

The Right Honourable Priti Patel MP, Secretary of State for the Home Department
Kevin Foster MP, Minister for Safe and Legal Migration

11 March 2022

Dear Madam or Sir,

Flexibility in enrolment of biometrics following R (SGW) v SSHD

Background

We are sending this letter given the current situation in Ukraine, and we write further to our letter of 4 March 2022.

We understand that, as of 10 March 2022, it is the Home Office's position for the Ukraine Family Scheme that:

*'From Tuesday 15 March, if you are outside the UK and hold a valid Ukrainian passport, you will no longer need to provide your biometric information from overseas to apply to the Ukraine Family Scheme. This means you will not need to attend an in-person appointment at a Visa Application Centre (VAC). You can instead complete your application online.'*¹

We understand persons with valid Ukrainian passports will be able to 'give their biometrics once in Britain'.²

This means persons who do not hold a valid Ukrainian passport, because it has expired, because it was left behind or destroyed during the Russian invasion, or because they are part of the large population of Ukrainian residents who are not Ukrainian nationals, will still need to apply at a Visa Application Centre and enrol their biometric information. This appears to be the case even if they are applying to travel with family members who have valid Ukrainian passports, and even if they hold other forms of identification such as national identity cards, driving licences or birth certificates.

Potentially, therefore, and to take one example, a family unit in which the parents have passports (and are, therefore, demonstrably Ukrainian citizens), but who have very young children without passports, would still need to enrol their biometrics on the scheme. While young children are among the most vulnerable in the current conflict, and in need of most immediate protection, the current proposals would still mean that the family would need to take a dangerous and long journey to a visa application centre. Such an outcome would wholly undermine the intention behind this concession.

¹ UK Visas and Immigration and Home Office, 'Apply for a Ukraine Family Scheme visa' (published 4 March 2022, last updated 10 March 2022)

https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=78213fe2-1af1-4490-ada3-785b51209541&utm_content=daily accessed 11 March 2022.

² The Rt Hon Priti Patel MP, 'Home Secretary update on support for Ukrainians' delivered to House of Commons (10 March 2022)

<https://www.gov.uk/government/speeches/home-secretary-update-on-support-for-ukrainians> accessed 11 March 2022.

Additionally, all persons not applying on that specific scheme, such as Skilled Workers, would still need to attend an appointment at a VAC and enrol their biometric information.

There is no longer a TLScontact visa application centre in Ukraine. Kyiv was closed until further notice, and the temporary centre in Lviv in Western Ukraine has recently been suspended. This forces countries bordering Ukraine (other than Slovakia, which does not have a visa application centre) and other countries *en route* to the UK to process applications. It also forces those fleeing to travel to such centres and pay for accommodation or rely on charity whilst waiting for an appointment and for their application to be processed in a foreign country.

We would respectfully remind you that applications which have the effect as leave to enter the United Kingdom, for a limited period which does not exceed 6 months, do not have any biometric requirement attached (as there is no requisite requirement to apply for a biometric immigration document under regulation 3A of the Immigration (Biometric Registration) Regulations 2008). Therefore, if persons were to apply for 6 months of leave outside the Rules, or if they were considered to be non-visa nationals in accordance with our recommendation to remove 'Ukraine' from Immigration Rules Appendix Visitor: Visa national list, then there would be no requirement at all for them to provide biometrics. Of course, on arrival their biometrics can be taken and it can be judged whether to grant them leave to enter. Once in the UK, when applying to switch to a longer term scheme, such a requirement to enrol biometrics would be part of the process of extending their leave. A clear example of this in practice, was those arriving from Hong Kong and receiving leave outside the Rules at the border, and switching onto the Hong Kong British National (Overseas) route once in the UK.

We would ask you to urgently address the terms of the specific Guidance on biometric requirements relating to Ukrainian nationals and residents, in order to deal with anomalies in the position that you propose, as highlighted above.

Unlawful Guidance

Furthermore, we respectfully request that the Home Office Guidance, entitled 'Family reunion: for refugees and those with humanitarian protection' (version 5.0, published 31 December 2020),³ is urgently updated to reflect the correct legal position as it relates to enrolment of biometrics for applicants seeking entry clearance to the UK.

The current Guidance states (at page 12) that '[s]ecurity and identity checks must be completed on the applicant and their sponsor before considering the application'.

You will be aware that on 26th November 2021, the Upper Tribunal (Immigration and Asylum Chamber) ('Upper Tribunal') handed down its judgment in the case of [R \(on the application of SGW\) v Secretary of State for the Home Department \(Biometrics - family reunion policy\)](#) [2022] UKUT 15 (IAC). In that case the Upper Tribunal considered the part of the Guidance set out above and found that is unlawful because the Regulation 5 of the Immigration (Biometric Registration) Regulations 2008 make clear that there is discretion as to whether to require a person to enrol their fingerprints and photograph. Additionally, Regulation 8 specifies that there is discretion as to when and how

³<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947066/family-reunion-guidance-v5.0ext.pdf> accessed 11 March 2022.

these are enrolled. The Upper Tribunal found that the failure to make clear that there discretion as to enrolment of biometrics had the effect of strongly suggesting to decision makers that an application for entry clearance would not be considered unless and until biometrics had been enrolled.⁴

The Upper Tribunal concluded the guidance is unlawful: 'The respondent has published guidance for decision-makers which fails to acknowledge the existence of discretion derived from the 2008 Regulations as to the enrolment of biometric information. Indeed, the distinct impression arising from the guidance is that there is no discretion, save in respect of children under 5 years old. This is a misleading picture of the true legal position, which in fact provides for a broader discretion.'⁵

As relief, the Upper Tribunal made a declaration to this effect⁶ and no application for permission to appeal to the Court of Appeal was made on behalf of the Secretary of State for the Home Department.

However, despite the judgment and Order made by the Upper Tribunal, no steps appear to have been taken to update the Guidance to reflect the correct legal position.

Conclusion

Applicants who are required to enrol their fingerprints and/or photograph, and who are unable to safely reach countries where there is a visa application centre, cannot make applications for visas to travel to the UK. They will not know by simply looking at the publicly available information on the UK Visas and Immigration or Home Office website that the position set out in the Guidance referred to above has been found to be unlawful.

It is clearly unacceptable that an unchallenged declaration on the lawfulness of the Home Office's policy - particularly where policy that deals with such a vulnerable and at risk group - should remain unamended despite the declaration having been made in November 2021.

Given the urgency, we ask that all relevant Guidance documents, such as the Biometrics Guidance, be updated to reflect the correct legal position as soon as possible, and to address the terms of the specific Guidance on biometric requirements relating to persons affected by the Russian invasion of Ukraine.

Yours sincerely,

Nicole Francis
Chief Executive

⁴ *R (on the application of SGW) v Secretary of State for the Home Department (Biometrics - family reunion policy)* [2022] UKUT 15 at [80].

⁵ *ibid* [85].

⁶ *ibid* [111].