discrimination contrary to Article 9 of the European Convention on Human Rights read with Article 14 which is unlawful unless justified; and (ii) unless justified, constitutes unlawful indirect discrimination contrary to section 19 of the Equality Act 2010. No such justification has yet been shown by the SSHD.

Ground VIII of Mr Rahman's claim

Smoking

67. Mr Rahman is himself a smoker, and at first blush it might seem odd that he can complain that smoking is permitted within those rooms at Brook House which are allocated to smokers when he himself did smoke within them. However, at paragraphs 14 to 19 of his second witness statement dated 22nd December 2017 (now at bundle 2, pp.I-14 and 15) he says:

> "Smoking
>
> 14. I am a smoker. My first room-mate was also a smoker. Within the second room that I was given at Brook House, I shared with two other detainees. Both of them were smokers.
>
> 15. Both of my room-mates smoked during the course of the night. I used to have two or three cigarettes throughout the night, but my other room-mates would smoke many more cigarettes per night. The cigarette smell got very strong as the time passed and even as a smoker it became too much for me. I would try to limit my smoking two or three cigarettes during the overnight lock-ins to try and keep to a minimum but the others did not do this.
>
> 16. In the last room I was in, I shared with one other detainee. He was a smoker. He would not only smoke during the overnight lock-in, but also during the two daytime lock-ins ...
>
> 17. …

18. The cigarette smells constantly remained in my rooms. The smoke made the room feel even more congested. I kept my smoking to a minimum in order to avoid this. But other detainees did not as there is no limit on how many cigarettes people can smoke in these rooms.

19. I did not have the right to tell them how much to smoke as everybody smokes a different amount if they are stressed, upset, scared or just bored."

68. Smoking in the rooms is either lawful or unlawful, and the SSHD has expressly accepted that that narrative by Mr Rahman establishes that, even as a smoker himself, he has sufficient interest to bring his claim that smoking within the rooms is in fact unlawful and that no one, himself included, should have been permitted to smoke.

69. Section 1(1) of the Health Act 2006 (in this part of this judgment "the Act") provides as follows:

"1(1) This Chapter makes provision for the prohibition of smoking in certain premises, places and vehicles which are smoke-free by virtue of this Chapter."

70. So far as is material, section 2 of the Act provides as follows:

"2. Smoke-free premises

(1) Premises are smoke-free if they are open to the public. But unless the premises also fall within subsection (2), they are smoke-free only when open to the public.

(2) Premises are smoke-free if they are used as a place of work -

(a) by more than one person (even if the persons who work there do so at different times, or only intermittently), or

(b) where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present).

They are smoke-free all the time.

(3) If only part of the premises is open to the public or (as the case may be) used as a place of work mentioned in subsection (2), the premises are smoke-free only to that extent.

(4) In any case, premises are smoke-free only in those areas which are enclosed or substantially enclosed.

(5) ...

(6) Section 3 provides for some premises, or areas of premises, not to be smoke-free despite this section.

... "

71. So far as is material, section 3 of the Act provides as follows:

"3. Smoke-free premises: exemptions

(1) The appropriate national authority may make regulations providing for specified descriptions of premises, or specified areas within specified descriptions of premises, not to be smoke-free despite section 2.

(2) Descriptions of premises which may be specified under subsection (1) include, in particular, any premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes, and prisons and other places where a person may be detained).

... "

72. So far as is material, section 8 of the Act provides as follows:

"8. Offence of failing to prevent smoking in smoke-free place

(1) It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.

...

(4) A person who fails to comply with the duty in subsection (1), or any corresponding duty in regulations under subsection (3), commits an offence.

(5) It is a defence for a person charged with an offence under subsection (4) to show -

(a) that he took reasonable steps to cause the person in question to stop smoking, or

(b) that he did not know, and could not reasonably have been expected to know, that the person in question was smoking, or

(c) that on other grounds it was reasonable for him not to comply with the duty."

73. Regulations have been made under section 3 of the Act by the Secretary of State for Health, namely The Smoke-free (Exemptions and Vehicles) Regulations 2007, SI [2007] 765. Regulation 2 of those regulations provides that the exemptions in Part 2 of the regulations apply only to premises that would be smoke-free under section 2 of the Act if those exemptions had not been made. It is thus necessary first to decide whether those areas of Brook House which are enclosed or substantially enclosed are premises that would be smoke-free but for any exemptions in the regulations.

74. The recent authority of the Supreme Court in *Black v Secretary of State for Justice* [2017] UKSC 81, [2018] 2 WLR 123, clearly establishes that Chapter 1 of the Act does not bind the Crown as it does not expressly so provide. Before and throughout the written and oral submissions in the present case, the SSHD, and Mr Roe and Ms Masood on her behalf, strenuously maintained that Brook House is "Crown premises" or "government premises" such that the Act is of no application to it.

75. As developed at the hearing, this argument relied in part upon the fact that there is a lease and a chain of subleases between the freehold owner of Brook House (Gatwick Airport) and G4S. Within that chain is a lease to the Secretary of State for Communities and Local Government, who in turn leased the premises to G4S at an annual peppercorn rent. The term of the lease to G4S expired in 2014, but they remain in occupation as tenants at will pursuant to a letter dated 27th February 2014 from solicitors on behalf of the Secretary of State for Communities and Local Government.

76. The argument on behalf of the Secretary of State for Justice in *Black* (which concerned a "state-run prison") drew a distinction between "state-run" or "public", and "private" prisons. This can clearly be seen in the summary of the argument of leading and junior counsel on behalf of the Secretary of State for Justice before the Court of Appeal in that case, now reported at [2016] QB 1060 at 1063G. Their argument before the Supreme Court has not yet been reported. However, at paragraph 42 of the judgment of the court, Baroness Hale of Richmond PSC, addressing the argument, appears to have accepted a distinction between "state-run" and "private" prisons. The assumption within the argument and paragraph 42 appears to be that the Act does apply to prisons which are "private" and not "state-run".

77. Mr Roe submitted during the present hearing that this is, for these purposes, an illusory and mistaken distinction. What matters is not who runs the prison or, in the present case, the IRC, but whether the premises themselves are Crown premises, since it is upon "premises" that section 1 of the Act bites. He submitted that the fact that the Crown is a lessee/landlord in one link of the chain of leases is sufficient, when taken with the functions performed there, to make the premises at Brook House "Crown premises" so as to be outside the scope of the Act altogether.

78. On the day after the oral hearing concluded, Mr Thomas Roe QC, on behalf of the Secretary of State, sent an email to myself, copied to all parties, dated 25th January 2018. So far as is material, that reads as follows:

> "One of the submissions I developed yesterday on behalf of the Secretary of State was that Brook House IRC is not 'smoke-free premises' within the meaning of Part 1, Chapter 1 of the Health Act 2006 because it constitutes Crown premises, to which Part 1, Chapter 1 therefore does not apply.
>
> On further reflection, the Secretary of State does not wish to pursue this submission. She is therefore content for the court to decide the smoking issue on the footing that Part 1, Chapter 1 of the Health Act 2006 *does* apply to Brook House IRC and the sole question is whether the individual rooms in it (in some of which, smoking is currently being permitted to take place in limited circumstances) are 'private dwellings' falling within the exception in the 2007 regulations."

79. Whether or not that email technically amounts to a formal concession, or merely an election in this particular case not further to pursue the point, I myself consider that the position taken by the Secretary of State after her further reflection is a wise and correct one. The premises have been demised by the Crown to a private contractor, G4S, albeit for a peppercorn rent. Brook House is run on behalf of the Crown pursuant to the Service Agreement, but is entirely run and managed by the private contractor. The fact that one link in the chain of leases is a Secretary of State does not render them Crown premises. Accordingly, both as a result of Mr Roe's email but also my own independent decision, I proceed on the basis that Brook House is indeed premises to which the Act applies.

80. That being so, it is accepted by the SSHD that the enclosed areas of the premises fall within section 2 of the Act, being "a place of work". That, however, is subject to any exemptions made by the regulations. Section 3(2) of the Act expressly extends to "premises where a person ... is living

whether permanently or temporarily (including ... prisons and other places where a person may be detained)." An IRC such as Brook House is patently "a place where a person may be detained", so it was, and is, within the power of the Secretary of State for Health to make an exemption for IRCs by regulation. Has he done so?

81. It is necessary to quote the regulations somewhat extensively. They provide as follows:

"Part 2

Exemptions

" ...

2 ...

3. Private accommodation

(1) A private dwelling is not smoke-free except for any part of it which is -

(a) used in common in relation to more than one set of premises (including premises so used in relation to any other private dwelling or dwellings); or

(b) used solely as a place of work (other than work that is excluded by paragraph (2)) by -

(i) more than one person who does not live in the dwelling;

(ii) a person who does not live in the dwelling and any person who does live in the dwelling; or

(iii) a person (whether he lives in the dwelling or not) who in the course of his work invites persons who do not live or work in the dwelling to attend the part of it which is used solely for work.

(2) There is excluded from paragraph (1)(b) all work that is undertaken solely -

(a) to provide personal care for a person living in the dwelling;

(b) to assist with the domestic work of the household in the dwelling;

(c) to maintain the structure or fabric of the dwelling; or

(d) to install, maintain or remove any service provided to the dwelling for the benefit of persons living in it.

(3) In this regulation, 'private dwelling' includes self-contained residential accommodation for temporary or holiday use and any garage, outhouse or other structure for the exclusive use of persons living in the dwelling.

4. Accommodation for guests and club members

(1) A designated bedroom in a hotel, guest house, inn, hostel or members' club is not Smoke-free.

(2) In this regulation 'a designated bedroom' means a room which -

(a) is set apart exclusively for sleeping accommodation;

(b) has been designated in writing by the person having the charge of the premises in which the room is situated as being a room in which smoking is permitted;

(c) has a ceiling and, except for doors and windows, is completely enclosed on all sides by solid, floor-to-ceiling walls;

(d) does not have a ventilation system that ventilates into any other part of the premises (except any other designated bedrooms);

(e) does not have any door that opens on to smoke-free premises which is not mechanically closed immediately after use; and

(f) is clearly marked as a bedroom in which smoking is permitted.

(3) In this regulation 'bedroom' does not include any dormitory or other room that a person in charge of premises makes available under separate arrangements for persons to share at the same time.

5. Other residential accommodation

(1) A designated room that is used as accommodation for persons aged 18 or over in the premises specified in paragraph (2) is not smoke-free.

(2) the specified premises are -

(a) care homes as defined in section 3 (care homes) of the Care Standards Act 2000;

(b) hospices which as their whole or main purpose provide palliative care for persons resident there who are suffering from progressive disease in its final stages; and

(c) prisons.

(3) ... "

82. The broad scheme of the regulations is clearly to distinguish "private accommodation", "accommodation for guests and club members", and "other residential accommodation" and to make express and tailored provision for each category. Prisons are firmly placed within regulation 5 (other residential accommodation), and express provision is made for them. Since section 3(2) of the Act expressly refers also to "other places where a person may be detained" the types of premises specified in regulation 5(2) could clearly have been extended to include IRCs, but they are not. I cannot speculate whether the omission results from policy or oversight.

83. It cannot be suggested, and is not suggested, that an IRC falls within the types of premises to which regulation 4 applies. By no stretch of the imagination is an IRC a hotel, guest house, inn, hostel or members' club, and even if it was, the exemption in the regulation would not extend to rooms occupied by more than one detainee: see regulation 4(3).

84. The SSHD, and Mr Roe and Ms Masood, are thus driven to submit that detainees' rooms within an IRC are "private dwellings" so as to fall within the exemption in regulation 3. Valiant though that submission is, I reject it.

85. First, the regulations make express provision for prisons within regulation 5 under the heading "Other residential accommodation". Since section 3(2) of the Act makes express reference to "prisons and other places where a person may be detained", the obvious place in which to make express provision for IRCs would be as an additional sub-paragraph in regulation 5(2). If the maker thought it necessary to provide expressly for prisons in regulation 5(2), he cannot sensibly have thought or intended that an IRC did not require express provision as falling within the description "a private dwelling" in regulation 3(1).

86. Second, whilst the word "dwelling" is not defined in the regulations, and I eschew any attempt to define it, the concept of a dwelling is not apt to describe the circumstances of a person who is compulsorily detained in an institution. Some colour is gained from the reference in regulations 3(2)(b) to "the household in the dwelling". Whilst not all dwellings contain a "household", for a person may dwell alone, the concept of a dwelling in the regulations is clearly that of a social

unit which may include a household. The shared room of a detained person does not, and cannot.

87. Third, regulation 3 applies only to a "private dwelling". Again, I eschew any attempt to define the word "private" for these purposes, but in my view it is impossible to characterise an IRC (although itself run by a private contractor) as the "private" dwelling of any person compulsorily detained there.

88. Fourth, the regulations differentiate between a "dwelling" in regulation 3 and a "bedroom" in regulations 4 and 5(3) and (although it ceased to have effect on 1st July 2008) in regulation 10(2) which related to mental health units. The rooms of detainees at Brook House are, in truth, not dwellings but bedrooms. They contain no cooking or recreational facilities or space.

89. For these reasons, I am crystal clear that the regulations as currently made do not make any exemption for IRCs and, accordingly, that all those areas of Brook House which are enclosed or substantially enclosed must be smoke-free, including the detainees' rooms.

90. I will grant a declaration that the practice and policy of permitting smoking within any of the areas of Brook House which are enclosed or substantially enclosed, including the detainees' rooms, was, at the time the claimant Mr Rahman was detained there, and still is, unlawful.

91. Whether or not an offence under section 8 of the Act has been, or is being, committed would appear to depend on whether or not any person charged with an offence under that section can show one of the defences listed in section 8(5). That is, of course, entirely outside the scope of these proceedings and this judgment.

Detention Services Order 2/2014

92. Detention Services Order 2/2014 (the DSO) is issued by the Home Office and is headed "Smoke-free legislation. Application to immigration removal centres, short-term holding facilities, pre-departure accommodation and escort vehicles." At paragraph 2 it states (now at bundle 3, p.K-G141):

> "2. Broadly, the regulations require all indoor areas to be smoke-free and for arrangements to be in place to minimise the dangers of passive smoking. Unlike prisons, where legislation [viz the regulations] makes provision for accommodation for persons aged 18 or over to be exempt from being smoke-free, subject to specified conditions, no such exemption applies to the immigration detention estate. However, given the particular circumstances of the estate, it has been decided that a

pragmatic approach should be applied in the implementation of the legislation so far as it affects detainees in removal centres and residential short-term holding facilities. This is based on the principle that these premises are, in effect, detainees' places of residence during their period of detention. For staff, the premises are places of work so the same considerations do not apply."

The DSO then describes a policy permitting in specified circumstances smoking in bedrooms.

93. The words "a pragmatic approach" in paragraph 2 of the DSO quoted above are, frankly, little more than a euphemism for knowingly evading the law for a "pragmatic" reason. The passage then bases that pragmatic approach on "the principle" that IRC premises "are, in effect, detainees' places of residence during their period of detention." Maybe they are, but for the reasons I have given that does not make them a private dwelling within the meaning of the regulations. In my view, insofar as it applies to Brook House or other private IRCs (I have given no consideration to short-term holding facilities, pre-departure accommodation, or escort vehicles) the DSO is plainly unlawful and I will so declare it.

94. If the SSHD wishes to continue to permit smoking within the bedrooms or other enclosed or substantially enclosed areas of Brook House or other private IRCs, this can be achieved by a very short and simple amendment to the regulations if the SSHD is able to persuade the Secretary of State for Health to make one.

Outcome

95. In summary -

(i) I grant permission to both claimants to apply for judicial review on grounds (V), (VI) and (VII) of their respective amended grounds.

(ii) I grant permission to Mr Rahman to apply for judicial review on ground (VIII) of his amended grounds.

(iii) I refuse permission to both claimants to apply for judicial review on any other grounds.

(iv) I declare that in continuing to authorise and/or permit the maintenance of the lock-in (or night state) regime at Brook House and/or the conditions of the detention generally and/or in the claimants' cases, the SSHD failed to have any regard to the public sector equality duty under section 149 of the Equality Act 2010.

(v) I declare (subject to precise drafting by counsel) that the night state or lock-in regime at Brook House, in conjunction with the presence of internal unclosed lavatories and shared rooms, (i) constitutes indirect discrimination contrary to Article 9 of the European Convention on Human Rights read with Article 14, which is unlawful unless justified; and (ii) unless justified, constitutes unlawful indirect discrimination contrary to section 19 of the Equality Act 2010 No such justification has yet been shown by the SSHD.

(vi) I declare that the practice and policy of permitting smoking within any of the areas of Brook House which are enclosed or substantially enclosed, including the detainees' rooms, was, at the time the claimant Mr Rahman was detained there, and still is, unlawful.

(vii) I declare that insofar as DSO 2/2014 applies to Brook House or other private IRCs it is unlawful.

(viii) I decline to make any mandatory orders.

96. Finally, I record my gratitude to Ms Harrison QC and Mr Roe QC, ably supported by their juniors, for their sustained and cogent arguments on paper and during the hearing.

[END OF JUDGMENT]

MR JUSTICE HOLMAN: I think we had a little discussion last week. I am very confidently assuming that counsel will be able now to draft an order that gives effect to all of that.

MR HALIM**:** My Lord, yes, I think so. I do not know whether it would be best to await the final approved judgment, although----

MR JUSTICE HOLMAN: I do not see why it should. I have read it out very carefully. I will read it out again if you want. You have been sitting there with a laptop. Do you want me to read it out again more slowly?

MR HALIM: No, thank you, my Lord.

MR JUSTICE HOLMAN: Are you sure?

MR HALIM: Yes. We have a note between us which I am sure we can use to draft an order.

MR JUSTICE HOLMAN: I am perfectly happy to read out that last outcome bit. That was the whole purpose of it.

MR HALIM: No. I do not think----

MR JUSTICE HOLMAN: Have you got it with complete clarity? Right. So you should be able to draft something. Yes?

MR HALIM: Yes.

MR JUSTICE HOLMAN: So far as costs are concerned, I think we probably agreed last week that if and insofar as costs cannot be agreed, there would be very concise written submissions. Was that what we agreed? Did we discuss this?

MS MASOOD: My recollection is that that is what was discussed and agreed.

MR JUSTICE HOLMAN: Was not discussed?

MS MASOOD: Was discussed.

MR JUSTICE HOLMAN: Was discussed.

MR HALIM: Yes.

MR JUSTICE HOLMAN: That is what we agreed?

MS MASOOD: Yes.

MR HALIM: Yes.

MR JUSTICE HOLMAN: So I do not need to deal with costs today?

MR HALIM: My Lord, no.

MR JUSTICE HOLMAN: If you cannot agree it, and I would earnestly urge sensible dialogue both as to the principle of costs and the quantum of it, if it cannot be agreed, I am prepared to accept very short written submissions limited to four sides of A4 each on the question of costs.

MR HALIM: Yes.

MR JUSTICE HOLMAN: So the only other matter would be any application anybody wanted to make for permission to appeal. I did say in relation to that that I would extend the time for making any such application for an appropriate period until after receipt by the party in question of the official transcript of the judgment. I think I said that.

MR HALIM: Yes.

MR JUSTICE HOLMAN: So I do not know whether we agreed or specified a period last week.

MS MASOOD: We did not.

MR JUSTICE HOLMAN: What is the normal time for applying for permission to appeal? 21 days?

MR HALIM: Twenty-one days.

MR JUSTICE HOLMAN: I will say that the 21 days is extended to start running on the date that the party in question receives, not what these ladies are very assiduously doing, but the official approved transcript of the judgment.

MR HALIM: My Lord, thank you.

MR JUSTICE HOLMAN: But that is extending the time for applying for permission to appeal and extending the time for appealing, but it is not implied in that that I am giving you permission

to appeal. I have never in 22 years yet thought it appropriate to give permission to appeal and I would be surprised if I do in this case. So it is not a grant of permission to appeal; it is merely saying that the time for applying for permission to appeal is extended.

MS MAHSOOD: Does my Lord intend to set down a timetable for costs submissions?

MR JUSTICE HOLMAN: Well, I am open to suggestions.

MR HALIM: My learned friend raises a point that I was going to raise as well. I think that if we do it within----

MR JUSTICE HOLMAN: May I suggest within three weeks of the approved transcript of the judgment being available.

MR HALIM: Yes. So those will be simultaneous submissions, then, I assume, or -- the proposal we were going to make was the ordinary timetable of claimant, defendant, reply and then for the claimant, and then it to go before your Lordship.

MR JUSTICE HOLMAN: I cannot at the moment really visualise any realistic application by the Secretary of State for an order for costs against these claimants.

MR HALIM: No.

MR JUSTICE HOLMAN: She may strongly say there should be no order as to costs. I cannot really see how she can sensibly apply for costs.

MR HALIM: Yes. Our position of course would be we cannot see how the Secretary of State could sensibly----

MR JUSTICE HOLMAN: What?

MR HALIM: Our position, of course, would be we cannot see how the Secretary of State could sensibly resist paying the claimants' costs, but we will deal with that----

MR JUSTICE HOLMAN: All I am saying is I think the effective claimant for any order as to costs is going to be you, so I would suggest sequentially you go first, Secretary of State replies.

MR HALIM: My Lord, yes. If we can have a right of reply seven days thereafter----

MR JUSTICE HOLMAN: I do not want a proliferation of paper.

MR HALIM: We do not wish to use the reply if it is not necessary, but if it is there as a provision.

MR JUSTICE HOLMAN: Four sheets of A4, your initial submissions; four sheets of A4, the Secretary of State's answer to your submissions; two sheets of A4, anything further you wish to say by way of reply.

MR HALIM: My Lord----

MR JUSTICE HOLMAN: The costs issues in this case are pretty straightforward. You have, of course, succeeded on the two significant points upon which I have granted permission, and you have succeeded.

MR HALIM: Yes.

MR JUSTICE HOLMAN: So that of course would normally lead to costs following the event on those issues. What the Secretary of State may say is you tried to raise a whole mass of other issues here which the judge has not allowed you to develop in these judicial reviews. That is the only point that she has got.

MR HALIM: I think that is right.

MR JUSTICE HOLMAN: At best it might support some argument in favour of a less than full costs recovery.

MR HALIM: My Lord, yes.

MR JUSTICE HOLMAN: So it is not a big issue. I do not have a final position on it, but it is -- I will hear what each of you say in writing, but we don't want prolix documents.

MR HALIM: My Lord, no. For our part we anticipate that the issue should be as simple as your Lordship has put it. It is really -- we really ask for that timetable as a backstop.

MR JUSTICE HOLMAN: Do you agree with that?

MS MASOOD: Save for obviously -- the Secretary of State does reserve her position about whether she will wish to apply for her costs. I do not have any instructions about that today.

MR JUSTICE HOLMAN: No.

MS MASOOD: But just for the record, as it were, I agree with the timetable, yes.

MR JUSTICE HOLMAN: I think we all know that attack is the best form of defence but it does not necessarily work. Anyway, of course you can mount that in your document but I think it might bounce back on you. So that deals with that.

So is there anything else with which I need to deal?

MS MASOOD: Just to clarify, so three weeks for the claimants' submissions and then a week thereafter for the Secretary of State's?

MR HALIM: I'm sorry, I just turned my back.

MR JUSTICE HOLMAN: The claimants have got to put in their costs submissions within three weeks after receipt by them of the approved official transcript. Then you have a period within which to reply. I would not make it as tight as one week; I think that is unfair on the Secretary of State and her lawyers. I will say you can have three weeks.

MS MASOOD: I am grateful.

MR JUSTICE HOLMAN: Then we will say that if the claimants wish to put in not more than two further pages of A4, they can do that within a further two weeks. How is that?

MR HALIM: My Lord, I am grateful, yes.

MR JUSTICE HOLMAN: When all that is done, it can all be sent to me and I will rule on it.

MR HALIM: Thank you, my Lord.

MR JUSTICE HOLMAN: So far as permission to appeal is concerned, if anybody is minded to try and apply for permission to appeal, you have got three weeks from the date of receipt by that party of the approved document. I provisionally would suggest that any such application should also be made in writing. Is that agreed, on the same timetable?

MR HALIM: My Lord, yes.

MR JUSTICE HOLMAN: But I am not encouraging any application to me, because I never have the intellectual ability to think that I may have gone badly wrong when I have just given a considered judgment. But you must nevertheless ask me. Anything else?

MR HALIM: No, thank you, my Lord. (Pause) I am going to keep all the bundles and so forth. (Pause).

MR JUSTICE HOLMAN: I think we had a third advocate or second junior, did we not, for the claimants at the substantive hearing. I have got here -- is that right or not? Or is it a solicitor's name? Simblet. Stephen -- no? Who is that?

MR HALIM: My Lord, yes. Mr Simblet attended the hearing as a second junior.

MR JUSTICE HOLMAN: So his name should feature on the cover sheet, that is all. How do you spell Simblet correctly?

MR HALIM: S-I-M-B-L-E-T.

MR JUSTICE HOLMAN: That is the claimants, and then we have got defendant, the Secretary of State for the Home Department. We have got Mr Thomas Roe QC, Ms Hafsah H-A-F-S-A-H.

MS MASOOD: That is right, yes.

MR JUSTICE HOLMAN: Masood. I think the Secretary of State managed with just two barristers, I think. And then we have got G4S, interested party. We had Mr Richard Furniss, and last but not least, what is your correct title?

MISS WHEELER: Miss.

MR JUSTICE HOLMAN: You told me, Miss----

MISS WHEELER: Eleanor, my Lord.

MR JUSTICE HOLMAN: Sorry, I am looking in the wrong place. Sorry, I do beg your pardon.

MISS WHEELER: Not at all.

MR JUSTICE HOLMAN: Sorry. Miss Eleanor Wheeler attended for judgment.