IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

R (on the application of C6) v Secretary of State for the Home Department (asylum seekers' permission to work) [2021] UKUT 0094 (IAC)

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Field House,
Breams Buildings

13 January 2021

Before:

UPPER TRIBUNAL JUDGE STEPHEN SMITH

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Between:

THE QUEEN
(on the application of C6)
(ANONYMITY DIRECTION IN FORCE)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms S. Harrison, QC, and Mr A. Bandegani
(instructed by Birnberg Peirce), for the applicant

Mr W. Hays
(instructed by the Government Legal Department) for the respondent

Hearing date: 6 November 2020
Further submissions received: 4, 5 and 7 January 2021

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J U D G M E N T

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JUDGMENT

Insofar as the Secretary of State's policy Permission to work and volunteering for asylum seekers, version 8.0, 29 May 2019, admits no exceptions, it has not been justified and so is unlawful.

Upper Tribunal Judge Stephen Smith:

Introduction

1. This is an application for judicial review challenging a decision of the respondent dated 4 February 2020 to refuse to grant the applicant, a citizen of Afghanistan with protection proceedings pending before the Special Immigration Appeals Commission ("SIAC"), permission, in principle, to work in any capacity other than in a role on the Secretary of State's "shortage occupation list" ("the SOL"), pursuant to her *Permission to work and volunteering for asylum seekers* policy, version 8.0, 22 May 2019 ("the Work Policy"). In this decision, I refer to the Secretary of State's decision of 4 February 2020 as "the February 2020 decision".

2. The applicant has obtained an offer of work as a delivery driver for a pizza and chicken fast food outlet. In the February 2020 decision, the Secretary of State refused to grant permission to take up that position on the basis that the role of delivery driver does not feature on the SOL, and, as such, the role would be incompatible with the Work Policy. The Secretary of State did not consider whether, if she were willing in principle to grant the applicant permission to work as a delivery driver, it would engage any national security considerations. National security matters are outside the scope of these proceedings.

3. On 19 May 2020, Upper Tribunal Judge Coker ordered that the applicant be granted anonymity in these proceedings in terms that mirror the anonymity he enjoys in the ongoing SIAC proceedings. Judge Coker also refused an application for this application for judicial review to be case managed by Mrs Justice Laing, the then President of SIAC, on the basis that the application did not raise matters that were outside the jurisdiction or competence of the Upper Tribunal. Before me, there has been no attempt to revisit Judge Coker's decision that this application is within the institutional competence of the Upper Tribunal, and no issues arose which gave me cause to do so of my own motion.

4. Permission to make this application was granted by Upper Tribunal Judge Owens on all grounds on 30 July 2020.

IJ (Kosovo): written submissions

5. On 18 December 2020, the Mr Justice Bourne handed down judgment in R (oao IJ (Kosovo)) v Secretary of State for the Home Department [2020] EWHC 3487 (Admin). Those proceedings considered the application of the Work Policy and paragraphs 360ff of the Immigration Rules in the

context of a victim of trafficking, declaring that the Work Policy was unlawful in certain respects.

6. I directed that, should they wish to do so, the parties could make written submissions on the judgment by 4 January 2021. I am grateful to both parties for having done so in a timely manner. Thereafter, both parties sought to respond to the other's submissions; the applicant on 5 January 2021, and the respondent, by way of a factual observation, on 7 January 2021. I had not directed or permitted additional submissions. The parties are reminded that the Tribunal would have issued further directions, or reconvened the hearing, in the event such steps were necessary.

7. I consider IJ (Kosovo), and the submissions made in response to it, where relevant below.

Factual background

8. The applicant, C6, is a citizen of Afghanistan. He arrived in this country as an unaccompanied minor in December 2003 and claimed asylum. The claim was refused, but he was granted discretionary leave to remain, and, in September 2011, he acquired British citizenship.

9. On 20 May 2014, the applicant was notified by the Secretary of State that she had decided to deprive him of his British citizenship on the grounds that to do so was conducive to the public good. That decision was upheld by SIAC on appeal on 22 December 2015, and an application for permission to appeal against the SIAC deprivation decision was finally refused on 10 November 2016. The applicant thus enjoyed British citizenship for a period exceeding 11 years.

10. The relevant findings of SIAC in the course of upholding the Secretary of State's decision to deprive C6 of his British citizenship related to a return visit he made to Afghanistan in 2014, and the links he was assessed by the Security Service to have with an associate of the leader of a "small group of highly experienced Al Qaeda militants" operating in Afghanistan. SIAC found that it was highly probable that items of electronic equipment taken by the applicant to Afghanistan via Saudi Arabia were taken with the intention of providing assistance to the associate of the Al Qaeda operative with whom the applicant was found to be linked. Further, SIAC found that it was very highly probable that C6 was an Islamist extremist.

11. On 15 November 2016, the applicant made further submissions in support of a fresh claim for international protection under paragraph 353 of the Immigration Rules. The application was refused on 31 January 2018, and the respondent initially declined to treat the further submissions as a "fresh claim", with the effect that the refusal decision did not attract a right of appeal. The decision was remade on 22 March 2018, in circumstances which again did not attract a right of appeal. On

29 October 2018, Mrs Justice Jefford granted permission to bring judicial review proceedings against the 22 March 2018 refusal decision, which led to the Secretary of State withdrawing the decision. The Secretary of State took a further decision to refuse the further submissions on 19 February 2020, this time treating them as a fresh claim, thereby attracting a right of appeal. The applicant's appeal against that decision lies to SIAC. The parties have informed me that it is unlikely that that appeal will be heard by SIAC before October 2021.

12. Following his release from a period in immigration detention, the applicant has been subject to bail conditions imposed by SIAC on 15 December 2014 by Mr Justice Irwin, as he then was. Pursuant to the bail conditions, the liberty of the applicant is restricted on several fronts, to a significant extent. The conditions imposed a curfew requirement on the applicant, requiring him to be in his residence at all times save for 5 am to 8am, 12 noon to 5.30pm, and 7pm to 9pm. He is subject to monitoring conditions, restrictions as to who is permitted to visit him at his home during the curfew periods, restrictions on contact with persons during the non-curfew periods, electronic communication conditions which prevent him from accessing the internet, conditions restricting his access to bank accounts and financial services, conditions relating to his identity and travel documents, conditions restricting his ability to lead prayers at the mosque, and conditions requiring him only to use a single vehicle of a type approved by the Secretary of State. The applicant is also subject to employment conditions, addressed below.

13. Another feature of the applicant's case, both when applying for variations to his bail conditions before SIAC, and in these proceedings, are his medical conditions. The applicant has been assessed by Dr Katona who, in a report dated 11 January 2018, diagnosed him with a "major depressive episode". Dr Katona noted that the applicant had an episode of poor mental health in 2010, but that he remained mentally well until his detention under immigration powers in 2014. Dr Katona prepared a joint expert report with Professor Grubin, instructed by the respondent, dated 19 January 2018. The experts agree that the applicant experiences depression, although Dr Katona considers it to be moderate, while Professor Grubin considers it to be mild [6.b]. The applicant also claims to experience a range of debilitating physical symptoms, including muscle pain, joint pain, chest pain, and abdominal pain. Dr Katona and Professor Grubin agree that the applicant is telling the truth about the pain he claims to experience, and that there is a "strong and malign interaction" between his mental and physical conditions. The experts also agree that the applicant's restrictive bail conditions have had an impact upon the applicant's health, and that amending his conditions would improve, but not cure, his depression. Some of the bail conditions, such as those restricting the applicant's attendance at the mosque, and restrictions on him leading prayers, "are particularly important factors in maintaining mental distress." See [7.b.i.].

14. Significantly for present purposes, on 11 February 2020, Mr C.M.G. Ockelton, Vice-President of the Upper Tribunal, sitting in SIAC, amended

the applicant's bail conditions. The bail conditions had always prohibited employment without the permission of the Secretary of State, but the revised bail order made more detailed provision for the process to be invoked by the applicant when seeking permission from the Secretary of State to engage in employment, and for SIAC to review any security concerns raised by the Secretary of State. In addition, SIAC partially relaxed the terms of the curfew requirement to which the applicant is subject, such that, it is contended by Ms Harrison, QC, undertaking some roles is now a real possibility for the applicant, subject, of course, to the permission of the Secretary of State under the bail conditions. The curfew requirement of the applicant's bail now permits the applicant to leave his residence between 0500 to 1030, 1130 to 1700, and 1730 to 2300. The new curfew hours are largely consistent with the applicant's proposed role as a delivery driver, and would require only a minor variation, submits Ms Harrison.

15. In the judgment that provided for the partial relaxation of bail conditions handed down on 9 January 2020 by the Vice President of the Upper Tribunal ("the SIAC bail judgment"), SIAC observed, at [58]:

> "If [C6] can spend time at the mosque and generally at large it is not easy to see why he should not be allowed to spend time in approved employment. It is very likely that being able to occupy his time usefully with paid work, or anything else, might well enable him to develop some self-esteem."

The November 2019 decision

16. On 4 November 2019, Duncan Lewis, the applicant's then representatives, applied to the Secretary of State for permission for the applicant to work at a pizza and chicken outlet as a delivery driver. At that stage, they would have had sight of the draft, embargoed SIAC bail judgment, and so were, presumably, able to make the permission to work application with the approach of SIAC in mind without expressly referring to it: see paragraphs 13 and 14 of the statement of David Williams, a Grade 6 lawyer with the Government Legal Department, dated 17 September 2020.

17. The Secretary of State refused the permission to work application in a letter dated 14 November 2019 ("the November 2019 decision"). The decision contained in that letter is not within the scope of this challenge, however Mr Hays, on behalf of the Secretary of State, contends that the February 2020 decision should be read alongside the November 2019 decision, such that the latter's reasoning may be incorporated into that of the former, or at least illuminate the February 2020 decision to some extent. Accordingly, it is necessary to examine the November 2019 decision, and the basis upon which the Secretary of State was invited to consider the application for permission to work on that occasion.

18. While I have not been provided with a copy of the application that led to the November 2019 decision, I have had the benefit of sight of the

applicant's skeleton argument dated 18 July 2019 from the SIAC proceedings, to which the Secretary of State referred in the course of that decision. The skeleton argument was drafted by Ms Harrison and Mr Bandegani, who represent the applicant in both the SIAC proceedings and this application. Paragraphs 43 to 47 focus on the applicant's mental health and highlight the salient features of the reports of Dr Katona and Professor Grubin. At [44], Ms Harrison highlights Dr Katona's conclusions that the applicant's bail conditions, "in particular his inability to work and support himself, his restricted ability to socialise and to move freely", were having a significant adverse impact on his continuing mental health. At [47], the skeleton argument highlighted the claimed positive mental health benefits the applicant would enjoy if the restrictions on him meeting and socialising, remaining in his residence under curfew conditions, and working, were lifted.

19. In the November 2019 decision, the Secretary of State highlighted the Work Policy, and referred to paragraph 360 of the Immigration Rules. The letter stated:

> "In accordance with the Home Office policy I can confirm that your client has permission to work, but that permission is restricted to roles on the Shortage Occupation List that is published by the Home Office.
>
> On that basis, your client's request to take up employment at [the pizza and chicken outlet] is refused because this is not a role on the current published Shortage Occupation List. For the avoidance of doubt, if the role had been one included on that list, the Secretary of State would have gone on to consider whether the role was appropriate, having regard to the terms of your client's bail conditions and the risk he poses to national security. As is common ground, the bail conditions were imposed by the Special Immigration Appeals Commission as being necessary on grounds that your client poses a risk to national security.
>
> The Secretary of State has given consideration as to whether to depart from her published policy and to permit, in principle, your client to work in roles that do not feature on the Shortage Occupation List (such as the role at the [pizza and chicken outlet]). In considering this question, the Secretary of State has not considered any risk to national security posed by your client. The Secretary of State does, however, take into account your client's claim that being able to work will positively impact on his mental health (for example, paragraphs 43 – 47 of the skeleton argument dated 18 July 2019 filed with the Commission on behalf of your client).
>
> Even assuming your client's mental health would improve if he takes paid employment, the Secretary of State does not consider it appropriate in this specific case to depart from her published policy. One of the purposes of the policy is to maintain a distinction between economic migration and asylum, which would be undermined if the request to undertake paid employment were acceded to. As for your client's personal circumstances, even if your

> client is currently unable to obtain employment on the Shortage Occupation List, your client is free to undertake unpaid employment, and/or a suitable study course to enable him to obtain employment on the shortage occupation list (subject to the terms of his bail and subject to the Secretary of State being satisfied that the particular employment or study is compatible with national security)."

There was no challenge to that decision.

The February 2020 decision

20. On 4 February 2020, the applicant renewed his application to the respondent for permission to work at the pizza and chicken outlet. It is the ensuing refusal of that application that lies at the heart of these proceedings: the February 2020 decision.

21. In support of the application, the applicant provided a number of supporting materials; two witness statements from C6, a witness statement from the manager of the pizza and chicken outlet, and a letter from him confirming the job offer as a delivery driver. The application noted that the Secretary of State had, in the course of the November 2019 decision, considered whether to exercise discretion to depart from the Work Policy, but had declined to do so.

22. The application highlighted the fact that the proposed employer was aware of the complications arising from C6's ongoing legal proceedings and that C6 had been deprived of his British citizenship on national security grounds. The employer was aware of the curfew conditions, and was able to offer shift work which corresponded, in broad terms, to the curfew hours. A minor amendment to the curfew would be required. The application highlighted the contents of C6's witness statements, and the positive benefits he considered would attach to him being able to work. It underlined the financial constraints experienced by C6, and his indebtedness to friends and family, caused, it was said, by his inability to work. The application stressed how the curfew and other conditions prevented the applicant from being able to obtain training or experience of the sort necessary to obtain a skilled role on the SOL. He would not have the time or money to train as an engineer, doctor or nurse, the application said. The applicant had attempted to obtain other, non-SOL roles. Those attempts had been fruitless as it had proved practically impossible to find a role with sufficient flexibility which did not require access or exposure to the internet, and which would be compatible C6's curfew conditions. C6's inability to use the internet also hampered his ability to construct a CV, and to apply for roles using online processes, thereby placing the vast majority of even non-SOL roles out of his reach. Being able to take up the offered position "would be the only way to practically improve his situation".

23. The application contended that the Secretary of State's reliance on the need to maintain the distinction between economic migrants and asylum

applications amounted to an unlawful fetter of her discretion, relying on established authorities including British Oxygen Co. Ltd v Minister of Technology [1971] A.C. 610 at 625:

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application…'"

24. Against that background, the application highlighted what it considered to be the uniquely disadvantageous situation of C6, whereby his restrictive bail conditions had placed immense constraints on his life. His situation was readily distinguishable from that of an economic migrant. In addition, C6 had previously enjoyed leave to remain and British citizenship, and his further submissions were predicated on the events surrounding the deprivation of his citizenship. As the Secretary of State had, in response to Jefford J's grant of permission in the judicial review proceedings, agreed to compromise the applicant's challenge to her decision to refuse to treat the applicant's further submissions as a fresh claim under paragraph 353, "he cannot also be considered an economic migrant and he is a genuine asylum seeker". The proceedings had lasted for more than five years which was considerably longer than a "normal asylum claim". Although the Secretary of State had agreed to compromise the judicial review proceedings for which Jefford J had granted permission, she had not yet issued a revised decision in relation to the applicant. The global conclusions of the application may be stated simply: the applicant was in "particularly unique circumstances" that had not been considered by the Secretary of State in the November 2019 decision; it was irrational for the Secretary of State to rely on the need to maintain the distinction between economic migration and genuine asylum seekers in C6's circumstances; and by not exercising her discretion to permit C6 to work, the Secretary of State was effectively prohibiting him from taking employment.

25. The application concluded in these terms:

> "37. We submit that this is at odds with the judgement of Mr Justice Ockleton [sic]. The judge did not consider the prospect of [C6] obtaining work to be fanciful and discussion has taken place during both hearings about potential jobs for [C6]."

26. By a letter dated 19 February 2020, the Secretary of State referred to the fact that a separate decision had been taken and served, on the same day, concerning C6's asylum claim. The operative reasoning in the February 2020 decision addressing the applicant's request for permission to work commenced in these terms:

> "Your client does not now have an asylum claim outstanding for more than 12 months and his fresh asylum representations and evidence have been fully considered and determined. **Therefore, your client does not qualify for permission to work in the UK.** This decision has been made with reference to the Home Office policy on "permission to work and volunteering for asylum seekers"

> and paragraph 360, part 11B of the Immigration Rules." (emphasis original)

27. The February 2020 decision proceeded to address the need for asylum applicants who are eligible for work to ensure that the roles they seek to obtain feature on the SOL in any event:

> "You were informed in our previous letter dated 14 November 2019 that your client should ensure that he does not apply for vacancies that are not on the [SOL] list…
>
> The policy states that it is the responsibility of the applicant and a potential employer to ensure that the job is one which is included on the list of shortage occupations and that the applicant is qualified for the position being offered before taking up the post.
>
> In summary, in light of your client's current circumstances and status in the United Kingdom, he may not take up employment in the United Kingdom, nor may he be self-employed or engaged in business or professional activity. On that basis your client's request to take up employment at [the pizza and chicken outlet] is refused."

RELEVANT LAW AND POLICY

Asylum seekers' access to the labour market

28. Section 1(2) of the Immigration Act 1971 provides that those without the right of abode in the United Kingdom may only work "by permission":

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

29. Council Directive 2003/9/EC prescribes minimum standards for the reception of asylum seekers. Article 11(1) provides that Member States "shall" determine a period of time, starting from the date on which an application for asylum was lodged, during which the claimant shall not have access to the labour market. Article 11(2) provides that, if a decision has not been taken within a year, provided the delay cannot be attributed to the claimant, Member States shall "decide the conditions for granting access to the labour market" for the claimant. Paragraph (4) of the article provides that, "[f]or reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the [EEA Agreement] and also to legally resident third-country nationals."

30. The Immigration Rules reflect the requirement for provision for permission to work to be granted to asylum seekers, subject to conditions, in the following terms:

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

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

(i) employment may only be taken up in a post which is, at the time an offer of employment is accepted, included on the list of shortage occupations published by the United Kingdom Border Agency (as that list is amended from time to time);

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

(iii) no engagement in setting up a business.

360B If an asylum applicant is granted permission to take up employment under paragraph 360 this shall only be until such time as his asylum application has been finally determined.

360C Where an individual makes further submissions which raise asylum grounds and which fall to be considered under paragraph 353 of these Rules, that individual may apply to the Secretary of State for permission to take up employment if a decision pursuant to paragraph 353 of these Rules has not been taken on the further submissions within one year of the date on which they were recorded. The Secretary of State shall only consider such an application if, in the Secretary of State’s opinion, any delay in reaching a decision pursuant to paragraph 353 of these Rules cannot be attributed to the individual.

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

(i) employment may only be taken up in a post which is, at the time an offer of employment is accepted, included on the list of shortage occupations published by the United Kingdom Border Agency (as that list is amended from time to time);

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

(iii) no engagement in setting up a business.

> 360E Where permission to take up employment is granted pursuant to paragraph 360C, this shall only be until such time as:
>
> (i) a decision has been taken pursuant to paragraph 353 that the further submissions do not amount to a fresh claim; or
>
> (ii) where the further submissions are considered to amount to a fresh claim for asylum pursuant to paragraph 353, all rights of appeal from the immigration decision made in consequence of the rejection of the further submissions have been exhausted."

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

32. I turn now to the Work Policy. Much of the content of the policy concerns operational instructions to caseworkers. However, it sets out the "policy intention" behind the permission to work regime in the following terms:

> "The policy objectives in restricting permission to work for asylum seekers and failed asylum seekers whilst their claim is considered are to:
>
> - ensure a clear distinction between economic migration and asylum that discourages those who do not need protection from claiming asylum to benefit from economic opportunities they would not otherwise be eligible for
>
> - prevent illegal migration for economic reasons and protect the integrity of the asylum system so that we can more quickly offer protection to those who really need it
>
> - be clear that asylum seekers can undertake volunteering as this provides a valuable contribution to the wider community and may help those who qualify for leave to remain here to integrate into society[.]"

33. In R (oao Rostami) v Secretary of State for the Home Department [2013] EWHC 1494 (Admin); [2014] Imm AR 56, Mr Justice Hickinbottom, as he then was, rejected a multi-faceted challenge to the lawfulness of paragraph 360 and following of the rules. The court held that Article 15(1) of the Charter of Fundamental Rights of the European Union did not confer a general right to work upon anyone in the territories of the EU at a particular time [55]. The court held at [81] that paragraphs 360A(i)

and 360D(i) of the rules, restricting asylum seekers to roles on the SOL, had as their main public policy objective the aim of ensuring that asylum seekers are granted access to the UK labour market without adversely impacting on UK nationals and other EU citizens, as access is only granted to jobs identified as those which the resident labour market would be unable to fill. That, held the court, was a well-established legitimate labour market policy [83]. The court gave fourteen reasons for finding that the policy as contained in the Immigration Rules was proportionate: see [92], and found that it did not engage Article 8 of the ECHR. Rostami features significantly in the parties' submissions, and I will return to its reasoning later.

Grounds for judicial review

34. In the course of her unrestricted grant of permission, Upper Tribunal Judge Owens gave the applicant permission to rely on all grounds of judicial review:

a. Ground 1: the Work Policy admits no exceptions, or provides no in-built discretion, and is so rigid as to amount to an impermissible and unlawful fetter on the Secretary of State's discretion.

b. Ground 2: the Work Policy is unlawful, and/or operates as an unlawful fetter on the Secretary of State's discretion. The policy makes no reference to the residual discretion outside the relevant paragraphs of the immigration rules, and refers to no criteria by which discretion may be exercised exceptionally, within the policy, or outside the rules. It fails to identify any factors relevant to the possible exercise of discretion. It is a blanket policy amounting to an unlawful fetter of discretion.

c. Ground 3: the respondent failed to review her policy in light of Covid-19. This ground is based upon the Government's post-decision designation of delivery drivers as "key workers" during the Covid-19 pandemic ("the pandemic").

d. Ground 4: the respondent failed to exercise discretion in the applicant's case by reference to all relevant facts, and/or to provide reasons.

e. Ground 5: the decision of the Secretary of State constitutes an arbitrary and/or disproportionate interference with the applicant's article 8 ECHR rights to family life.

f. Ground 6: the decision of the Secretary of State entailed unjustified discrimination against the applicant contrary to Article 14 of the ECHR, when read with Article 8 ECHR.

Submissions and discussion

35. I will commence my analysis by considering ground 4, which contends that the respondent failed to exercise discretion by reference to all relevant facts and circumstances, as the facts and submissions that were before the Secretary of State set the context for my consideration of the remaining grounds for judicial review.

36. Well established public law principles require decision makers to take into account all relevant considerations and to disregard irrelevant considerations.

37. In the course of his application for permission to work dated 4 February 2020, the applicant set out a number of factors which he contended militated in favour of a departure from the policy, in light of what that application submitted were the unique circumstances of his situation. While the Secretary of State had, in the November 2019 decision, considered issues relating to the applicant's physical and mental health in light of the conclusions of Dr Katona's report, and the joint report with Professor Grubin, there were a range of additional matters which the 4 February application drew to the attention of the Secretary of State which had not previously been relied upon. Those factors included:

    a. C6 had accrued serious debts to his friends, which he had incurred as a result of his inability to work [13], [29].

    b. C6 had no qualifications or experience that would enable him to apply for a role on the SOL. He had neither the time nor the money to train in order to apply for such roles [16].

    c. The unique circumstances of C6's bail conditions meant that many roles, even those not on the SOL, were out of reach [17]. Most roles were the subject of an online application procedure, a process which the applicant's bail conditions prohibited him from undertaking [18]. As for the role itself, it would need to be extremely flexible, and not require access to the internet. The proposed delivery driver role "would be the only way to practically improve his situation" [19].

    d. C6 was in a unique situation; as a former British citizen who had resided lawfully for over 11 years, with the right to work at those times, his situation could be distinguished from that of an economic migrant. Moreover, his asylum claim was predicated on events surrounding the deprivation of his citizenship. See [29] and [30].

    e. Given the Secretary of State had accepted that his asylum claim amounted to a fresh claim within the meaning of paragraph 353, she had accepted that his claim was arguable, with the effect

that “he cannot also be considered an economic migrant and he is a genuine asylum seeker” [32].

f. C6’s asylum claim had lasted for 11 years, which was significantly longer than a normal asylum claim. The Secretary of State had repeatedly delayed the further submissions decision, having initially undertaken to take it by 15 November 2019, later delaying until 31 January 2020 and subsequently 17 February 2020. At the time of the application’s submission, it was not clear when the decision would be taken. See [33]. Were the Secretary of State to rely on national security considerations, the refusal would have to be dealt with in SIAC, taking further time [34].

g. The overall circumstances of C6 had not been considered in the course of the November 2019 decision [35].

h. The application concluded by stating that, by her refusal to exercise discretion in favour of C6, the Secretary of State was “in effect prohibiting him from employment” [36]. The SIAC bail judgment did not consider the prospect of C6 obtaining work to be fanciful, and a discussion had taken place at two SIAC hearings about potential roles for C6.

i. C6’s highly restrictive bail conditions meant that his choice of roles would be “severely hampered”, in particular the restrictions on his time and use of the internet.

j. The Secretary of State’s reliance on the terms of the policy, and her refusal to depart from it, amounted to an unlawful fetter on her discretion, and reliance upon arbitrary and irrational reasoning.

38. I find that the February 2020 decision did not purport to consider whether it was appropriate to exercise discretion. Still less did it consider or otherwise engage with any of the above factors advanced on behalf of the applicant. Indeed, all the decision did was to restate, and apply, the Work Policy, absent any consideration of the applicant’s submissions for discretion to be exercised in his favour. The factors set out above were plainly relevant considerations which the February 2020 decision failed to take into account, at all.

39. Strikingly, the February 2020 decision contended that the applicant did not even have permission to engage in a role on the SOL in accordance with the Work Policy. The applicant’s further submissions had not been outstanding for more than 12 months, the decision stated, with the effect that the emboldened text stating that the applicant “does not qualify for permission to work in the UK” was simply incorrect. As was common ground before me, that was an error.

40. I accept that the Secretary of State had taken a decision on the applicant's protection claim in parallel to taking the February 2020 decision, and so to that extent, the decision did engage with one of the factors raised by the applicant (see paragraph above). But the context in which the decision referred to the protection decision having being taken was to underline, erroneously, the applicant's *ineligibility* for permission to work under the Work Policy. The letter did not deal with the substantive underlying concern of that aspect of the application, namely the length of time for which the applicant had been waiting for his protection claim to be resolved, and in all likelihood would have to continue waiting.

41. When the letter proceeded to analyse the applicant's request to work as a delivery driver in any event, it simply appealed to the terms of the Work Policy, and concluded that, because the role of a delivery driver does not feature on the SOL, he would not be entitled to assume such a role.

42. Rather than setting out a considered response to the reasons advanced by the applicant in favour of a departure from the Work Policy, the February 2020 decision singularly failed to engage with any of those factors. The decision was based on the flawed premise that the applicant was not even eligible for permission to work in a role on the SOL, which highlights and underlines the deficiencies in the decision. The decision misunderstands the nature of the application for permission to work and the applicant's circumstances, incorrectly treating the application as though it were made in the initial 12 month period during which asylum seekers do not enjoy the possibility of accessing the labour market at all. Against that background, the February 2020 decision's consideration of the proposed role at the pizza and chicken outlet has the appearance of being added simply as a makeweight.

43. Mr Hays sought to cure these evident defects in the February 2020 decision on the basis that it should be read alongside the November 2019 decision. I accept that, to an extent, the course of correspondence with the Secretary of State can be read as a whole, to in order to ascertain the Secretary of State's overall approach.

44. In this respect, the Secretary of State's discussion in the November 2019 decision of whether it would be appropriate to exercise discretion in the applicant's favour does demonstrate that, in principle, the Secretary of State is aware of her ability to consider departing from the terms of the policy, and did undertake such consideration on that occasion. That letter states:

> "…the Secretary of State has given consideration as to whether to depart from her published policy and to permit, in principle, your client to work in roles that do not feature on the [SOL] (such as the role at [the chicken and pizza outlet]). In considering this question, the Secretary of State has not considered any risk to national security posed by your client…."

45. While the Secretary of State's decision on that application illuminates the fact that she accepts she is able, in principle, to consider whether to depart from the terms of the Work Policy, nothing in the November 2019 decision is capable of curing the significant defects in the February 2020 decision. First, the February 2020 decision did not seek to incorporate, or otherwise rely upon, the reasoning adopted by the November 2019 decision. Merely referring to the earlier decision is not capable of incorporating its reasoning. Secondly, had the February 2020 decision incorporated the earlier decision's reasoning in the wholesale terms for which Mr Hays contends it should be read as having been incorporated, that would have led to an irrational conclusion. The applicant's February 2020 permission to work application post-dated the application he made for permission to work in November 2019, and featured a range of considerations which the Secretary of State, on the materials before me, had not been invited to consider as part of the earlier application. By definition, even had the Secretary of State sought expressly to rely on her November 2019 reasoning, those reasons would have been incapable of addressing the quite separate matters she was invited to consider by the applicant in the February 2020 application.

46. It follows, therefore, that the import of the November 2019 decision, taken at its highest, is that it provides a single example of the Secretary of State demonstrating that she has considered whether to depart from the Work Policy. It cannot cure the defects in the February 2020 decision.

47. The approach of the February 2020 decision to the exercise of discretion was in stark contrast to the approach of the Secretary of State to the application for permission to work in IJ (Kosovo). While the applicant in those proceedings invited the Secretary of State to exercise discretion on different grounds, it is clear that the Secretary of State nevertheless considered whether to exercise discretion: see [52] and [57]. It is nothing to the point, as submitted by Mr Hays, that IJ (Kosovo) concerned the unique position of a victim of trafficking; the judgment provides an example of the Secretary of State having conducted the discretionary exercise she wholly failed to conduct in these proceedings, and to that extent it underlines the findings outlined above.

48. Given the discretionary nature of the judicial review jurisdiction, ordinarily a court or tribunal would consider whether, but for the defect identified, the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Section 31(2A) of the Senior Courts Act 1981 codifies this well-known principle of judicial review.

49. I cannot say that it would be "highly likely" that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, pursuant to section 31(2A). There are two reasons for this.

50. First, the applicant has highlighted a series of considerations which set his application for permission to work apart from the many asylum seekers who are subject to the Work Policy. The policy objectives of the Work Policy are readily distinguishable from an individual in the position of this claimant, given his position as a former British citizen now seeking to renew his protection claim as a third country national. That is not to say that that is capable of being a determinative factor, given the High Court has underlined and endorsed the "bright line" approach and consequences of the Work Policy in Rostami. But it is to say that this is, on any view, an application for permission to work which features few parallels with the situation of the vast majority of asylum seekers. Very few asylum seekers, for example, will have had the benefit of the Vice President of the Upper Tribunal indicating the positive benefits of potential employment in their circumstances, as he did in the SIAC bail judgment. While the Secretary of State may well have sound reasons for maintaining her position in the course of a properly reasoned future decision (I do not speculate), I cannot say that it is "highly likely" that the outcome would not be different for the applicant, which is the threshold codified by Parliament under section 31(2A) of the Senior Courts Act 1981.

51. Secondly, the Secretary of State has not openly considered the potential national security considerations of the applicant's proposed role. She indicated her likely phased approach to the national security issue in the November 2019 decision, in which she stated that, had the applicant proposed a role on the SOL, she would have gone on to consider whether any national security considerations would arise. Again, I cannot pre-empt that process, still less conclude that it would be "highly likely" that permission to work would be refused, in the absence of any reasoning from the Secretary of State on this issue.

52. For these reasons, I grant this application for judicial review in relation to the February 2020 decision insofar as it relies on Ground 4.

Grounds 1, 2 and 3

53. This application for judicial review is not confined to the February 2020 decision. The applicant seeks to challenge the terms of the Work Policy itself.

54. I shall take Grounds 1 and 2 together. In essence, they contend that the Work Policy features no possibility of the exercise of discretion, fails to acknowledge the existence of the Secretary of State's broad discretion in the exercise of her powers under the Immigration Act 1971, and fails to articulate the criteria pursuant to which a departure from the otherwise rigid policy should be considered. As such, contends Ms Harrison, the policy amounts to an unlawful fetter of the Secretary of State's discretion.

55. Mr Hays submits that Rostami provides a complete answer to these submissions, and that Ms Harrison's submissions seek to deprive the authority of any effect. In Rostami, Hickinbottom J held that the imposition of the conditions on asylum seekers' access to the labour market by paragraphs 360 and following of the Immigration Rules was lawful and proportionate, for detailed reasons which I need not repeat here: see, for example, [92]. To the extent that the Work Policy provides no scope for discretion, there can be no complaint, submits Mr Hays. So much is clear from [94] of Rostami, where the High Court addressed the submission that paragraph 360 of the rules was unlawful because it made no provision for a decision maker to exercise discretion to allow an asylum seeker greater access to the rules, on the basis of his or her own individual circumstances. It was a bright line rule from which no departure was envisaged or permitted. At [95], Hickinbottom J recalled that there is no "near miss" principle concerning the Immigration Rules: "in short, a rule is a rule", he held at [96]. Accordingly, Mr Hays submits that the Work Policy is a lawful, bright-line policy, from which a departure may be made in an exceptional case. In addition, the issue of asylum seekers' access to the labour market is a matter of "high policy". The Secretary of State is best placed to decide who is able to access the labour market, not a court or tribunal. The issue of the weight to be ascribed to the competing factors is necessarily a matter for the Secretary of State.

56. In any event, Mr Hays accepted that the Secretary of State does enjoy a residual discretion in the exercise of her statutory powers under section 1of the 1971 Act, and that she was prepared to depart from the position enunciated in her policy in exceptional circumstances. Further, there was no need for the policy to articulate what such exceptional circumstances were likely to be; it was sufficient that the possibility existed for discretion to be exercised in an appropriate case. Mr Hays relied on R (Gurung) v Secretary of State for the Home Department [2013] 1 WLR 2546; [2013] Imm AR 651; [2013] EWCA Civ 8 at, for example, [16].

57. Ms Harrison seeks to distinguish Rostami on the basis that it concerned paragraph 360 and following of the Immigration Rules, rather than the exercise of discretion *outside* the rules pursuant to policy. Wherever the Immigration Rules provide for a strict approach, it is nevertheless necessary to entertain the possibility of an exercise of discretion outside the rules, she submits. It is trite law that a policy cannot be a blanket policy admitting of no exceptions, and to the extent that the Work Policy may be so described, it is unlawful. Ms Harrison relies on the opinion of Lord Dyson JSC in R (oao) Lumba v Secretary of State for the Home Department and others [2012] 1 AC 245; [2011] UKSC 12 at [20], where His Lordship was addressing whether an unpublished blanket detention policy concerning foreign criminals was unlawful:

> "Mr Beloff QC [for the Secretary of State] rightly accepts as correct three propositions relating to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy.

> Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations…"

58. Lord Dyson continued at [21]:

> "As regards the first of these propositions, it is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers…"

59. Ms Harrison submits that the Secretary of State's reliance on Rostami is misplaced. This is not a near-miss case within the rules. The presenting issue is whether the *policy* concerning what takes place *outside the rules* unlawfully fails to countenance the possibility of the exercise of discretion, and in so failing to do so amounts to a policy that is so rigid as to amount to a fetter of discretion.

60. On one view, there is little difference between the applicant and the Secretary of State. The applicant contends that the Work Policy should admit of exceptions; the Secretary of State accepts that there may be a departure from the policy in exceptional cases. To the extent Ms Harrison relies on established public law principles going to preserving the residual possibility of the exercise of discretion, Mr Hays submits that such residual discretion exists. He points to the November 2019 decision in which the Secretary of State in terms considered whether to depart from the Work Policy. There is agreement on the principles. The dispute lies in the application of those principles to the facts. I return therefore to the terms of the policy itself.

61. The Work Policy states on each page that it was "Published for Home Office staff on 22 May 2019". The policy is primarily intended as operational guidance or instructions to the respondent's officials as to how to implement paragraphs 360 and following of the Immigration Rules, rather than, for example, a guide to asylum seekers on accessing the labour market. That the Work Policy's target audience comprises the officials responsible for applying the relevant provisions of the rules is significant. If the policy admits of a discretion in the manner for which Mr Hays contends, one would expect to see references to the existence of such a discretion in the policy itself, or at least cross-references to the existence of such discretion elsewhere.

62. At page 4, the Work Policy provides:

> "Those who claim asylum in the UK are **not normally** allowed to work whilst their claim is being considered. They are instead provided with accommodation and support to meet their essential living needs if they would otherwise be destitute. The Home Office may grant permission to work in accordance with this policy to asylum seekers whose claim has been outstanding for more than 12 months through no fault of their own. Those who are allowed to work are restricted to jobs on the shortage occupation list published

> by the Home Office. Any permission to work granted will come to an end if their claim is refused and any appeals rights are exhausted because at that point they are expected to leave the UK. Those who are granted leave have unrestricted access to the labour market." (Emphasis added)

63. At page 6, under the heading *Relevant legislation*, the relevant Immigration Rules are summarised. The summary reflects the "bright line" approach approved in Rostami. There is no mention of a discretion to depart from those rules.

64. On page 9, under the heading *Considering permission to work applications*, the policy states:

> "The following criteria are relevant and **must** be considered by caseworkers when deciding whether to grant permission to work…" (emphasis added)

65. There are a number of conditions precedent which an asylum seeker must fulfil in order to be granted permission to work, which are covered in the policy in the following terms.

    a. First, there must be an outstanding decision on protection grounds which has been outstanding for more than 12 months. See *Outstanding UKVI decision on protection grounds*, on page 9.

    b. Secondly, the delay must not be the fault of the asylum seeker. See the paragraph titled *Delay,* on page 9: "Permission to work must be refused where the delay was their fault." On page 12, there is the sole express reference to the exercise of discretion in the policy, cited as an indicative example of a reason to refuse an application for permission to work. It provides:

        > "Reasons for refusing permission to work might include the following… the delay is partly due to the claimant's actions or inaction **and it is not possible to exercise discretion in their favour**…"

    c. There is provision requiring applications to be refused where there is an outstanding prosecution: see *Criminality*, page 10.

    d. Under the heading *Dependants* on page 10, the policy states that there is "no provision" in the Immigration Rules to grant permission to work to the dependents of asylum seekers, even where the claim has been outstanding for more than 12 months.

    e. Provision is made for asylum seekers with existing leave which confers permission to work in its own right. Such persons are not subject to labour market access restrictions while their existing leave remains extant.

66. Page 11, headed *Granting or refusing applications*, deals with the substantive decision to grant or refuse permission to work. Page 11 first deals with granting applications. A series of prescriptive instructions are set out. Caseworkers "must" use the specified template letter, and the following wording "must" be used "when updating Home Office records":

> - permission to work request received in [name of team] on [date]
> - request granted on [date]
> - permission to work restricted to the Shortage Occupation List (SOL)
> - granted on basis of: [further submissions outstanding for more than 12 months / asylum claim outstanding for more than 12 months / **other – give detail** (delete as applicable)]
> - ASL.4264 sent/handed to the applicant/representative at [address] on [date]
> - name of caseworker
> - name of team
> - telephone number (including external code)"

I have added emphasis to the words "other…"

67. On page 12, while still dealing with granting applications for permission to work, under the heading *Shortage Occupation List (SOL)*, the policy states:

> "If an asylum seeker or failed asylum seeker is granted permission to work (subject to the exceptions listed in the section on Applications from asylum seekers with existing leave), this **must be restricted to jobs on the Shortage Occupation List** (SOL), published by the Home Office." (emphasis added)

68. Page 12 continues by dealing with *Refusing permission to work*. The potential reasons for refusal highlighted by the guidance all concern an asylum seeker's eligibility under the Immigration Rules to be allowed to perform a role on the SOL. This part of the guidance does not deal with the SOL, for example indicating that permission to work should be refused on the grounds that the role sought was not on the SOL.

69. Against that background, I find that the terms of the policy itself do not countenance the possibility that there may be a departure from its requirement to restrict asylum seekers' permission to work to the SOL, in any circumstances, for the following reasons:

a. First, there is no reference in the policy, anywhere, to departing from the provisions of the rules, or otherwise granting permission outside the rules, whether in exceptional cases or otherwise. Specifically, there is no provision at all in the policy for consideration of an application for permission to work outside the rules.

b. Secondly, the only point at which the Work Policy refers to the "normal" approach, that is in the context of asylum seekers "not normally" being allowed to work. That is a reference to the default position in the first twelve months of an asylum claim being considered; the exception to the "normal" position is the limited access to the labour market that asylum seekers once their claim has been outstanding for more than twelve months, and even then, only to SOL roles. There is no provision in the policy which provides that the SOL restrictions are the "normal" approach, such that in exceptional or other specified circumstances permission may be given on different bases.

c. The only express reference to an exercise of discretion by the Secretary of State's officials is in the context of delay which is the partial fault of an asylum seeker, where it is "not appropriate to exercise discretion in their favour" to categorise the delay as not being the fault of the applicant. This reference to discretion concerns whether an applicant is to be regarded as being at fault for their asylum claim not being considered; it goes only to the binary issue of whether an asylum seeker will be granted permission to work in accordance with the terms of the Work Policy, thereby entailing restriction to the SOL. There is no reference to the possibility of an exercise of discretion to permit consideration, in an appropriate case, of whether to grant permission to work in a non-SOL role.

d. When giving instructions on granting access to the labour market, the guidance does admit of the possibility that access may be granted for reasons other than an asylum claim or further submissions being outstanding for more than 12 months or "other – give detail" reasons (see page 11, *Granting permission to work*). This envisages the possibility that another reason may be given for restricted access to the labour market. Significantly, however, the mandatory wording of such a letter must still include the caveat that "permission to work restricted to the [SOL]". This underlines the absence of any provision in the policy to consider, in an appropriate case, a possible departure from the SOL restriction condition.

70. It is clear that pursuant to the express terms of the policy, permission to work, if granted, will only ever be for SOL roles. There is simply no provision anywhere in the policy for the Secretary of State's officials to consider exercising discretion to depart from that requirement in exceptional, or any, circumstances.

71. I accept that the substance of the policy is, as Mr Hays submits, a matter of "high policy", and that it is not for this tribunal to seek to determine that policy for the Secretary of State. However, my role is not to determine what the contents of the policy should be, but to scrutinise it against well-established public law principles prohibiting the fettering of discretion through an inflexible and rigid policy. In any event, the

Secretary of State's submissions in these proceedings contend that there *is* a residual discretion inherent to the Work Policy, such that, in exceptional circumstances, there may be a departure from, for example, the SOL-restrictions in the policy. Accordingly, this tribunal is not straying into the forbidden territory of the "high policy" of asylum seekers' access to the labour market by finding that the Secretary of State's policy does not encompass the discretion which she contends is inherent to it. My findings in this regard merely contrast the reality of the contents of the Work Policy with the submissions made by Mr Hays in relation to it. See the following paragraphs of Mr Hays' skeleton argument, with emphasis added:

> "…the Work Policy… gives effect to the Rules, **unless it is appropriate to make an exemption**." (para 25)
>
> "…this is a case where, **subject to exceptions**, the relevant policy gives effect to an extant decision-making framework (the Rules) which is comprehensive and lawfully admits of no exception." (para 36(ii)(a))
>
> "…the present situation is a case of a lawful bright-line rule **from which exceptions may be made**. That is an unobjectionable state of affairs." (para 36(ii)(c))
>
> "…in this case the 'rule' is defined by the Rules, **which may be departed from in an exceptional case**. This is unobjectionable." (para 36(ii)(d))
>
> "A policy **from which the decision-maker may exceptionally** depart need not spell out what those exceptional circumstances would be… That is simply a product of **the decision maker having the power to depart from a policy in an exceptional case**." (para 36(iii))

72. Accordingly, it is appropriate for this tribunal to examine the terms of the policy for wording of the sort that would be expected in the event that such discretion was to be found within it, and highlight omissions or deficiencies when the policy is scrutinised against Mr Hays' realistic acceptance that there must be some form of ability to depart from it in exceptional circumstances. For the reasons set out above, no such discretion is clear from the terms of the policy.

73. Mr Hays submitted that if such wording was not present in the policy, the policy should nevertheless be read and scrutinised as though some discretion were inherent to it. To that end, Mr Hays relied on R (oao Chaudhry) v DPP [2016] EWHC 2447 (Admin) as authority for the proposition that the ability of a decision maker to depart from the terms of a policy need not be express. Chaudhry concerned the process established by the Crown Prosecution Service ("the CPS") to review decisions not to prosecute certain suspects, pursuant to its *Victims' Right to Review* ("VRR") guidance. The CPS had declined to prosecute an

individual said by the claimant to have been involved in the abduction of her children, on the grounds that there was no realistic prospect of conviction. The suspect was the sister of the father of the abducted children, who had been convicted of child abduction in this jurisdiction and sentenced to seven years' imprisonment. The CPS had initially declined to reconsider the decision not to prosecute the sister, citing a provision in the VRR which excluded from the scope of the policy cases where charges were brought against some, but not all possible, suspects. The CPS later reviewed the decision not to prosecute the sister, notwithstanding the terms of the VRR. The review upheld the decision not to prosecute. One of the grounds for judicial review was that the guidance unlawfully prevented the CPS from reviewing a decision not to prosecute a suspect of its own motion, thereby unlawfully fettering its own discretion, presenting an absolute bar to reconsidering decisions to prosecute such as those at play in those proceedings. The Divisional Court dismissed the application, finding that the CPS enjoyed the ability to review its own prosecutorial decisions. Little turns on this authority, which sits in the very specific context of prosecutorial independence, the operational ability of prosecutors to review their own previous decisions, and the margin of discretion enjoyed by prosecutors when taking such decisions. See, for example, [16], [28], [36], [38], and [43]. The case turned on its context and facts, and is not authority for the general proposition for which Mr Hays places reliance upon it.

74. Mr Hays also sought to resist Ms Harrison's submissions that exceptionality must be articulated by the terms of the policy through relying on Gurung. The policy with which the Court of Appeal was concerned in Gurung expressly admitted of the possibility that there may be exceptional cases meriting a departure from the policy. The discretion inherent to the policy under consideration in Gurung throws the approach adopted by the Work Policy into sharp relief. In Gurung, an issue was whether the Secretary of State was obliged to set out, on the face of the policy or in similar guidance, the criteria to be taken into account when considering whether there were exceptional circumstances, meriting a departure from the Immigration Directorate Instructions concerning Gurkha family reunion cases, in light of the well-documented "historical injustice" experienced by Gurkhas. The policy stated:

> "Children over the age of 18 and other dependant relatives will **not normally qualify** for the exercise of discretion in line with the main applicant and would be expected to qualify for leave to enter or remain in the UK under the relevant provisions of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human Rights Act. **Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see [para] 13.2**." (emphasis added)

As may readily be seen, the Gurkha policy said that adult relatives would "*not normally*" qualify for an exercise of discretion, but exceptional

circumstances could be considered on a case by case basis. As the analysis of the Work Policy set out above demonstrates, there is no such criteria in the present matter.

75. Of course, it is clear that in the November 2019 decision the Secretary of State did expressly address her mind to the issue of whether to exercise discretion outside the requirements of paragraph 360. However, I do not consider that that decision, which is outside the scope of this judicial review application, is capable of imputing to the Work Policy a discretion which does not feature on the face of that policy. There is no evidence from the Secretary of State that, in practice, she applies the Work Policy with the inherent possibility of the exercise of discretion in mind. While Mr Williams' witness statement accepts at paragraph 4 "a power to depart from the policy in exceptional circumstances", there is no evidence from the Secretary of State that she ever considers whether to do so, save for the single example in the November 2019 decision, and the decision in IJ (Kosovo). The fact that there is no reference to an exercise of discretion may give rise to a real risk that, as here, the policy is applied in a rigid and inflexible manner, fettering the discretion of the decision maker.

76. The point is underlined with all the more force when one considers that, in the February 2020 application, the applicant expressly invited the Secretary of State to consider exercising discretion on a number of bases. The substance of the response from the Secretary of State in the February 2020 decision was little more than a standard refusal, which not only failed to engage with the specific factors the Secretary of State was invited to consider, but did nothing to support Mr Hays' contentions that the Secretary of State is prepared to consider the exercise of discretion in an appropriate case. To the extent that the November 2019 decision mitigates against a conclusion of rigid inflexibility in the Work Policy, the February 2020 decision negates and cancels out any such mitigating factors. The February 2020 decision was taken entirely in accordance with the Work Policy and is a true reflection of its rigidity.

77. Mr Hays sought to rely on Budd v Office of the Independent Adjudicator for Higher Education [2010] EWHC 1056 (Admin) as authority for the proposition that an absence of evidence of discretion being exercised is not evidence of a fettering of discretion. However, that is nothing to the point. In Budd, the review policy of the Office of the Independent Adjudicator encompassed the possibility of an oral hearing: see paragraph 6.2 of the policy, quoted at [23] of the judgment, but there had not been an oral hearing in the course of the complaint under consideration. The mere fact that an oral hearing had not been conducted was not evidence of discretion being fettered; the High Court noted at [90] that it was difficult to see why there should be any general need for an oral hearing, in the context of higher education disputes, and that dispute specifically. In contrast to paragraph 6.2 of the policy under consideration in Budd, the Work Policy contains no provision for the exercise of discretion *at all*. The Work Policy is rigid and inflexible, as currently drafted. Budd is not authority for a general proposition that a

policy may legitimately preclude the exercise of discretion; the extract relied upon by Mr Hays simply demonstrates that in the case-specific procedural context of higher education grading disputes, it was not irrational or otherwise unlawful for the Office of the Independent Adjudicator to have declined to invoke the oral hearing procedure in the course of that dispute.

78. I am fortified in this approach by that of the High Court in IJ (Kosovo), which found that the Work Policy makes no reference to the claimed inherent discretion, with the effect that it is "misleading". While the context of the court's analysis was the exercise of discretion for the purposes of ensuring compatibility with the United Kingdom's international obligations under the Council of Europe Convention on Action against Human Trafficking, the absence of any references to discretion is equally likely to lead to a failure to consider the exercise of discretion in other cases, as with the present matter. See [75], per Bourne J:

> "the lack of any reference to the discretion obviously makes the guidance misleading."

79. I find that the Work Policy is a blanket policy, admitting of no possibility of exceptions, and is unlawful to that extent, and make a declaration to that effect.

80. Ground 1 therefore succeeds.

Ground 2

81. To the extent that Ground 2 seeks to attack the policy on the additional basis that it fails to articulate the criteria for the exercise of discretion, that submission is misconceived. In this respect, Gurung at [22] is apposite:

> "It is inherent in any policy which permits a departure from a general rule in exceptional circumstances that there may legitimately be scope for different views as to whether there are exceptional circumstances on the facts of a particular case. There is implicit in the exercise of any discretion the risk that different decision-makers can legitimately make different decisions on what appear to be indistinguishable facts. The range of reasonable (and therefore legitimate) responses may be wide. This is the inevitable consequence of giving a decision-maker a discretion. But that does not mean that a discretionary rule or policy is unlawful on grounds of uncertainty."

82. In the present context, not only are the criteria for departing from the Work Policy matters of "high policy", but articulating such criteria in the abstract is likely to be almost impossible. Indeed, as the February 2020 application pointed out, this applicant's situation as a former British

citizen who came to the United Kingdom as an unaccompanied child now facing removal to Afghanistan, pending the resolution of protection proceedings in SIAC is unique. Any attempt to articulate, in the abstract, possible grounds for exceptional circumstances in the Work Policy would have been highly unlikely to have foreseen such an unusual situation, and would have, therefore, not benefitted the applicant in the manner he seeks.

83. Ground 2 therefore fails.

84. Ground 3 is a post decision matter and was not pursued with any vigour before me. The Covid Pandemic had not taken hold at the time of the impugned decision. To the extent the applicant contends there was a general obligation on the Secretary of State to review her Work Policy in light of the Pandemic, that submission is misconceived. That delivery drivers performed a valuable role during the lockdown, and have done since, does not place the Secretary of State under an obligation proactively to review the Work Policy, disapplying the SOL requirement to the extent that it relates to delivery drivers. Delivery drivers are not on the SOL. The contents of the SOL are, as Mr Hays submits, a matter of "high policy", and are chosen in light of independent advice provided to the Secretary of State by the Migration Advisory Committee. To the extent, in an individual case, an applicant invites the Secretary of State to exercise discretion in their favour, including on pandemic grounds, it is incumbent on the Secretary of State to consider that application. But it cannot be said, and nor did Ms Harrison realistically seek to pursue, that the Pandemic necessitated an exception to this aspect of the SOL requirement in the Work Policy.

85. I dismiss this application in relation to Ground 3.

Grounds 5 and 6 – Articles 8 and 14 ECHR

86. In respect of Ground 5, the statement of facts and grounds contends that the Secretary of State's decision in this case constitutes an arbitrary and/or disproportionate interference with the applicant's right to private life under Article 8 of the European Convention on human rights.

87. In light of my decision concerning ground 4 in which I have found the February 2020 decision to be unlawful, it is not necessary to consider this ground in depth, other than to highlight the binding authority dispositively determining this ground against the applicant. In R (oao Negassi and Lutalo) v Secretary of State for the Home Department [2013] EWCA Civ 151, the Court of Appeal considered whether Article 8 was engaged by the restrictions imposed upon two asylum seekers' access to the labour market. The court rejected the submission. At [38], Maurice Kay LJ held:

> "In the present cases, where it is common ground that Article 8 does not embrace a general right to work, I do not consider that the

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

88. I do not consider there to be any features of the present matter which distinguish the applicant from the positions of Mr Negassi and Mr Lutalo concerning their access to the labour market. Like Messrs Negassi and Lutalo, the applicant is a foreign national with no automatic right of access to the labour market.

89. Consideration of the authorities analysed by the Court of Appeal in Negassi underlines this conclusion. At [34] of Negassi, the court considered Sidabras v Lithuania (55480/2000) (2006) 42 EHRR 6, which concerned employment restrictions imposed by Lithuania on those of its citizens who, prior to independence, had worked for the Lithuanian branch of the KGB. One reading of [43] of the judgment of the European Court of Human Rights could imply the existence of a broad, Article 8-based ability to "freely pursue the development and fulfilment of his or her personality." Two observations follow, based on the analysis of the Court of Appeal. First, Sidabras concerned the ability of certain citizens of Lithuania to access the labour market in the country of their own nationality. The applicant, as a citizen of Afghanistan, cannot possibly be said to be in an analogous position. No breach of Article 8 was found in Sidabras in any event. Secondly, to the extent that the approach of the ECHR appeared to mandate a broad, Article 8-based right to access the labour market, it was described by Lord Bingham at [15] of R (oao Countryside Alliance and others and others) v Her Majesty's Attorney General and another [2006] EWCA Civ 817 as "a very extreme case on its facts".

90. I reject Ms Harrison's submission that the High Court in Rostami, and the Court of Appeal in Negassi, are restricted to their facts. This applicant is subject to a range of SIAC bail conditions which impose significant restrictions on his liberty; to the extent there is an interference with his private life Article 8 rights due to those restrictions, that interference is caused by the SIAC bail conditions imposed in consequence to the applicant's national security risk, rather than the terms of the Work Policy, or the February 2020 decision. So much is clear from paragraph 29 of the applicant's 4 February 2020 application for permission to work:

> "[C6] is in a unique situation. He has been under restrictive bail conditions for the last five years that have seriously restricted his movements and his ability to occupy his time…"

91. The only example of Article 8 being found to be engaged by a decision concerning an asylum seekers' access to the labour market is R (Tekle) v Secretary of State for the Home Department [2008] EWHC 3064 (Admin). It is well established that Tekle turns on its facts. See Negassi at [35]:

> "Tekle may have been correctly decided on its facts but they went way beyond those in the present cases. The context was one in

> which the Secretary of State had deliberately adopted a policy whereby decisions on claims such as the one under review were deferred for five years or more."

And again at [38]:

> "Tekle is readily distinguishable."

92. Mr Hays highlights the Court of Appeal's lukewarm endorsement of Tekle in the extract quoted above; even when confined to its facts, the high watermark of the Court of Appeal's views of the case were that it "*may* have been correctly decided". There is force to that submission. Tekle is of no assistance to the applicant on Article 8 grounds.

93. Negassi is binding on this tribunal. As Hickinbottom J said at [111] of Rostami of similar Article 8 submissions made in those proceedings when following and applying Negassi:

> "[W]e are simply not in Article 8 country here."

94. I find that Article 8 was not engaged by the February 2020 decision. I dismiss Ground 5 of this application.

Ground 6

95. As pleaded in the Statement of Facts and Grounds, Ground 6 is anchored to case-specific considerations which contend that the applicant has suffered unjustified discrimination on account of his disability, thereby contravening Article 14 of the ECHR, on the basis the decision is within the "ambit" of Article 8.

96. At [80], Ms Harrison's skeleton argument seeks impermissibly to expand the scope of the pleaded ground to attack the Work Policy itself on this basis, as well as paragraph 360A(ii) of the Immigration Rules. I decline to permit the applicant to advance a significantly broader ground for judicial review than the ground upon which he was granted permission, which related to the *decision* and not the policy. See paragraph (4) of Judge Owens' grant of permission. Further, this tribunal does not have the jurisdiction to entertain a challenge to an immigration rule, and it was incumbent upon the applicant to seek to transfer the proceedings to the High Court in order to seek permission to advance submissions on that basis.

97. In the light of my decision concerning Ground 4, it is not necessary to consider whether the impugned decision breached Article 14 of the ECHR on the basis it was within the ambit of Article 8. I accept that in IJ (Kosovo), the High Court held that the decision in those proceedings was within the "ambit" of Article 8, although Bourne J held that, in the case of the decision refusing to exercise discretion in IJ's favour, all relevant

factors were taken into account: see [109]. However, in light of my decision concerning Ground 4, it will be incumbent upon the Secretary of State to consider all factors advanced by the applicant upon reconsideration of the application, and no further analysis of the Article 14 point is necessary in relation to the February 2020 decision in these proceedings.

98. For these reasons, I dismiss this application on Ground 6.

SUMMARY OF DECISION

99. This application for judicial review is granted in relation to Grounds 1 and 4, and dismissed in relation to Grounds 2, 3, 5 and 6.