IN THE UPPER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER)

R (on the application of Dzineku-Liggison and Others) v Secretary of State for the Home Department (Fee Waiver Guidance v3 unlawful) [2020] UKUT 00222 (IAC)

Field House, Breams Buildings

London, EC4A 1WR

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

- -

Between:

THE QUEEN

on the application of

(1) AUGUSTINA AFI DZINEKU-LIGGISON

(2) MELCHISEDECH KWADAWO ACHEAMPONG

(3) JOEL KWABENA ACHEAMPONG

(4) JEREMY KWABENA ACHEAMPONG

(5) MYMA-LISA NSHIRA POMAA ACHEAMPONG

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Alasdair Mackenzie

(instructed by Duncan Lewis), for the Applicants

Sir James Eadie QC and Zane Malik

(instructed by the Government Legal Department) for the Respondent

Hearing date: 2 March 2020

Additional written submissions filed on 9 April 2020

- -

J U D G M E N T

- -

This judgment was handed down remotely by circulation

to the parties' representatives by email at 4pm on 20 May 2020.

The Secretary of State's Fee Waiver Guidance, version 3, was unlawful because it failed properly to reflect the settled test, of whether the applicant is able to afford the fee.

Judge Blundell:

1.
The applicants are Ghanaian nationals. The first and second applicants are the parents of the third, fourth and fifth applicants, who are twin sons aged nine and a daughter aged 5. By a claim form which was issued on 25 April 2019, they sought judicial review of a decision made by the respondent on 25 January 2019, refusing their applications for a fee waiver and therefore treating their applications for leave to remain as invalid. The applicants submit that the refusal of the fee waiver application was unlawful and that the respondent's extant published policy on such applications – Fee Waiver: Human Rights-based and other specified applications, version 3.0 (dated 4 January 2019) - is itself unlawful.

Factual Background

2.
The first applicant entered the United Kingdom at some point in 2006. She held entry clearance as a Working Holiday Maker. The leave to enter which was conferred by her entry clearance was valid until 2008, after which she overstayed.

3.
The second applicant also entered the United Kingdom as a Working Holiday Maker. He entered on 24 May 2005 and held leave to enter in that capacity until May 2007. On application, his leave was extended until 21 November 2007. Upon the expiry of that period of leave to remain, he also overstayed.

4.
The third, fourth and fifth applicants were born in the United Kingdom on 15 June 2010 and 14 July 2014 respectively.

5.
On 22 December 2018, the applicants applied for leave to remain on Article 8 ECHR grounds. Their applications were made with the assistance of a firm of representatives, the Refugee and Migrant Forum of Essex and London ("RAMFEL"). The FLR (FP) application form was accompanied by a detailed covering letter from RAMFEL and a volume of supporting evidence. It was submitted, in summary, that it would be a breach of Article 8 ECHR to remove the family from the United Kingdom. Reliance was particularly placed on the best interests of the children and it was submitted that the older two children had lived in the United Kingdom for more than seven years and that it would not be reasonable to expect them to leave (paragraph 276ADE(1)(iv) of the Immigration Rules refers).

Application for Fee Waiver

6.
The letter from RAMFEL also contained a section about the applicants' ability to pay the fees for the applications, which totalled £7665, including the Immigration Health Surcharge. That section of the letter was in the following terms:

Despite this positive contribution though, our client and Mr Acheampong have struggled desperately due to their inability to work and provide for their children. Their church have supported them with intermittent financial support and provided food and clothing, but as they confirm in their supporting statements they cannot assist the family with the fees for this application.

Aside from support from friends, amounting to no more than relatively small cash donations, the family have no regular source of income and depend on the food bank run by the organisation representing them in this application. They are also not paying for legal advice and RAMFEL are acting pro-bono in this matter.

The family currently reside at […]. This accommodation is provided by a family friend and the family make irregular payments only rather than paying consistent rent. They previously resided at […] and Mr Acheampong's bank statements are still addressed here as he has yet to update his details with the bank.

It is submitted that there is no prospect of the family raising the funds for this application - £7665 with the Immigration Health Surcharge – within the foreseeable future, ie 12 months and on this basis a fee waiver should be granted. Account statements for all bank accounts held by the family, as well as credit cards held by our client, are enclosed. Our client has a savings account and an ISA with Barclays, but she does not receive statements for these accounts. However, her current account statements show that the balance for her savings account has remained consistently at £0.00 whilst the ISA's balance stands at £0.01. It is clear that our client and her partner have no meaningful income, and it is repeated that there is no prospect of them raising the funds for this application.

In summary, it is submitted that our client qualifies for a fee waiver due to her inability to raise the funds for this application…

7.
Also submitted to the respondent with Form FLR(FP) was a completed Appendix 1: Request for a Fee Waiver. The rubric at the start of that form included sections in the following terms:

You should only complete this form if you are seeking a fee waiver because you think you meet the published fee waiver policy. This will be because you are destitute, or because you would become destitute if you paid the fee (in respect of your own application or one or more of your dependants included in the application), or because there are exceptional circumstances relating to your financial circumstances which mean that you are unable to pay the fee for your application (or for that of one or more of your dependants).

[…]

The decision on whether you qualify for a fee waiver will be made on the basis of the information you provide in this form and the evidence submitted with it. It is your responsibility to provide sufficient information and evidence to demonstrate that you qualify for a fee waiver.

You will need to provide documentary evidence with this fee waiver application to demonstrate your financial circumstances. The nature of this evidence will vary according to your individual circumstances, but some examples of relevant documents you may wish to include are listed below.

8.
There then followed a list of the types of evidence which might support the application for a fee waiver. The applicants indicated that they were submitting four types of evidence: bank statements

covering the period of six months prior to the application; savings accounts statements for the same period; letters from a registered charity or Local Authority confirming receipt of support; and other documents (as described in RAMFEL's covering letter).

9.
In section 1 of the application form, the applicants left unchecked a box next to the statement 'I am destitute'. They checked the box next to the statement 'I am not destitute but I would become destitute if I paid the application fee'. Also checked was the box next to the following statement:

I am not destitute and would not become destitute if I paid the application fee, but I have exceptional circumstances relating to my financial circumstances which mean I am unable to pay the fee for my own application and all of the dependants included in the application.

10.
In the section of the form which asked for an explanation of the answers to those questions, the applicants' solicitor had placed a stamp which stated "See cover letter", referring to the letter from which I have quoted above. The form was filled out with various other details. At section 2, the first applicant provided her personal details including her National Insurance number. Section 3 contained the personal details of the remaining applicants.

11.
At section 4, the applicants provided details of their accommodation, stating that they had lived there since September 2017 and that they had not been asked to leave the property. They stated that the property was neither owned nor rented but that it was provided by a friend. They stated that they made a 'variable' contribution to their accommodation costs. In answer to a question about whether or not they received other financial support, including from a Local Authority, they answered in the negative. At the foot of the page on which that question was asked, the applicants were requested to provide documentary evidence such as annotated bank statements and payslips from the third party from whom support was received. At the end of section 4, the applicants stated that they were not homeless and would not become homeless shortly.

12.
Section 5 of the form is entitled 'Your Financial Details'. It begins with an emboldened paragraph which reads as follows:

Please note we require evidence of your finances, including bank statements, building society savings books or other formal documentation in support of your application for a fee waiver. The evidence should cover the six month period prior to your application being submitted. If you are being supported by a friend or relative, we require written evidence in the form of a letter confirming this, with formal documentation showing that person's financial resources. If you are being supported by a registered charity or a Local Authority, we also require formal documentation to evidence this. Please provide full details of exactly what the support consists of, why you are eligible for such support and when the support began.

13.
The applicants then stated that they had received 'intermittent' support from friends since arriving in the UK. The first applicant's sister in Belfast had also provided support previously. In answer to question 5.2, the applicants stated that they were unable to borrow money for the application fee from family and/or friends. A statement at 5.4 of the form requested applicants who were already receiving

financial support from family or friends to provide documentary evidence to confirm whether they were able to borrow the application fee from those individuals.

14.
A series of questions then sought to elicit information regarding the potential sources of funding not covered previously. The applicants stated that they were not receiving support from a former partner and that they had not received compensation or damages. The only non-cash asset they had was a television which was worth about £100. At 5.11, the applicants stated that they had attached bank statements for the accounts they held in the UK. At 5.14-5.17, they indicated that they had no income from employment or potential employment.

15.
Section 6 of the form is concerned with the amount of public funds received by an applicant, if any. The applicants stated that they were not receiving any of the 21 different types of public funds listed. Section 7 asked about the second applicant's financial situation. Each of these boxes was marked to indicate that he had no employment or assets. At 7.8, reference was made to his bank statements having been appended to the form. Section 8 asked for any additional information which was thought to be relevant. The applicants' solicitor had again stamped this section "See cover letter". At section 9, the applicants were required to provide a summary of their monthly incomings and outgoings. In the former column, they indicated that they received variable assistance from family and friends. No other sources of income were stated. In the latter column, the applicants stated that they paid gas and household bills (gas, electricity and water) of £160 and that they paid for the children's school meals, at a cost of £92.

16.
The form concluded with two places for the first applicant's signature. Above the first was an emboldened warning that "All figures on this form must be supported with evidence/documentation". Above the second was a declaration section, containing warnings in familiar terms, about the importance of providing accurate information and the consequences of failing to do so. There was then a box, underneath the place for the applicant's signature, which contained this:

Any friend, relative or other party whom the applicant has stated will provide financial support and/or is a joint customer with the applicant with a bank or utility company must ensure that they have also completed the consent for verification checks declaration which is included in the relevant leave to remain application form.

17.
On the final page of the 25 page form, the applicants checked boxes to indicate that they had completed all sections of the form; enclosed all documentary evidence required by the form; and enclosed a fully completed application for leave to remain.

18.
Evidence which bore on the application for a fee waiver and the application for leave to remain was submitted with the application forms. The evidence which related to the application for a fee waiver was as follows: (i) the first applicant's Barclays Bank current account statement from November 2017 to December 2018; (ii) the first applicant's current account mini-statement from 30 October 2018 to 15 December 2018; (iii) the second applicant's Barclays Bank current account statement from November 2017 to November 2018; (iv) the first applicant's Marks & Spencer credit card statement for May to September 2018; and (v) the first applicant's Tesco credit card statement for April 2018 to October 2018. I should note (as did RAMFEL in the covering letter) that the Barclays statements also

sought to provide an overview of the adult applicants' finances, in that they also gave the balance of their ISA accounts, which were £0.01 and £0.00 respectively.

Decision Under Challenge

19.
In her decision of 25 January 2019, the respondent stated that the applicants did not qualify for a fee waiver because 'you are not considered to be destitute, you have not demonstrated that you would be rendered destitute by payment of the fee, and it is not considered that there are exceptional circumstances in your case such that a fee waiver should be granted'. The reasoning in support of that conclusion was expressed over the course of the following page of the decision. Given the nature of this claim, it is necessary to set out that reasoning in full. (The paragraph numbering does not appear in the original; I have added it for subsequent ease of reference.)

(1) We have considered your application against all parts of the fee waiver policy. We have considered whether you are destitute.

(2) You have stated that you have access to accommodation provided by your friend and you have made no representations to the effect that this accommodation is inadequate. Therefore it is accepted that you have access to adequate accommodation.

(3) You have stated that you are able to meet your essential living needs through the support from your family/friends. Therefore it is accepted that you are able to meet your essential living needs.

(4) As a result, we have not received sufficient evidence to demonstrate that you are destitute.

(5) We have considered whether you would become destitute if you paid the application fee or whether you could borrow the required amount from family or friends.

(6) We acknowledge the bank statements provided for the account ending […]. However, in order to assess your disposable income and whether your financial circumstances have changed recently we require bank statements for all of your accounts covering a period of six months with all major and regular incoming and outgoing payments explained. The bank statements you provided were not sufficient for our purposes as they were not fully explained, for example the Barclays statement ending […] showed a deposit of £250 on 26 March 2018, £360 deposit on 13 April 2018, £300 deposit from Richard Abebrese on 9 July 2018, £200 deposit from Richard Abebrese on 1 October 2018. There was a total amount of £2550 deposit [sic] from E Acheampong throughout the period of the bank statements, all of which were not annotated.

(7) Also, you submitted statements for Santander account ending […] from 30 October 2018 – 15 December 2018, you have not submitted six months consecutive statements for this account.

(8) As a result, we are unable to assess whether or not you are able to pay the fee now.

(9) Any support provided by others should be evidenced by letters from the friend, family member or organisation providing it, detailing what support is provided and whether or not it can continue. You claim to receive support from your friend. We have not received sufficient evidence to confirm you are unable to borrow the fee from that source.

(10) Therefore, you have not provided sufficient evidence to demonstrate that you have no additional disposable income such that you could either: pay the fee now without compromising your ability to accommodate yourself adequately or meet your other essential living needs, or that you have no

ability to borrow the required amount from family or friends. Finally, there is no basis for concluding that your financial circumstances are likely to change. As a result we do not consider that you would be rendered destitute by payment of the fee.

(11) Consideration has also been given as to whether any exceptional circumstances exist relating to your financial circumstances and ability to pay the fee. You have not provided any evidence to demonstrate that there are exceptional circumstances relating to your financial circumstances and ability to pay the fee.

(12) Consideration has also been given to section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children). We have considered the best interests of your children. We note that your children currently has [sic] access to adequate accommodation provided by your friend and that their other essential living needs are being met by support from friends/family.

(13) For the reasons set out above, the Secretary of State does not consider that you meet the criteria for the grant of a fee waiver and your application for a fee waiver is therefore rejected.

20.
The letter continued by reminding the applicants that they could re-apply for leave to remain, and that they could make a further application for a fee waiver, but that up to date evidence would be required in support of any such applications. There was then a sub-heading entitled 'Liability to Removal', in which the applicants were informed that they could be detained or placed on reporting conditions and that they would be liable to enforced removal to Ghana if they did not leave the United Kingdom 'as required'. That section of the letter concluded by stating, in bold, that the applicants would be given further notice of when they would be removed. After that section, and before the part of the letter in which the applicants were given contact details of the Voluntary Departure Service, there was a list entitled 'Consequences of staying in the UK unlawfully'. Given Mr Mackenzie's reliance on the Home Office's 'hostile environment' [1], it is necessary to set out that list in full.

If you stay in the UK without leave

- You can be detained
- You can be prosecuted, fined and imprisoned
- You can be removed and banned from returning to the UK
- You will not be allowed to work
- You will not be able to rent a home
- You will not be able to claim any benefits and can be prosecuted if you try to
- You can be charged by the NHS for medical treatment
-

You can be denied access to a bank account

•

DVLA can prevent you from driving by taking away your driving licence.

21.
On 9 February 2019, RAMFEL sent a Letter Before Action to the respondent, challenging the rejection of the application for a fee waiver. It was submitted that the total fee for the five FLR(FP) applications, including the Immigration Health Surcharge ("IHS"), was £7665 and that there had been clear evidence submitted that the applicants would be unable to raise the fee. In the circumstances, it was submitted that the decision was unreasonable, irrational and unlawful, when set against the fee waiver guidance. The letter cited the decision of Stewart J in R (Carter) v SSHD [2014] EWHC 2603 (Admin), to which I will return, and traced the development of the fee waiver guidance from the date of that decision. It was accepted that the applicants were not destitute. It was submitted that they would become destitute if required to pay the fee or, in the alternative, that they met the third limb of the respondent's test, which was described as 'exceptional circumstances … that justify the grant of a fee waiver'. The applicants' financial circumstances were evaluated at length and it was submitted, in summary, that no reasonable Secretary of State could have concluded that the 'exceptional circumstances' limb of the policy did not apply. It was also submitted that the decision was contrary to the respondent's obligations under section 55 of the Borders, Citizenship and Immigration Act 2009.

22.
On 26 February 2019, the respondent responded to the Letter Before Action, stating that the decision under challenge would be maintained. She did not accept that the guidance had been applied incorrectly; that she had failed to consider the applicants' circumstances as a whole; or that the decision breached section 55.

Procedural Background

23.
This claim was initially issued on 25 April 2019. Time having been extended for the respondent to reply, she filed Summary Grounds of Defence on 30 May 2019. By a consent order which was sealed on 23 July 2019, however, the parties agreed that the applicants should have permission to amend their grounds. It was therefore the amended grounds upon which Upper Tribunal Judge Pickup granted permission (on the papers) on 15 November 2019. In the circumstances, I propose to make no further reference to the original grounds. The amended grounds may at this stage be summarised as follows:

(i)
The Fee Waiver guidance, version 3, is unlawful in that it fails to implement the decisions in R (Omar) v SSHD [2012] EWHC 3448 (Admin) and R (Carter) v SSHD [2014] EWHC 2603 (Admin), presents unnecessary obstacles to an individual's right to be granted leave to remain under Article 8 ECHR, and is contrary to s55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act").

(ii)
The respondent's decision on the facts is unlawful, in that the respondent failed to ask herself the correct question, which was whether the applicants could in practice pay the fee. The respondent could not rationally conclude, on the facts, that the applicants were able to do so.

24.

There were also lengthy submissions which responded to a particular point ("the Ahsan argument") taken in the respondent's Summary Grounds of Defence, which were settled by Mr Malik of counsel. Since those submissions did not amount to a ground of challenge, and given their prominence in the submissions made before me orally and in writing, I propose to return to them in due course.

25.
Judge Pickup rehearsed the competing arguments in some detail before concluding materially as follows:

In summary, for the reasons set out above, it is arguable that insofar as the Fee Waiver Policy may exclude those who cannot afford to pay the fees but who do not qualify under the policy's definition of destitute/destitution, it is unreasonable, irrational or unlawful. If the policy is to be applied inflexibly, it is also arguably an unlawful fetter on discretion to waive fees. It is arguable that even though the policy has been amended to take account of Omar and Carter, the focus on either destitution or, in the alternative, exceptional circumstances still fails to be compatible with the Convention.

Legislative Scheme

26.
The relevant provisions are not in issue between the parties and much of what follows is taken directly from [16]-[23] of the amended grounds.

27.
By s68 of the Immigration Act 2014 ("the 2014 Act"), the respondent has power to require a fee for an application for leave to remain. Section 68(2) provides that the functions in respect of which fees are to be charged are to be specified by the Secretary of State by order. By s68(7), the amount to be charged for any particular function is to be set by the Secretary of State by regulations. By s68(10), the Secretary of State is empowered to permit, by way of regulations, the reduction, waiver or refund of part or all of a fee (whether by conferring a discretion or otherwise).

28.
Article 4(1) of the Immigration and Nationality (Fees) Order 2016 ("the Fees Order"), as amended, provides that a fee is to be charged for the consideration of an application for leave to remain in the United Kingdom.

29.
By paragraph 1 of schedule 2 to the Immigration and Nationality (Fees) Regulations 2018 ("the Fees Regulations"), applications such as those made by the applicant (in reliance on Article 8 ECHR) are defined as specified human rights applications. As a result of Table 6 of the same regulations, the fee for such an application is £1033 per applicant. An additional fee, or surcharge, is imposed by the Immigration (Health Charge) Order 2015 which, at the material time, stood at £500 per applicant.

30.
By regulation 16 of the Fees Regulations, the Secretary of State may reject an application as invalid or request an applicant to pay an outstanding fee where that person is required to pay a fee specified in the Regulations but has failed to do so. The fee may however be waived in accordance with paragraph 9.4 of Table 9 of the Fees Regulations, which provides as follows:

No fee is payable in respect of a specified human rights application where to require payment of the fee would be incompatible with the applicant's Convention rights.

R (Omar) v SSHD and R (Carter) v SSHD

31.
Two decisions reached by judges in the Administrative Court are said by Mr Mackenzie to be particularly relevant to my assessment of the lawfulness of the current Fee Waiver policy.

32.
The first of those decision is that of Beatson J (as he then was) in R (Omar) v SSHD [2012] EWHC 3448 (Admin); [2013] Imm AR 601. The claimant in that case had succeeded in his appeal against a deportation order, with the Asylum and Immigration Tribunal concluding that his deportation to Cameroon would be a breach of Article 8 ECHR: [6]. Limited leave was eventually granted to him and he applied for further leave before its expiry: [10]. He contended that he should not be required to pay a fee or, in the alternative, that any fee for the application should be waived in his particular circumstances: [12]-[13]. The respondent refused to consider the application. Her position, although not expressly stated in the decision under challenge, was that she was positively unable, as a result of the regulations then in force, to waive the requirement for a fee: [14]. The claimant (who was also represented by Mr Mackenzie) submitted that the refusal to consider the application was unlawful and that the regulations then in force were ultra vires section 51 of the Immigration, Asylum and Nationality Act 2006 (the predecessor provision to s68 of the 2014 Act): [15] and [63]

33.
By the time the application came before Beatson J, the defendant had granted the claimant thirty months' discretionary leave to remain. For reasons he gave at [35]-[61], Beatson J did not accept that this had rendered the claim academic because, in particular, the question of whether a discretion to waive the fee must exist in law remained outstanding: [60]. Nor did he accept the primary submission made by the Secretary of State, which was that there was no prospect of an Article 8 ECHR breach because the Secretary of State had a residual power to grant leave to remain of her own motion and because there were other ways in which a claimant could obtain leave without making a paid application: [70]. To wait for the respondent to grant leave of her own motion was a "deeply unattractive" solution, since that would confine an individual to a "grey hole" of uncertainty and expose them to potential prosecution under s24 of the Immigration Act 1971: [72]. Ultimately, Beatson J concluded, at [82], that

The requirement in regulations 6 and 30 of the 2010 Fees Regulations that, in this class of case, a fee must be paid, there is no provision for waiver and an application without a fee "is not validly made" must, in the light of section 3 , be read subject to a qualification that the specified fee is not due where to require it to be paid would be incompatible with a person's Convention rights.

34.
So it was that the words "except where that would be incompatible with a Convention right' were to be read into the regulations then in force: [83]. Although the Secretary of State was granted permission to appeal against Beatson J's decision, she did not pursue the appeal. It is as a result of the decision in Omar that paragraph 9.4 of Table 9 of the 2018 Fees Regulations (as set out above) is worded as it is.

35.
It was in response to the decision in Omar that the Secretary of State introduced the first of three Fee Waiver polices in September 2013. It was then to be found in the Immigration Directorate Instructions. The policy made express reference to Beatson J's decision, and to [82] in particular. The test for granting an application for a fee waiver was described at 1.1.1 of the policy:

Applicants will qualify for a fee waiver only where they can demonstrate on the basis of evidence provided that they are destitute, or where there are exceptional circumstances.

36.
The policy adopted the definition of destitution in s95 of the Immigration and Asylum Act 1999, under which the respondent may provide or arrange support for asylum-seekers and their dependants who are destitute or likely to become destitute. The statutory definition is as follows:

(3) For the purposes of this section, a person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.

37.
The 2013 policy was challenged in R (Carter) v SSHD [2014] EWHC 2603 (Admin). The respondent had refused to waive the fee for the claimant's human rights application (£578) because he lived with his grandmother, who gave him £20 per week spending money. As a result, the defendant did not accept that 'your client meets the definition of destitution and is not eligible for a fee exemption'.

38.
Having set out the facts of the applicant's case and the relevant legal provisions, Stewart J considered Beaton J's decision in Omar . He set out excerpts from [3], [13], [64], [68]-[69] and [82]-[83] of that judgment before turning to the way in which the claimant put his case, which he summarised at [16] in the following way:

(i) The crucial point is that he cannot afford the fee. If that is the case then, irrespective of whether he meets the test of destitution or exceptional circumstances in Appendix 1 FLR(O), his Article 8 rights are breached.

(ii) The evidence clearly establishes that C is unable to afford the fee in that he receives a maximum cash allowance of £20 per week, well below the minimum sum stipulated by law to be necessary for a single person of his age to live upon – the single person allowance for income support is £56.80 per week.

(iii) The refusal by D to process C's application to regularise his status in the UK is an ongoing breach of Article 8. This is regardless of the fact that D has taken no steps to remove C. Article 8 encompasses the right to develop as a person. C has no permission to work and claim benefits. He would find it difficult to pursue higher education/vocational training. Therefore C is being forced by D's decision to subsist below the poverty line. D's decision results interferes with C's personal autonomy and right to self determination and therefore interferes with his Article 8 rights. These rights can only properly be given effect to by a grant of status in the UK; a promise not to remove a person pending some further event is insufficient of recognition of Article 8 rights. C is entitled to a decision about his rights to reside in the UK. He is being deprived of this because his application has been rejected for want of the fee which he cannot pay.

39.
Stewart J then noted that the defendant relied on R (Sheikh) v SSHD [2011] EWHC 3390 (Admin). (Although judgment in that case was handed down by Sales J (as he then was) in December 2011, it

was not considered in Omar , which was heard nearly a year later.) Sheikh was an entry clearance case, on the facts of which Sales J had concluded that it was lawful for the defendant to require that a fee be paid. Whilst Stewart J was cautious about the different context in which the two challenges were brought, he did accept that the following section of [74] of Sales J's judgment translated into the circumstances he was considering:

It is fair and proportionate to the legitimate interests identified in Article 8(2) for state authorities to focus attention primarily on the ability of an applicant to pay the relevant fee. If there is no great difficulty in them raising funds to pay the fee there will be no tenable case under Article 8 for the Applicant to be exempted.

40.
The defendant sought, in addition, to rely on an additional section of [74] of Sales J's judgment in Sheikh . In [74](10) of his judgment, Sales J had stated that it would be relevant, in assessing an application for a fee waiver, to consider the strength and force of the underlying claim. Stewart J did not consider the strength of the underlying claim to be relevant in the case before him, since he had to consider the issue of principle, which was "if someone has a potentially valid claim for LTR, is D's policy unlawful?": [20].

41.
Having recorded at [22] that there was a measure of agreement between the parties, Stewart J stated that the critical point was whether the Fee Waiver policy was incompatible with a Convention right, noting that "[s]o long as the policy is not so incompatible, D is entitled to adopt a rigorous approach to the question of fees": [23]. In support of that latter statement, Stewart J footnoted four authorities, including Sheikh . He also noted that it was reasonable and proportionate for those who claimed to be destitute to be required to provide evidence as to their finances, rather than expecting caseworkers to make their own enquiries: [24]. At [25], Stewart J accepted a submission made by the defendant that a policy should provide 'clear objective guidance' to caseworkers considering such applications and that unless that guidance was 'clear and objective, transparency, consistency and fairness may be compromised'.

42.
At [26], Stewart J identified two major problems with the policy. The first ("the narrow point") was that there was an internal inconsistency in the policy, whereby a person in receipt of NASS support because they were destitute would be in a preferable position to a person who was not destitute but who had no greater ability to pay the fee than the NASS recipient. The second problem, which Stewart J described as "the wider point", was this:

In any event, the heart of the matter is what is the true ratio of Omar ? To what extent does Omar assist in determining where the incompatibility with a Convention right arises? D's submission is that the policy is entirely consistent with the ratio because "this class of case" means a person who is destitute or in receipt only of NASS support. (I note that D's Skeleton Argument did not initially include the words "in receipt only of NASS support"). I do not accept that the ratio is so limited. I note from paragraph 13 of Omar , the Claimant's submission in that case that "in the light of the minimum funds granted by NASS, he did not have sufficient funds to pay the fee." It seems to me that if a person demonstrates upon proper proof that they cannot pay the fee, then a policy which does not provide for waiver in those circumstances is incompatible with a Convention right. [emphasis added]

43.

Stewart J pressed counsel for the defendant about the ambit of the ‘exceptional circumstances’ part of the policy, which appeared to him to be circumscribed very closely. Counsel for the defendant returned after the short adjournment with a position statement in which it was accepted that “if a person were able to prove with sufficient evidence of satisfactory quality that their financial position was such that were they to pay the application fee, they would be left without sufficient funds to meet their essential living needs and would thereby be rendered destitute within the meaning of the policy, this could amount to exceptional circumstances.” In undertaking that assessment, the defendant stated that she would consider all the circumstances of the case including the assets available to the individual and any relevant third parties.

44.
Stewart J did not consider this to reflect the reality of the situation; it was not a question of the individual being rendered destitute by paying the fee. He observed that “[s]uch a person would not be able to get their hands on the hundreds of pounds necessary to pay the fee”: [27]. Nor, in any event, did the defendant’s position appear to be in accordance with the policy on exceptional circumstances, the introduction to the policy, or the rubric on the application form (which referred only to destitution). Nor did this position provide a satisfactory answer to the position of the individual who was not in receipt of NASS support but who was no better off than a recipient of that support. At [33], Stewart J granted a declaration in the following terms:

I therefore declare that the Policy is unlawful in that the decision to refuse to waive the application fee based on the destitution criteria and exceptional circumstances (as described in paragraph 7 of the 2013 Directions) is incompatible with the Article 8 Rights of a person such as C, who is within the jurisdiction and who has an arguable private/family life within Article 8(1) ECHR.

45.
Stewart J granted the Secretary of State permission to appeal against his decision and stayed the effect of it until resolution of that appeal. In the event, the Secretary of State chose not to pursue the appeal to the Court of Appeal. Instead, on 30 August 2017, she issued amended guidance: Fee waiver: Human Rights-Based and other specified applications , version 2.0. I need not dwell on that guidance. It was in force from that date until 4 January 2019. The parties before me are in agreement that it is upon the 2019 guidance that I should focus, notwithstanding the fact that the applications were made when version 2 was in force.

Version 3.0 of the Fee Waiver Policy

46.
The current version of the guidance is available online: https://www.gov.uk/government/publications/applications-for-a-fee-waiver-and-refunds . It is a lengthy document, running to 27 pages of single-spaced type, and does not readily lend itself to precis, although it is plainly necessary to consider its structure and to highlight certain passages, as counsel did in the detailed skeleton arguments filed on both sides.

47.
As is commonplace, the policy begins with a statement of purpose and a section explaining the changes from the last version of the guidance. That section explains that there will be a transition to digital applications from 4 January 2019 and that certain changes to the fee waiver application process have been made in light of that change. That section is irrelevant to the present claim. What is relevant, however, is the section entitled “Other changes from last version of this guidance”, which contains four paragraphs, the second of which is as follows:

The stages of the decision are now set out in order to make it clear that the decision on the request for a fee waiver takes into account whether the applicant can afford the amount required at the time of the application, and whether this is consistent with the applicant's wider circumstances.

48.
Pages 6-7 contain sections entitled "Applicants who are eligible" and "Circumstances to be considered". The former section states, inter alia, that applicants who are eligible for a fee waiver are those making certain specified human rights applications "where to require payment of the fee before deciding the application would be incompatible with a person's rights under the ECHR". It also states that the guidance has taken account of the judgments in Omar and Carter . The latter section states that decision makers must have regard to the best interests of children in assessing a fee waiver application. It also states that applicants will be asked to provide details of their financial circumstances, in the form of six months' statements from all relevant bank accounts and a full breakdown of incomings and outgoings. Checks might be undertaken with government agencies and with Equifax to verify information provided by the applicant with regard to their income and finances.

49.
Pages 8-9 consider the types of immigration applications for which a fee waiver may be requested, and need not be further considered in this judgment. Nor do I need to consider the section which follows, dealing with the applications for which a fee waiver cannot be requested.

50.
It is pages 13-24 of the guidance which are particularly relevant to the challenge advanced by Mr Mackenzie. Page 13 begins by reminding caseworkers that fee waivers are only available under certain specified routes, as defined previously. It then states that, in order to receive a fee waiver, an applicant "must qualify on the basis of one of the three definitions below". The three definitions appear in a different sized font, interspersed with other text, over the course of the next three pages. They are, verbatim, as follows:

(i)
The applicant has demonstrated, by way of evidence, that they are destitute.

(ii)
The applicant has demonstrated, by way of evidence, that they would be rendered destitute by payment of the fee.

(iii)
Where the applicant provided evidence that, although none of the destitution criteria apply, there are exceptional circumstances in their case that justify the grant of a fee waiver.

51.
The structure of pages 13-14 is rather confusing, as Sir James Eadie QC was constrained to accept. Whilst these three 'definitions' appear to be sub-headings, the text which appears underneath the third sub-heading does not appear to relate to the question of whether there are exceptional circumstances that justify the grant of a fee waiver. With the exception of a hyperlink to a different part of the guidance (entitled "Assessing whether there are exceptional circumstances"), the text underneath the third definition appears to relate to the second definition. Underneath the 'exceptional circumstances' subheading, we also find two paragraphs which state, firstly, that the 'decision to grant a fee waiver will rely on two sets of considerations' and, secondly, that:

The first consideration is whether the applicant can afford the amount required at the time of application. If the applicant cannot, then the second consideration is whether requiring the amount would mean the applicant living in such a way as to lead to destitution.

52.
Page 16 is entitled 'Assessing and taking individual circumstances into account'. Caseworkers are instructed to assess the application for a fee waiver on the basis of the information provided by the applicant in the relevant form and by the accompanying evidence. At the top of page 16, the guidance states that "The assessment itself is against the circumstances of destitution, or its likelihood if required to pay the fee, as set out in the qualifying section above." Having drawn attention to the requirement to provide satisfactory evidence, and to various circumstances which might be particularly relevant (including pregnancy and physical or mental disabilities), the guidance reminds caseworkers that:

The significance of considering such individual circumstances is that they have the potential to impact on the applicant's resources and therefore the consideration of whether the applicant is destitute or would be rendered destitute by payment of the fee, or whether there are exceptional circumstances relating to their financial circumstances and ability to pay the fee such that the fee waiver should be granted.

53.
Over the course of pages 17-20, there is guidance on specific subjects, including the consideration of requests from applicants who are part of a wider household, the timeframe for considering the request, the consideration of documentary evidence (highlighting again that the onus is on the applicant), applicants who are in receipt of support from NASS, a local authority or a registered charity, and a list of some other miscellaneous factors to be taken into account. There are then sections dealing specifically with what might be considered a reasonable period to save from disposable income and the intentional disposal of funds. There is then a sub-heading of 'Assessing whether there are exceptional circumstances'. (This is the section of the guidance to which the reader is directed by clicking on the hyperlink at page 14 of the guidance). Below the sub-heading there is the following (the emphasis is in the original):

Although a fee waiver will not normally be granted where evidence of destitution is not provided, or where an applicant cannot show that they would be rendered destitute by paying the fee, there may be exceptional circumstances affecting the applicant's expenditure which mean that a fee waiver should be granted. Exceptional circumstances at this point relates only to the applicant's financial circumstances and their ability to pay the application fee.

For instance, if the applicant is not destitute and would not be rendered destitute by paying the fee but cannot afford to pay it because, in relation to their income, they incur significant additional expenditure to provide for a child's well-being needs. This does not mean discretionary items, but it does mean substantial items such as travel to special needs facilities, or expenses linked to responding to illness, or long term health conditions or disability. A decision on whether there are exceptional circumstances should be made on a case-by-case basis, taking into account the applicant's individual circumstances and those of any dependent family member and all the information and evidence the applicant provides in support of their fee waiver request.

It is for the applicant to provide evidence that there is something exceptional about their financial circumstances and ability to pay that warrant granting the fee waiver request , even though they are not destitute or likely to be rendered destitute by payment. If it is obvious that the

applicant is dealing with exceptional financial circumstances along the lines described, but insufficient detail has been provided, the decision maker should ask for detailed verification. If the decision maker considers a fee waiver may be appropriate on the basis of exceptional circumstances, the application should be referred to a senior caseworker for a decision.

54.
Pages 22-24 provide detailed guidance on the way in which income and assets are to be considered, with sub-headings relating income from employment and self-employment, illegal working, welfare benefits and tax credits and support from family and friends. I need not refer to the final pages, which refer to the process for granting or refusing fee waiver requests.

Witness Evidence for the Respondent

55.
On 3 February 2020, a witness statement was filed by the respondent in support of her defence. It was made by Mike Gallagher, who is a Grade 7 Policy Adviser in the Asylum and Family Policy Unit. He has responsibility for the fee waiver policy insofar as it applies to applicants who rely on Article 8 ECHR. He has been in that role since 28 January 2018.

56.
Mr Gallagher gives background to the fee waiver policy at [4]-[8]. He states that the aim of the policy is to allow Article 8 rights to be formally considered and to avoid an applicant whose Article 8 rights are engaged becoming unlawfully present in the UK where they are unable to pay the fee. He notes that the IHS increased from £200 to £400 per year in January 2019 and that this necessitated a change in policy, by requiring decision makers to consider the overall amount to be paid when a fee waiver request was made. At [7], he confirms that the guidance was drafted having regard to the decisions in Omar and Carter . At [8], he summarises what he understands to be the effect of those cases. The ratio of Carter is described as follows:

In the Carter case the court found that our policy did not go far enough because whilst it offered protection to those that were destitute or receiving NASS support, it did not cover those who could not afford the fee without becoming destitute.

57.
At [9]-[14], Mr Gallagher considers the criteria for a fee waiver. He states that the decision making process is in two stages, which he describes as follows:

The first consideration is whether the applicant can pay the required amount at this point in time? Secondly, is this consistent with the applicant’s circumstances as demonstrated by all the evidence provided. The aim of this is to ensure that applicants are not required to pay the required amount simply because they can on the day, but with a future detrimental effect to them as a result.

58.
He also states the guidance requires caseworkers to check whether an applicant whose financial circumstances are otherwise ‘robust’ might have a reduced ability to pay the fee at the required time. Taken together, he states at [13], the relevant statements in the guidance ‘provide decision makers with scope to take into account the future impact on an applicant, and scope to take into account whether the applicant is endeavouring to be able to afford the fee, as opposed to acting without regard to this’.

59.

At [15]-[18], Mr Gallagher highlights what is apparent from the guidance already; that the onus is on the applicant to provide evidence in support of their application for a fee waiver. He considers the possibility of loans from those already providing support at [18] and at [19]-[20] he explains how further evidence might be sought from those with leave to remain but not from those who are present unlawfully, who are expected to submit a further application in the event of a refusal to waive the fee.

60.
At [21]-[24], Mr Gallagher comments on the application of the guidance to the specific circumstances of the applicant's case, highlighting the fact (accepted by Mr Mackenzie) that the applicants did not provide evidence corroborating that they were receiving support from family and friends. He notes that the absence of any such statement is 'fatal' to the request for a fee waiver: [24].

Submissions

61.
I am grateful to counsel on both sides for the clarity and economy of their submissions, the essence of which was as follows.

62.
For the applicants, Mr Mackenzie prefaced his written and oral submissions with four points which were said, without demur from the respondent, to represent common ground between the parties:

(i) The Applicants were liable (unless eligible for a fee waiver) to pay a total of £7,665 for their applications (including the Immigration Health Surcharge (IHS), liability for which stands or falls with their liability to pay a fee).

(ii) Following Omar and Carter , the test to be applied when a fee waiver is sought is whether the applicant can afford to pay the fee (the "affordability test"). As it was put in Carter at [27], the issue is whether the individual can 'get their hands on the [sums of money] necessary to pay the fee'.

(iii) A sub-set of the affordability test is whether an applicant will be destitute (as defined in law) as a result of paying the fee (the "destitution test"); however, the destitution test is not the ultimate question to be asked. That is to say, a person who is destitute will be unable to afford the fee and thus entitled to a fee waiver, but the enquiry does not stop there, because a person who is not destitute may nonetheless be unable to 'get their hands' on the money for the fee.

(iv) The Applicants cannot be removed without consideration of their human rights.

63.
In his skeleton argument and his oral submissions, Mr Mackenzie posed four questions for the Tribunal to consider. I take the questions posed and Mr Mackenzie's suggested answers to those question largely from the helpful summary which appears at [3] of his skeleton.

64.
Mr Mackenzie asks me to consider, firstly, whether the 2019 guidance is consistent with the decision in Omar and Carter . He submits that it is not, primarily because it does not require the decision-maker to apply the affordability test, but rather to ask themselves whether the applicant will be destitute as a result of paying the fee (the "destitution test").

65.
Mr Mackenzie submits that the second question for me to resolve is whether the respondent's decision in this particular case actually applied the affordability test. He submits that the respondent

did not, and that she applied the destitution test ‘as indeed was inevitable on any reading of the 2019 guidance as a whole’.

66.
The third question posed by the applicants is said to arise in the event that I conclude that the respondent applied the affordability test. If so, the question posed is whether the respondent reasonably concluded that the applicant had not shown that they could not afford the fee. The applicants submit that it was not reasonably open to the respondent, considering the evidence as a whole, to conclude that they had, or were able to acquire, sufficient funds.

67.
By the fourth and final question, Mr Mackenzie asks whether it is an answer to the applicant’s case to submit, as the respondent does with reference to Ahsan v SSHD [2017] EWCA Civ 2009; [2018] Imm AR 531, they could have made (or could in the future make) a human rights claim by way of written submissions without a formal application for leave to remain and the relevant fee. Mr Mackenzie submits that it is not. He submits that the respondent’s stance on this issue was inconsistent in inter partes correspondence and that the position adopted by the respondent before the Tribunal is inconsistent with the terms of the decision under challenge. (Mr Mackenzie’s submissions in this regard were in any event refined in order to respond to the additional note which the respondent produced midway through the hearing, the contents of which I reproduce below.)

68.
For the respondent, Sir James Eadie QC and Mr Malik submit, firstly, that the guidance is consistent with the authorities, which were expressly taken into account in its formulation. The concerns addressed by Stewart J in Carter are fully addressed by the third iteration of the guidance, which makes it clear that the underlying question is whether the applicant is able to pay the fee.

69.
The respondent submits in response to the second and third questions posed by the applicants that the decision in question properly applied the test in the authorities and that the respondent reached a lawful decision in light of the absence of adequate evidence provided by the applicants.

70.
The respondent submits, fourthly, that matters have moved on since Omar and Carter were decided. The position adopted by the respondent in Ahsan , Shrestha [2018] EWCA Civ 2810 and Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647 was relevant. It could not properly be submitted that the decision to treat the applications as invalid was incompatible with Article 8 ECHR because the applicants would not be removed from the UK until their rights under the ECHR had been considered.

71.
I should also record, as foreshadowed above, that the respondent produced an additional note after the short adjournment. This was seemingly produced in answer to concerns expressed by Mr Mackenzie about the application of the respondent’s stance in Ahsan (etc) to the applicants’ case. The note, which was handed up without objection from Mr Mackenzie, begins by stating the terms of section 113 of the Nationality, Immigration and Asylum Act 2002 Act [2] . At [2], the respondent states that in order to fall within that statutory definition, “a human rights claim does not require to be made in the form of a fee paid application under the Immigration Rules”. Given its potential significance in other cases, I must reproduce the rest of the note verbatim:

[3] A human rights claim ought to be made by a fee-paid application, in the interests of orderly decision-making, and that priority may be given to claims so made; but that is not a statutory requirement and even if a claim is made in some other form an applicant will not be removed from the United Kingdom until it has been considered.

[4] In this case, the applicant has not made a valid fee-paid application under the Immigration Rules. However, the application covering letter dated 22 December 2018 is a human rights claim that meets the section 113 definition. The applicant will not be removed from the United Kingdom until it has been considered. It is not unlawful to consider it forthwith at this stage.

[5] It is desirable in the interests of orderly and efficient decision-making for a human rights claim to be made by way of a fee paid application for leave to remain in the United Kingdom. If the applicant makes such an application, it will be considered and determined in accordance with the Immigration Rules; and priority may be given of [sic] that application. If the applicant makes no such application, she will not be removed from the United Kingdom unless the human rights claim made in the application covering letter dated 22 December 2018 is considered and adversely determined.

72.
Sir James Eadie QC accepted in oral argument that this note omitted a crucial word in the final sentence of [4], which was plainly intended to read “It is not unlawful **not** to consider it forthwith at this stage.”

73.
This note prompted Mr Mackenzie to submit in reply that his clients were entitled to much of the relief sought in the claim form. In particular, he noted that the applicants had sought an order quashing the respondent’s decision to treat their human rights claims as invalid and an order prohibiting the respondent from removing the applicants from the UK until there had been a lawful assessment of their claims.

74.
I reserved judgment at the conclusion of the oral argument. Shortly before this judgment was to be sent to the parties in its embargoed form, additional written submissions were filed by the both parties on 9 April 2020. In these notes, the advocates drew to my attention two decisions which had recently been handed down by Lane P: R (Mujahid) v FtT & SSHD [2020] UKUT 85 (IAC) and MY (Pakistan) [2020] UKUT 89 (IAC). In both notes, the focus was on the latter of these decisions. The respondent sought to submit that MY (Pakistan) supported the argument she advanced with reference to Ahsan . The applicant submitted that the respondent had made an important and far-reaching concession in the short note handed up at the hearing and that the position considered in Lane P’s decision must be taken to have been superseded as a result of that concession.

75.
It was as a result of these notes – and particularly that filed by the applicant – that I requested a copy of any written arguments which were filed by the respondent in Shrestha [2018] EWCA Civ 2810. The written submissions settled by Mr Thomann of counsel were sent by email on 17 April 2020.

Discussion

76.
This is not a case in which there is any disagreement between the parties regarding the correct approach to the interpretation of the Fee Waiver Guidance. As Chamberlain J recently explained in R

(Ellis) v SSHD [2020] UKUT 82 (IAC), it is for the courts to interpret such extra-statutory policies, in accordance with the objective meaning that a reasonable and literate person would ascribe to them: [29]-[37]. His conclusion in that regard accords with that of the Court of Appeal in MS & MBT v SSHD [2017] EWCA Civ 1190; [2018] 1 WLR 389, at [37]-[42], per Underhill LJ, with whom Simon and Gloster LJJ agreed. Sir James Eadie QC did not attempt to persuade me to adopt a different approach, submitting that the guidance was either 'ex facie good' or 'ex facie bad' and that it was for the Tribunal to decide whether it accurately reflected the law.

77.
Adopting that approach, I consider there to be fundamental difficulties with the Fee Waiver guidance. The first is that it does not expressly state what is accepted on both sides to be the underlying test from Omar and Carter , which is whether the applicant is able in reality to afford the fee (helpfully labelled "the affordability test" by Mr Mackenzie). Counsel for the respondent accepted at the outset of his submissions that it was common ground that this was the yardstick by which eligibility for a fee waiver is to be gauged. Omar and Carter are mentioned in the policy, and Mr Gallagher indicates in his witness statement that the intention was to tailor the guidance so as to take account of what was said by Beatson J and Stewart J. Contrary to one of the submissions made at [20] of the respondent's skeleton argument, however, the guidance does not make clear at any point that the "underlying question" is whether an applicant can afford the fee.

78.
As accepted by Sir James Eadie QC in oral argument, there is no express statement at any point in the lengthy guidance that affordability is the underlying question. The nearest the guidance gets to such a statement is the reference at the start of the document to an applicant's ability to pay being taken into account (as reproduced at [47] above). That is to relegate the overarching question to a material consideration. I consider the absence of a clear statement of the underlying test to be an important omission; the provision of a detailed analytical framework is unlikely to assist a caseworker who is not squarely directed to the underlying question which they are required to consider. Those tasked with applying this guidance are not lawyers. They are not expected to have familiarised themselves with the decisions from the Administrative Court. In the absence of an express statement of the underlying test, there is every danger that it will not be understood.

79.
I have already alluded to the respondent's frank acceptance in oral argument that the structure of pages 13-14 of the guidance is confusing. As I observed in my attempt to summarise the terms of the policy, these important introductory sections, which will necessarily inform the reasonable and literate reader's understanding of what follows, fail to adopt any sort of logical structure. The three tests (which might conveniently be labelled 'currently destitute', 'rendered destitute' and 'exceptional circumstances') are stated but the text which appears under the sub-headings does not consistently relate logically to those tests. As counsel for the respondent accepted before me, the text which appears underneath the 'exceptional circumstances' sub-heading on page 14 appears to relate entirely to the second question. It is only if the reader chooses to ignore that text and to click on the "Assessing whether there are exceptional circumstances' hyperlink that they would be taken to guidance on the third test. The result is that the reasonable and literate reader of the policy is likely to be confused by this important introductory section of the guidance.

80.
Mr Mackenzie submitted orally and in writing that the guidance was dominated by considerations of destitution, with the result that the proper question – of whether an individual applicant could afford

the fee – was obscured. He noted in his oral submissions that the words ‘destitute’ or ‘destitution’ appear 40 times in the guidance. Whilst the precise number of times that those words appears is not significant in itself, the submission does reflect the distance in the guidance between the test which should be applied and that which caseworkers are instructed to apply. There is no express statement of the affordability test but there is repeated and extensive reference to destitution.

81.
Mr Mackenzie does not submit that there is no utility in directing caseworkers to consider whether an individual is currently destitute, or whether they would become so if they paid the relevant fee. Counsel on both sides accept that those categories form a sub-set of those who simply cannot afford to pay the fee. Assisting caseworkers to identify those who fall into these two categories is therefore of some value but, as Mr Mackenzie submits, the constant and repeated reference to destitution serves to focus the attention of the reasonable reader of the policy on the subset rather than the wider question.

82.
Even if these first two stages of the guidance adopt an improper focus on destitution without stating the correct and wider test, the guidance poses a third question, as set out above. The real issue, it seems to me, is whether the guidance as a whole is capable of assisting caseworkers to undertake a structured analysis which yields a reasoned conclusion on the ultimate question of whether an individual can afford the application fee. Those who fall into the first two categories – currently destitute or rendered destitute – must, on any sensible view, comprise only a small number of applicants. As Mr Mackenzie submits, there are likely to be many applicants who maintain that they are not destitute nor at risk of becoming so upon payment of the fee but who maintain that they just have no way of accessing the thousands of pounds necessary to make a paid application. In those cases, it is to the third stage of the guidance to which the caseworker will turn.

83.
Before I turn to my own analysis of that third stage of the guidance, it is timely to recall the way in which the guidance summarises this third stage. At pages 13-14, it is expressed in the following way: “ Where the applicant provided evidence that, although none of the destitution criteria apply, there are exceptional circumstances in their case that justify the grant of a fee waiver.” At pages 17 and 18, the test is differently formulated, in this way: “whether there are exceptional circumstances relating to their financial circumstances and ability to pay the fee such that the fee waiver should be granted”. Then there is the dedicated section at page 21 of the guidance, which I have already reproduced in full at [53] above. (Slightly different formulations appear on the Fee Waiver application form, as reproduced at [7] and [9] above.)

84.
Against the backdrop provided by Omar and Carter , the rationale behind these formulations of the third stage is wholly unclear. If it is to generate an answer which complies with the overarching affordability test, the issue which a caseworker must at this stage consider is simply whether an individual who is not destitute and who will not be rendered destitute by payment of the fee is nevertheless demonstrably unable to pay the fee. The introduction of an ‘exceptional circumstances’ dimension to this third and final stage not only serves to obscure that question; it also serves, in the mind of the literate and reasonable reader, to erect a threshold which should not be present. Those who are demonstrably unable to pay the fee should not be required to do so; they need not be unable to do so because there is ‘something exceptional about their financial circumstances’.

85.
I asked Sir James Eadie QC why it might have been thought appropriate to include reference to exceptional circumstances throughout the policy. His response was blunt: it would have been better to re-formulate the policy from scratch (after the decision in Carter) but that this had not been done, and the present version of this section carries over some of what was in the initial version of the policy. It was to be seen, he submitted, as a "product of history". The basis of his answer is quite apparent when page 10 of the first version is compared with page 21 of the current version.

86.
Counsel for the respondent submitted that the most significant question for me to resolve was whether this aspect of the guidance – framed as it is with reference to exceptional circumstances – required an applicant to demonstrate merely an inability to pay or whether there was an elevated threshold. He submitted that it was clear, when the guidance was read as a whole, that there was no threshold of exceptionality. He drew attention to the fact that caseworkers are required by the guidance to take careful and holistic account of an individual's circumstances. He noted the rubric next to the third of the boxes on page 4 of the fee waiver application form: "I am not destitute and would not become destitute if I paid the application fee, but I have exceptional circumstances relating to my financial circumstances which mean that I am unable to pay the fee." He submitted that the form and the guidance clearly showed that consideration was given to an applicant's ability to pay, without any additional element of exceptionality being required. The guidance did not confine the circumstances in which an individual who was genuinely unable to pay would be able to secure a fee waiver, he submitted.

87.
However elegantly these submissions were advanced, I am unable to accept them. It is obviously correct that there is reference – throughout the guidance and the application form – to an individual's ability to pay. Wherever there is such a reference, however, it is accompanied by reference to exceptional circumstances. The example given in the section on page 21 – of a sickly child who presents an unusual drain on a family resources – only serves to reinforce the impression that caseworkers are required to consider not only whether an individual can pay the fee, but also whether any inability to do so is the product of exceptional circumstances. I am reinforced in that conclusion by the occasions when the guidance refers to the test being whether there are exceptional circumstances without reference to an inability to pay. Notably, the sub-heading on page 21 is 'Assessing whether there are exceptional circumstances' and not 'Assessing whether those not covered by definitions (1) and (2) might nevertheless be unable to afford the fee' or even 'Assessing whether the applicant can afford the fee.' A reasonable and literate person who sought to apply this guidance would, in my judgment, consider that an applicant who failed to meet the first two tests would be required to show exceptional financial circumstances, and that it would not suffice for an applicant merely to establish by evidence that they were unable to pay. Even if the guidance does not expressly 'confine' the circumstances in which an applicant might qualify for a fee waiver, it colours the required analysis with its consistent reference to exceptional circumstances.

88.
The requirement for exceptional circumstances to be established by those who are unable to meet the first two definitions prompts Mr Mackenzie to submit that the guidance gives rise to a significant 'gap' between those who should be eligible for fee waiver and those who are deemed to be so by the guidance. The guidance gives the example of the family whose resources are depleted by unusual financial demands brought about by a sick child. Consider, however, the circumstances of the

applicant family. Their essential living needs are met by the charity of others. They are not destitute and there is no risk of them falling into destitution upon payment of the fee but they maintain that they simply have no way of raising the several thousand pounds necessary to make an application to regularise their status. There is nothing ‘exceptional’ about their circumstances, which are very similar to a great number of applicants who manage to remain in the UK without leave despite the hostile environment. Were their account to be accepted, however, it could not properly be said that they are able to afford the fee.

89.
I come to the clear conclusion that the overall effect of the guidance is to circumscribe unduly the circumstances in which an individual might qualify for a fee waiver. The underlying affordability test is not mentioned expressly. The structure of pages 13 and 14 is confused and confusing. The guidance is dominated by references to destitution, which further obscures the relevant test. The analysis required by the third stage impermissibly erects an ‘exceptional circumstances’ hurdle. A reasonable and literate person applying the guidance would understand the three stages to be focused upon destitution, the threat of destitution and the existence of exceptional circumstances. Mr Mackenzie submitted that the guidance was unlawful because there was a real risk that the affordability test would not be applied. He adopted that manner of expression from what was said by Hickinbottom LJ at [57] of PK (Ghana) v SSHD [2018] EWCA Civ 98; [2018] 1 WLR 3955. He is certainly correct in that submission, although I prefer to express my conclusion more simply: the guidance is unlawful because it fails to focus the mind of the reasonable and literate reader on the affordability test. As in Carter , it does not provide for waiver upon proper proof that the applicant cannot pay the fee; the reasonable and literate reader would understand something more to be required.

90.
It is perfectly understandable that the respondent should expect foreign nationals who seek leave to remain to pay a fee for their application which represents in part a contribution to the departmental costs of processing an application and in part a payment in recognition of the benefits an applicant would obtain from a successful application (Odelola [2009] UKHL 25; [2009] 1 WLR 1230, at [10], refers). As Sales J noted in Sheikh , resources must be diverted from other activities of the State in the event that such costs are not borne by applicants themselves. The respondent is necessarily entitled, therefore, to scrutinise applications for a fee waiver carefully, so as to ensure that those who are able to pay do so. What the respondent is not entitled to do, however, is to obscure the underlying affordability test and erect an exceptional circumstances threshold in place of that test.

91.
Sir James Eadie QC’s second submission in defence against Mr Mackenzie’s submissions was that the lawfulness of the guidance did not fall for consideration in this case. He submitted that the ‘gap’ identified by Mr Mackenzie was not relevant on the facts of this case; the reality of the decision in the applicants’ case was simply that they had failed to adduce sufficient evidence to show that they were unable to afford the fee.

92.
I do not consider that submission to be correct, essentially for the reasons given at [21]-[26] of Mr Mackenzie’s skeleton argument. The policy is unlawful for the reasons I have summarised at [88]. If I am to grant a declaration that the guidance is unlawful, the ordinary course would be for the decision taken pursuant to that guidance to be quashed. As Mr Mackenzie submits, the decision taken by the respondent in these cases is in any event demonstrably tainted by the flaws in the guidance. Like the guidance, the decision itself is dominated by consideration of whether the applicants are presently

destitute, or would be rendered so by payment of the fee. The summary of the decision, as reproduced within [19] above makes no reference to affordability. Paragraphs (1)-(4) assess whether the applicants were destitute, despite there having been no submission that this was the case. The second stage of the enquiry, which takes place over the course of (5)-(10) of the decision, begins and ends with reference to whether the applicants would be rendered destitute by payment of the fee. The consideration of whether there are exceptional circumstances is brief and formulaic.

93.
It is submitted by the respondent that the ultimate conclusion reached by her was simply that the evidence did not show that the applicants were unable to pay the fee. They had been reminded throughout the application form, the respondent submits, that the onus was on them to support their application for a fee waiver with adequate evidence and they had failed to do so. That is not my reading of the decision. As I understand it, the respondent concluded that she was 'unable to assess' whether the applicants were able to pay the fee because she had not been provided with 'annotated' bank statements explaining the sources of funds which appeared in the accounts held by the adult applicants. As submitted by Mr Mackenzie, however, the respondent seems to have seized on the absence of specific evidence and thrown up her hands, rather than seeking to engage with the import of the evidence with which she was presented. It is notable in that connection that the respondent stated that she was 'unable to assess' whether the applicants were able to pay the fee, and that Mr Gallagher refers to the absence of evidence being 'fatal'.

94.
It is worth recalling the context in which the evidence presented by the applicants fell to be considered. The adult applicants are not permitted to work and have not been entitled to do so for more than a decade. They submitted evidence to show that they have no savings to speak of and the respondent, who has the facility to check for undisclosed bank accounts using the power conferred by s40 of the UK Borders Act 2007, did not cast doubt on that evidence. RAMFEL had explained in their covering letter that their services were provided pro bono publico and that the applicants were dependent upon the food bank run by that organisation. The income which the applicants had received between March and November 2018 totalled £3660. Even if all of that evidence had been saved for the payment of the fee (which it had not been), the applicants would not have saved half of the amount necessary. The evidence which had been presented was sufficient, on any rational view, to establish that the applicants were unable to pay a combined application fee of nearly £8000 from their own resources.

95.
The possibility of applicants borrowing money in order to fund an application is addressed in the guidance, just as it featured in the respondent's decision. For those with leave to remain and a source of income, it might presumably be expected that the fee for an application could be raised by way of a bank loan or other credit facility. For those in the position of these applicants, however, there can be no suggestion that a bank or building society would be willing to extend credit in the sum required. It is for that reason that the guidance requires applicants in this position to establish by evidence that they are unable to secure a loan from one or more individuals. The briefest consideration of that requirement reveals how it would, in practice, be practically impossible to prove. Since the sources of potential charity are infinite, so too are the potential sources of evidence. The applicants seem to have received support from a Mr Abebrese and a Mr Acheampong during the period under consideration. The respondent considered it unacceptable that there was no evidence from these individuals to show that they could not loan the applicants the sum needed to make the application. Had letters and bank

statements from these individuals been presented, however, the respondent might simply have stated that the adult applicants – who have been in the United Kingdom for many years – should be able to borrow the sum from other acquaintances. The difficulty in proving this particular negative is writ large.

96.
As Mr Mackenzie submits at [31] of his skeleton argument, though, this aspect of the guidance, and of the decision under challenge, has an air of fiction about it. There is no reason to think that individuals in the position of these applicants – surviving on the charity of others and food from a local organisation – might have access to one or more Dickensian benefactors who would be able and willing to provide a loan of nearly £8000, which might never be repaid.

97.
In summary, therefore, I answer each of the first three questions posed by Mr Mackenzie in the applicant's favour. The guidance is not consistent with the affordability test which emerges from Omar and Carter and which is agreed to be the correct test. The respondent's decision in this case followed the guidance in failing to apply the affordability test. Even if the affordability test was applied, it was not rationally applied to the facts of the applicants' case. Subject to my consideration of the fourth question, or the ' Ahsan question', as it came to be described in submissions, the applicants are entitled to the relief sought.

98.
The respondent's submission in relation to the line of authority which began with Ahsan [2017] EWCA Civ 2009; [2018] HRLR 5 has been something of a moving target. From the date of decision until the date of the hearing, the applicants understood the respondent to maintain that they had made no valid application for leave to remain and no human rights claim. On the day of the hearing before me, the latter half of the respondent's position was either clarified (as I think the respondent would submit) or amended (as Mr Mackenzie did submit).

99.
The respondent's Summary Grounds of Defence cited what had been said by leading counsel for the Secretary of State at [14] of Ahsan and set out various passages from Shrestha and Balajigari before making the following submission:

[36] It is surely desirable for a human rights claim to be made by way of a formal application for leave to remain in the United Kingdom. The Secretary of State shall give priority to such applications, and that would be in the interests of orderly decision-making. However, as recognised in recent case-law, this is not a requirement prescribed by the statute. If a person makes a claim by way of written submissions, without a formal application for leave to remain and the fee, that person would not be removed from the United Kingdom until that claim has been considered. There would, however, be no guarantee for a decision to be taken on such a claim within a specified time limit.

[37] Accordingly, the premise on which Omar and Carter were decided (namely, it is, in all circumstances, mandatory for a person who seeks to make an Article 8 claim to make a formal/paid application on a specified application form) no longer exists. In the light of the protection recognised by the Secretary of State and the Court of Appeal in Ahsan , Sherstha [sic] and Balajigari , it can no longer be said that a [sic] guidance which restricts the circumstances in which fee waiver should be granted would be incompatible with Article 8. Article 8 rights are protected, in any event, for a distinct reason.

100.
It is to be noted that this position was expressed in the abstract; there was no positive acceptance on the part of the respondent that the applicants had actually made a human rights claim which had the protective effect suggested. This stance prompted correspondence from the applicants' solicitors to the GLD. On 5 July 2019, the GLD responded to that correspondence in a short letter which included the following:

It is denied that the Respondent's position is misleading. It appears that you have misunderstood my client's response and have conflated a human rights (HR) application with a HR claim. These are two separate things. To clarify, a formal application for a grant of leave is made in conformity with the requirements of the immigration rules (either on the form accompanied by a relevant fee, or under an exception in Appendix FM).

On the contrary, a HR claim is a claim that removal of the applicant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention). (Please see s113 Nationality, Immigration and Asylum Act 2002). As a result, the Respondent's position is that they do not have to determine such claims until the issue of removal comes up. The Court of Appeal accepted this distinction in the case of Ahsan & Others v SSHD 2017 EWCA Civ 2009 (specifically para 15), copy attached. In essence, the Respondent's position is that every HR application is a HR claim but not every HR claim is a HR application.

101.
In an addendum to the summary grounds which was filed in August 2019, in response to the applicants' amended grounds, the correctness of [36] of the original summary grounds was affirmed by the respondent. The stance adopted in the original summary grounds was also adopted at [25] and [26] of the Detailed Grounds of Defence and at [26] and [27] of the respondent's skeleton argument before me. At each of these stages, therefore, there was no express acceptance that these applicants had made a human rights claim which operated to prevent their removal from the United Kingdom prior to its consideration.

102.
In the note which was handed up during the hearing by Sir James Eadie QC, the entirety of which I have already set out above, the respondent's stance was amended. Even if a human rights claim had been made in some form other than that prescribed by the Immigration Rules, the maker would not be removed until it had been considered, she submitted. As for the applicants, it was expressly accepted by the respondent that the covering letter from RAMFEL constituted a human rights claim and the applicants would not be removed until that claim had been considered. It was on the basis of this note that counsel for the respondent advanced his submission in the alternative, which might be summarised as follows. Even if the guidance fails to adopt the affordability test in the authorities, the human rights of applicants such as this family are nevertheless protected by the acceptance that they have made a human rights claim which must be considered prior to removal. Before I evaluate that submission, I should first set out a little more of the relevant authorities.

103.
Ahsan & Ors was part of the extensive litigation which arose out of the BBC's Panorama investigation into the use of proxies (or 'pilots') in a great number of TOEIC English language tests. The question before the Court of Appeal, as summarised by Underhill LJ at [3], was whether the applicants could challenge the Secretary of State's decisions (whether by judicial review or appeal) from within the UK or whether they could only do so by an appeal brought after they had left the country. Two of the

appellants had been given notices of administrative removal under s10 of the Immigration and Asylum Act 1999, which attracted only an out of country appeal. The other two appellants had made (valid) applications for leave to remain on human rights grounds. Those applications had been refused but the certification of the decisions by the respondent meant that only an out of country appeal was permitted by statute. At [14], Underhill LJ recorded one of the submissions made by counsel for the Secretary of State in the following way:

… Ms Giovannetti accepted before us that in order to fall within the terms of section 113 a “claim” does not require to be made in the form of a fee-paid application under the Immigration Rules. She made it clear that it is still the Secretary of State’s position that a human rights claim ought to be made by a formal application, in the interests of orderly decision-making, and that priority may be given to claims so made; but she acknowledged that that was not a statutory requirement and she said that even if a claim was made in some other form a claimant would not be removed from the UK until it had been considered.

104.
It was pursuant to that stance that the respondent expressly accepted in both of the ‘section 10 cases’ that the appellants had raised a human rights claim which engaged s113 even though they had not made human rights applications as separately defined: [106]-[107] refers.

105.
The next case was Shrestha [2018] EWCA Civ 2810. Although this was a decision on an application for permission to appeal, Hickinbottom LJ (with whom Hamblen LJ, as he then was, agreed) considered that the decision raised an issue of wider importance and that it should accordingly receive a neutral citation: [37] refers. At [1], Hickinbottom LJ summarised the issue in the case as follows:

This application raises the following issue: if an applicant for leave to remain raises a human rights ground for the first time after the refusal of his application on other grounds and in response to a request by the Secretary of State under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), does the Secretary of State have an obligation to treat and determine that response as an application for leave to remain on human rights grounds even absent any further form of application? The Applicants submit that he does. The Secretary of State denies any such obligation.

106.
Having set out in full what was said at [14] of Ahsan , Hickinbottom LJ described the position of the Secretary of State to be as follows:

[33] In this case, Mr Thomann accepts that the Secretary of State cannot remove the Applicant without considering his claim that to do so would breach article 8 of the ECHR. But, as he submits, the use of removal powers is a last resort. On the basis that the Applicant needs leave to remain and does not have it, he would be expected to leave the United Kingdom voluntarily. It is, of course, open to him to make an application for leave to remain on human rights grounds, in the required form and on payment of the required fee. If he considers that he has such a claim, that is the course required by the statutory scheme. If, in the meantime, the Secretary of State issues removal directions, then, at that stage, the Applicant will be able to rely on any human rights claim that he and/or his daughter have; and, reflecting the passage from Ahsan which I have quoted, subject to certification, he will be entitled to a right of appeal to the First-tier Tribunal to assess the merits of that claim whether or not a formal claim for leave to remain has been made because, otherwise, his removal would breach article 8. Therefore, the Applicant will suffer no possible unfairness or injustice as a result of the Secretary of State refusing to consider his human rights claim at this stage.

107.
The answer given by Hickinbottom LJ to the question he had posed at the start of his judgment is to be found at [35]:

For those reasons, I would answer the question I posed at the beginning of this judgment, "No": if an applicant for leave to remain raises a human rights ground for the first time after the refusal of his application on other grounds and in response to a request by the Secretary of State under section 120 of the 2002 Act, the Secretary of State has no obligation to treat and determine that response as an application for leave to remain on human rights grounds in the absence of the required form of application and payment. Indeed, I do not consider the contrary to be arguable.

108.
Balajigari & Ors [2019] EWCA Civ 673; [2019] 1 WLR 4647 is the leading decision on what have become known as 'earnings discrepancy cases', in which the earnings relied upon by an applicant in a previous application for leave to remain conflict with those declared to HMRC. The discrepancies caused the Secretary of State, in each case, to refuse the applications for Indefinite Leave to Remain ("ILR") which had been made by the appellants. At [96], Underhill LJ explained why it had been necessary to bring claims for judicial review: 'a refusal of ILR is not in itself an appealable decision under s82(1) of the Nationality, Immigration and Asylum Act 2002'. Underhill LJ went on to note that the refusal of a human rights claim was an appealable decision under the statutory scheme. Having cited s113 of the 2002 Act, he went on to state as follows, at p4676:

The procedural requirements for making such a claim were recently reviewed by this Court in R (Shrestha) v Secretary of State for the Home Department [2018] EWCA Civ 2810 . In short, section 50 of the Immigration, Asylum and Nationality Act 2006 enables the Secretary of State to require a particular procedure to be followed, including the form to be used and the fee to be paid; and paragraph 34 of the Immigration Rules, made under that provision, sets out mandatory requirements for an application for leave to remain (which includes an application made on human rights grounds). Where an application fails to comply with those requirements (including by not referring to a claim for leave on human rights grounds at all), there is no "human rights claim" refusal of which would give rise to a right of appeal. The Secretary of State has, however, conceded that in the context of an imminent removal an appeal will lie to the FTT against a refusal of a human rights claim even if not made in proper form: see paras. 31-33 of the judgment of Hickinbottom LJ in Shrestha . The basis of the concession (which originated in Ahsan : see para. 14 of the judgment of Underhill LJ) is not articulated, but it would appear to be justified on the basis that the Secretary of State can waive the formal requirements in the Rules.

109.
As counsel noted in their helpful post-hearing notes, this line of authority was comprehensively reviewed in two recent decisions written by the President, Lane J: R (Mujahid) v FtT & SSHD [2020] UKUT 85 (IAC) and MY (Pakistan) [2020] UKUT 89 (IAC). Like the parties, I propose to focus on only the latter decision.

110.
The appellant in MY (Pakistan) had made an application for ILR on the basis of domestic violence. The respondent did not accept that his marriage had broken down as a result of such violence. She refused ILR accordingly, and stated that there was no right of appeal against the decision because it did not constitute the refusal of a human rights claim. She expressly declined to consider the human rights claim. The appellant nevertheless sought to appeal. The FtT declined jurisdiction for the

reasons given by the respondent. The appellant appealed to the Upper Tribunal, contending (partly in reliance on the decision of Kerr J in R (AT) v SSHD [2017] EWHC 2589 (Admin); [2018] Imm AR 483) that the respondent's decision amounted to the refusal of a human rights claim and that a right of appeal accordingly arose under Part 5 of the 2002 Act.

111.
Lane J reviewed his own decision in Baihinga [2018] UKUT 90 (IAC); [2018] Imm AR 930 and that of Stephen Morris QC (sitting as a Deputy Judge of the High Court, as he then was) in R (Alighanbari) v SSHD [2013] EWHC 1818 (Admin), noting that it was accepted by the respondent that the appellant had made a human rights claim: [50]-[55]. For reasons he gave at [56]-[80] the President concluded that the appellant's human rights submissions had not been refused because they had not been considered, and therefore that there had been no refusal of a human rights claim which engaged s82 of the 2002 Act. In so concluding, Lane J said this at [67]:

The respondent's ability, pursuant to section 50 of the 2006 Act, to require a specified procedure to be followed in making or pursuing an application or claim, and, in particular, in requiring the use of a specified form (along with the payment of a fee) has been endorsed by the Court of Appeal in Shrestha . Although that case was concerned with a section 120 Notice, paragraphs 29-33 of the judgment of Hickinbottom LJ acknowledged the power of the respondent to regulate the way in which applications and claims fall for consideration under the Immigration Acts. The way in which the respondent does so may, of course, be subject to public law challenge. However, there is no suggestion in Shrestha that the Court had difficulties with the respondent's stance (which differed from that in Ahsan), whereby the respondent will, as a general matter, engage with an application or claim only if made in the specified manner, until the point at which the individual concerned is subject to removal directions, when no formality will be necessary. We reject Ms Mair's attempt to distinguish Shrestha ; although concerned with section 120, it contains an endorsement of the respondent's practice that has relevance to the present case.

112.
The judicial headnote to the decision reflects the conclusions summarised at [81]. The headnote is as follows:

(1) The Secretary of State's assessment of whether a claim by C constitutes a human rights claim, as defined by section 113 of the Nationality, Immigration and Asylum Act 2002, is not legally determinative. The Secretary of State's Guidance is, however, broadly compatible with what the High Court in R (Alighanbari) v Secretary of State for the Home Department [2013] EWHC 1818 (Admin) has found to be the minimum elements of a human rights claim.

(2) The fact that C has made a human rights claim does not mean that any reaction to it by the Secretary of State, which is not an acceptance of C's claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim under section 82(1)(b) of the 2002 Act, generating a right of appeal to the First-tier Tribunal. The Secretary of State is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal.

(3) There is, accordingly, no justification for construing section 82(1)(b) otherwise than according to its ordinary meaning, which is that the Secretary of State decides to refuse a human rights claim if she:

(i) engages with the claim; and

(ii) reaches a decision that neither C nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right.

113.
With that overview of the authorities, I return to the submission made by Sir James Eadie QC before me. For the reasons which follow, I do not consider the respondent's acceptance that the applicants have made a human rights claim which will not be considered forthwith but at some point prior to removal serves to affect the relief which would ordinarily flow from the conclusions I have reached in relation to the guidance itself and the decision in the applicant's individual cases.

114.
I do not accept the respondent's principal submission that the stance recorded and adopted in the authorities I have set out above has removed the basis upon which Omar and Carter were decided. On the contrary, I consider Mr Mackenzie to be correct in his submission that the respondent's argument before me is merely a reworking of a submission which was rejected by Beatson J in Omar .

115.
At [70] of his judgment in Omar , Beatson J recorded that the respondent's primary submission before him was that "the prospect of a breach of Article 8 is only theoretical because the Secretary of State has a residual power to grant leave to remain of her own motion and because of the other ways a claimant can obtain leave without making an application". At [74], Mr Johnson QC for the Secretary of State was recorded as having submitted, inter alia , that the claimant was able to bring his circumstances to the attention of the Secretary of State by submitting that he could not be removed without disproportionately interfering with his Convention rights, so he had to be given discretionary leave without making a formal application'.

116.
Those submissions were rejected by Beatson J for a number of reasons, not all of which I propose to rehearse. Amongst those reasons, however, was the following. At [72], Beatson J concluded that it was 'deeply unattractive' to submit that the Secretary of State could grant leave of her own motion, not least because it required an individual who waited for her to do so to commit an offence under section 24 of the Immigration Act 1971, although he recognised that a prosecution would be unlikely. He also noted that requiring a person in that claimant's position to wait for the respondent to take a decision would confine them to what he described as a 'half-world' or 'limbo' [3] .

117.
Albeit in a slightly different guise, therefore, the submission made by Sir James Eadie QC before me was made before, and rejected by, Beatson J. Contrary to the submission made by the Secretary of State in these proceedings, Beatson J did not proceed on the basis that it was, in all circumstances, mandatory for a person who seeks to make an Article 8 claim to make a formal/paid application on a specified application form. Beatson J acknowledged that there were other ways in which an individual might ventilate his Convention rights before the Secretary of State but he did not accept that those alternatives provided an adequate solution for the impecunious applicant who sought to regularise their status.

118.
As matters presently stand, the concerns expressed by Beatson J about individuals in the position of these applicants being confined to a half-world apply a fortiori . The applicants have attempted to regularise their position in the United Kingdom by attempting to make an application for leave to

remain. The respondent declined to consider that application for leave to remain because, as I have concluded, she operates an unlawful policy on fee waivers which is not properly aligned with the affordability test. As a result of those unlawful actions, the applicants are required to await a decision from the Secretary of State on what she nevertheless accepts to have been a valid human rights claim. In the intervening period, they continue to be subject to the hostile or compliant environment, the extent of which is clear from the decision under challenge (as set out at [20] above) and was recently considered by Hickinbottom LJ at [3] of SSHD v JCWI [2020] EWCA Civ 542. The 'battery of provisions' described in that judgment were largely brought about by the Immigration Act 2014. What Beatson J considered to be a 'half-world' is now even less of an existence, and it is a position to which these applicants (adult and child alike) are confined by the unlawfulness of the respondent's actions.

119.
I consider it to be at this point that Mr Mackenzie's reliance on section 55 of the Borders, Citizenship and Immigration Act 2009 bites. It is difficult to see how that the respondent can be said to have regard to her statutory obligation to safeguard and promote the welfare of children when children such as the third, fourth and fifth applicants are confined to the hostile environment as a result of the respondent's adoption and application of a fee waiver policy which fails to reflect the affordability test properly or at all. I recognise, as did Mr Mackenzie, that the children have existed in that environment for some years, as a result of the decision made by the first and second applicants to overstay and found a family whilst in the UK unlawfully. But their parents subsequently made an application to regularise their position in the UK and were entitled to consideration of that application at public expense if they were genuinely unable to afford the requisite fee. It is the erection of an improper obstacle to that consideration, in the form of an unlawful policy, which means that the children are not entitled to consideration of their applications 'forthwith' and must instead wait for consideration of their human rights claims in the fulness of time.

120.
I am, in any event, concerned by the efficacy of the safety net relied upon by the Secretary of State. If it is to be submitted that individuals who have not made an effective application for leave to remain on human rights grounds are protected from removal because they have nevertheless made a human rights claim, that protection must not be arbitrary or elusive. It is necessary to recall the point in time at which it was made clear to these applicants that they were accepted to have made a human rights claim which safeguarded their position. That was not said in the decision under challenge. In fact, they were given precisely the opposite indication, with the decision stating that they were liable to be removed from the UK. They were not told expressly in the response to their Letter Before Action that they were accepted to have made a human rights claim. Nor did the respondent make that clear in the further correspondence to which I have alluded above. Whilst the claim was afoot, the respondent did not state in the summary grounds, the detailed grounds, or even in the skeleton argument prepared for the hearing, that the applicants were accepted to have made a human rights claim. That acceptance came orally and in writing after lunch on the day of the hearing.

121.
This seems to be a feature shared with the reported decisions I have considered above. It was seemingly only in the course of litigation before the Court of Appeal in Ahsan and Shrestha that the respondent accepted in terms that the applicants in those cases had made human rights claims which engaged s113 of the 2002 Act.

122.

Consider, therefore, the position of the individual and their legal advisers upon receipt of a notice such as that received by the applicants in this case. The notice states that the application for leave to remain has been treated as invalid because it was not accompanied by the requisite fee. It states, in bold, that the individual is liable to be removed from the United Kingdom. It gives no indication whatsoever that a human rights claim is nevertheless accepted to have been made. Against the backdrop of the authorities above, what advice might legitimately be given to the claimant, who is naturally concerned that they might be removed imminently from the United Kingdom? Are they to be reassured that there was nevertheless a human rights claim and that they cannot be removed until it is considered? A right-thinking client may find that advice difficult to accept, given the contents of the respondent's letter. Or are they to be advised, contrary to what might actually be the respondent's underlying position, that there was no valid application for leave to remain and no human rights claim, such that they are at imminent risk of removal action being taken?

123.
Individuals such as the applicants find themselves in an uncertain situation upon receipt of a notice such as the decision under challenge. They have received no chit reassuring them that their human rights claim will be considered and that their position in the UK is protected until then. They cannot know with any degree of accuracy whether they are accepted by the respondent to have made a human rights claim or not. Externally, therefore, there is a lack of clarity in the respondent's position. I am also concerned that there is a lack of clarity internally, within the department itself. It is wholly unclear to me why it was that the respondent only accepted at the eleventh hour that a human rights claim had been made in this case. Nor do I understand the point at which the respondent recognised that there had been a human rights claim. Has that always been the (previously undisclosed) position, or was it only accepted to be the position at some point on the day of the hearing? If this claim had not been underway, could the applicants have been removed without consideration of the human rights claim which is now accepted to have been made? It is not possible to say, and the lack of clarity in these regards must call into question the extent of the protection relied upon by the respondent. I note that Mr Gallagher's statement is silent on these important questions.

124.
That leads me to a further point, which concerns departmental recording of applications for leave to remain and human rights claims. The respondent obviously has a record in this case that the applicants attempted to make an application for leave to remain, and that the application was rejected as invalid because it was not accompanied by the requisite fee. The notice states, as I have noted more than once already, that the applicants are liable to be removed from the United Kingdom. If the position is actually that they are not liable to be removed from the United Kingdom because it is accepted that they have made a human rights claim, it is not clear to me how this is reflected internally. I asked Sir James Eadie QC how individuals such as these applicants (who have not made a valid application for leave to remain but have made a human rights claim) are identifiable to a subsequent caseworker, who might come to consider the cases, pre-removal, months or years hence. There might be no external acceptance, communicated to the applicant, that there is a 'barrier to removal' but is there, I enquired, some internal system by which this is clearly identified? He was unable to give any indication of the mechanism by which this identification might take place.

125.
It would be all too easy, in my judgment, to dismiss these concerns by stating that there is a record, not only in the respondent's note but also in this judgment and in the files of the applicant's solicitors, to show that the respondent has accepted that these applicants have made a human rights claim and

that they cannot be removed until it has been considered. In this case, that is undoubtedly correct. Were the respondent to seek to remove these applicants without considering the claim which is accepted to have been made, their representatives would surely take action to prevent that course. But there will be many such cases in which potentially vulnerable applicants are not legally represented and it cannot simply be assumed, in the absence of any indication about the mechanism for identifying such cases, that the human rights of individuals in this position will be safeguarded by their having made a human rights claim at some point previously.

126.
In summary, therefore, I do not accept that the submissions made by the respondent in reliance on Ahsan and subsequent authorities provides any answer to the submissions made by Mr Mackenzie regarding the policy or the decision in this case. That line of authority (or the position adopted by the respondent within it) has not removed the basis upon which Omar and Carter were decided. If, as I have concluded, the respondent's policy on fee waiver is unlawful, it is no answer to submit that an applicant whose application for leave to remain is improperly rejected in reliance on that policy might nevertheless wait for the respondent to consider her human rights claim in the fulness of time. Such a solution confines an applicant to the hostile environment improperly and indefinitely, which is unjustifiable in the case of an adult applicant and contrary to the best interests of a child applicant. In any event, it is for the respondent to show that a person whose application for leave to remain is rejected is nevertheless protected effectively from removal by the acceptance that they have made a human rights claim under s113 of the 2002 Act. No such acceptance is communicated to the individual. It is unclear whether any such acceptance is recorded internally and, if it is, at what stage and by what means. If the respondent's submission is that decisions such as the present can never be incompatible with the ECHR because individuals such as the applicants will not be removed without consideration of their human rights, the evidence before me does not support the existence of that protection and the respondent's late adoption of that stance in this case and others calls it positively into question.

127.
It was submitted in the post-hearing note filed by Mr Mackenzie that the respondent's position in relation to the making of a human rights claim had changed since Shrestha and MY (Pakistan) . The respondent maintained that there has been no change in her position, and that the note handed up during the hearing merely replicated her stance in the earlier cases. As will be apparent from the conclusions I have drawn above, I have not considered it necessary to resolve those competing submissions. As requested by Mr Mackenzie, I have reproduced the respondent's note in full in case it might be of significance in future cases. Whilst it is not material to my decision, my conclusion on the competing submissions is as follows.

128.
The submission made by Ms Giovannetti at [14] of Ahsan comprised three parts. Firstly, an acceptance that a human rights claim was not required to be made in the form of a fee paid application under the Rules. Secondly, that a human rights claim ought however to be made by way of a formal application for leave to remain and that priority would be given to claims made in that way. Thirdly, that even if a human rights claim was made in some other way, a claimant would not be removed until it had been considered.

129.
These elements were also present in the submissions made by Mr Thomann, on behalf of the Secretary of State, in Shrestha . As noted, I was helpfully provided with the written submissions made

in that case upon request. Paragraph [14] of Ahsan was cited at [20] of Mr Thomann's written submissions. At [21], he submitted that the respondent had acted lawfully in requiring the applicant to make his application for leave to remain in compliance with the Immigration Rules. Immediately thereafter, at [22], the respondent's submission was:

It is accepted that the Secretary of State is not actually able to remove the Appellant without, in due course, considering his claim to remain under Article 8 of the Convention (see Ahsan , at [14]).

130.
With respect, [33] of Hickinbottom LJ's judgment reflects these submissions precisely. That paragraph (which I have reproduced above) begins by noting the respondent's acceptance that she could not remove the applicant without considering his human rights claim and ends by concluding that the applicant would not suffer injustice as a result of the Secretary of State "refusing to consider his human rights claim at this stage". Mr Mackenzie is therefore wrong to submit, at [12], of his post-hearing note, that the respondent adopted a position in Shrestha whereby she was not obliged to consider a human rights claim which had been made in the wrong form 'at all'. As is clear from the excerpts above, her position in Shrestha was to accept that a human rights claim had been made, and that it would have to be considered before removal, but that she was not required to "treat and determine" that human rights claim as an application for leave to remain on human rights grounds. So it was that the respondent submitted that the notification of a human rights claim in response to a notice under s120 of the 2002 Act could not amount to an application for leave to remain under the Immigration Rules.

131.
Nor do I consider the respondent's submissions before me to be inconsistent with her stance in MY (Pakistan) . She accepted in terms in that case that a human rights claim had been made: [53] refers. She maintained that she had not refused the claim because she had, instead, refused to engage with it because it had not been made in form of an application for leave to remain. There is no suggestion in the record of the respondent's submissions or in the decision of the Tribunal, however, that the respondent had departed from the position in Ahsan , that she was required to consider the human rights claim which had been made at some indeterminate point prior to removal.

132.
For the reasons set out at [1]-[126], I conclude that the respondent's policy is unlawful and that the decision taken pursuant to it in this case was unlawful. This judgment will be handed down electronically due to the Covid-19 pandemic. I therefore invite written submissions on relief and the form of any order.

Supplemental Judgment

133.
With the agreement of the parties, this judgment will be handed down by email. Negotiations between the parties regarding the form of order were unsuccessful. I have had regard to their submissions in formulating the order. In respect of each point of disagreement, I prefer the submissions made by Mr Malik.

134.
Mr Malik has made brief written submissions in support of an application for permission to appeal. He submits that it is at least arguable that the respondent's guidance is lawful and that the decision taken pursuant to it was also lawful. In the alternative, he submits that the 'profound consequences'

of my decision are such that there is a compelling reason for the matter to be considered by the Court of Appeal. Mr Mackenzie submits that the former submission is unmeritorious and that the latter is for the Court of Appeal to decide.

135.
Although I am not persuaded by Mr Malik's first submission, I consider that there is another compelling reason for an appeal to be heard. As Stewart J observed in Carter , that reason is to be found in the impact on the fee waiver system and the important points of principle in the case. I grant permission to appeal on that basis.

136.
If I understand CPR 52.16 correctly, it is a consequence of my decision to grant permission to appeal that the effect of my substantive decision is stayed pending the determination of the appeal. In the event that I am wrong in that, I order under rule 5(3)(l) of the Upper Tribunal Rules that the effect of my decision shall be suspended pending the appeal.

~~~~0~~~~

Postscript

On 25 June 2020, the Secretary of State confirmed that she would not be lodging an Appellant's Notice with the Civil Appeals Office and that she was content, in the circumstances, for the suspension of the effect of the Upper Tribunal's decision to come to an end immediately.

---

[1] This was the term used throughout the hearing, although it is nearly two years since the former Home Secretary indicated his preference for 'compliant environment'.

[2] "human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention)

[3] I note that Underhill LJ used similar language in Ahsan , at [123], referring to an individual who had made a human rights claim which had not been refused being 'left entirely in the hands of the Secretary of State and may have to pass many weeks or months in limbo'.
~~~~