Case No: CO/1026/2011
Case No: CO/5374/2011

Neutral Citation Number: [2013] EWHC 1144 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2013

Before :

MR JUSTICE HOLMAN

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Between :

The Queen on the application of SM and TM (by their litigation friend TS), and JD (by her litigation friend JW)	**Claimants**
-and-	
The Secretary of State for the Home Department	**Defendant**
-and-	
The Queen on the application of SR and DB (by their litigation friend PS)	**Claimants**
-and-	
The Secretary of State for the Home Department	**Defendant**
-and-	
Coram Children's Legal Centre	**Intervener**

- -

Ms Amanda Weston (instructed by **Luqmani Thompson**) for **all the Claimants**
Ms Samantha Broadfoot (instructed by **The Treasury Solicitor**) for the **Defendant**
Ms Joanne Rothwell (instructed by **Coram Children's Legal Centre)** for the **Intervener**

Hearing dates: 24th and 25th April 2013

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Judgment

Mr Justice Holman:

The issues

1. These claims, which were effectively consolidated, concern the impact of section 55 of the Borders, Citizenship and Immigration Act 2009 upon the consideration by the Secretary of State for the Home Department of applications by children, made outside the scope of the Immigration Rules, for leave to remain in the United Kingdom. All the claimants applied for indefinite leave to remain (ILR). All were granted discretionary leave (DL) for a period in each case of three years. They say that if the Secretary of State had correctly applied section 55 and lawfully considered their applications she would, or at any rate might, have granted them the requested ILR. Such applications are decided by officials of the UK Border Agency by reference to a policy document and instruction entitled "Discretionary Leave". The version of that policy relevant to the present case is that issued with amendments on 27 October 2009.

2. As all counsel agreed towards the end of the hearing, there are essentially two issues in the case.

   i) Is that policy document and instruction capable of being read and applied in a way which is compliant with section 55 and the associated jurisprudence? If not, the policy is not lawful, and the decisions under review, which were taken by reference to it, should be reconsidered.

   ii) If the policy is capable of being read and applied in a way which is compliant with section 55 and the associated jurisprudence, did the actual decision maker fail to read and apply it in that compliant way? If he did, the decisions should also be reconsidered.

3. If, however, the policy is capable of being read and applied in a way which is compliant with section 55 and the associated jurisprudence, and if there is nothing to indicate that the actual decision maker failed to read and apply it in that compliant way, the decisions cannot be interfered with by the court (subject to irrationality).

4. Issue (i), illuminated perhaps by the decision making process and reasons later given in the present case, is an issue of general and widespread public importance to all applications made by or on behalf of children, outside the Immigration Rules, for leave to remain. Accordingly, Coram Children's Legal Centre (CCLC), which specialises in law and policy affecting children and young people, applied for, and was granted, permission to intervene to make submissions on the issues of law and policy which arise in this case.

5. I am immensely grateful to each of Ms Amanda Weston, Ms Samantha Broadfoot, and Ms Joanne Rothwell, who appeared respectively for the claimants, the Secretary of State, and CCLC, for their very thorough written skeleton arguments and for their sustained oral submissions, all of which displayed considerable knowledge and experience in this field. I am grateful, too, to Mr Manjit Gill QC who drafted CCLC's skeleton submissions jointly

with Ms Rothwell, although he did not appear at the oral hearing. I am grateful, too, to the various solicitors and others who were patently providing considerable support and expertise to their respective counsel during the hearing.

The factual context

6. It is the very essence of the argument for the claimant children and by CCLC that on every application by or on behalf of a child for leave to remain the Secretary of State, by her officials, must give specific consideration to the circumstances of the individual applicant child. For the purposes of this judgment, however, and what I have to decide (which is very different from what the decision maker had to decide) I can summarise the relevant history quite briefly.

7. The background to the extended family concerned is Jamaica, and all the people to whom I am about to refer are citizens of, or entitled to citizenship of, Jamaica. None of them is currently British. A lady called JW, who is now aged 48, entered the UK lawfully in 2001 and was granted a visa for one year. She overstayed and has, as I understand it, remained here continuously (but until 2010, unlawfully) ever since. JW has two adult daughters, TS, who is now aged 28, and PS, who is now aged 27. TS and PS both entered the UK lawfully in 2002 with leave to remain for short periods. They, too, overstayed and remained here unlawfully until grants of discretionary leave to remain (DL) in 2010 and 2011 respectively. Whilst here, TS has given birth to three children: SM, who was born on 28 June 2003 and is now nearly 10; TM, who was born on 16 March 2007 and is now aged 6; and SS, who was born on 31 December 2011 and is now aged about 16 months. Pausing there, I mention that TM applied concurrently with her sister SM for ILR and was granted DL. In the cases of SM and TM, SM was selected as a representative claimant, but at the outset of the hearing, with the consent of the Secretary of State, I formally joined TM as a claimant without any reservice or amendment of the pleadings. The issues in relation to TM are (in the context of this judicial review) identical. I have not, however, joined the third child, SS as there has never yet been an application on his behalf for leave to remain and so there is no reviewable decision.

8. PS has two children, SR, who was born on 14 July 2002 and is now aged 10; and DB, who was born on 26 June 2006 and is now aged 6. The mother of TS and PS, namely JW, has herself had another child, JD, who was born on 8 February 2005 and is now aged 8.

9. The claimant children are SM, TM, SR, DB, and JD. Their ages range (now) between 10 and 6. They are all related to each other either as siblings or as cousins (or in the case of JD as aunt/nieces/nephew). All were born in the United Kingdom at times when their respective mother was an overstayer. All have lived continuously in the UK. There are also other members of the extended family living here, namely brothers of JW and some of their also young children.

10. The Secretary of State became aware of the claimant children and their mothers when certain claims were made by the mothers for asylum and for leave to remain. These claims were all refused by the Secretary of State who sought to remove all three mothers and their children to Jamaica. Appeals to the First Tier Tribunal by JW, and to the Upper Tribunal by TS, were allowed, in each case under Article 8 of the ECHR. The full written Determinations and Reasons of the immigration judges were of course available to the official of the UK Border Agency when he made the subsequent decisions now under review. It is sufficient to give context to this judgment to quote the following very short passages. In the case of JW, the FTT judge said "The family life that extends between all members of this family [viz the wide extended family] would be torn asunder by the removal of JD and her mother (and of TS and PS and their children)…." In the case of TS, SM and TM, the Senior Immigration Judge in the Upper Tribunal said: "The ties between the three appellants and their relatives who are settled here are particularly strong."

11. The Secretary of State accepted and did not seek to appeal those tribunal decisions. The Secretary of State also accepted that in the light of the tribunal decisions she could not lawfully remove PS and her children SR and DB. It is very important to emphasise that the extent of the tribunal decisions in each case was that the mothers and children could not lawfully be removed from the United Kingdom. Patently, the question whether or not a person (whether adult or child) can lawfully be removed from this country without breach of Article 8 is very different from the question whether that person (if he cannot be removed) should then be granted an initially limited or immediately indefinite leave to remain; and the latter question raises issues which were not considered at all in the tribunal hearings.

12. It is common ground that if a decision is made on Article 8 grounds, whether by the Secretary of State or by a tribunal on appeal, that a person cannot be removed, the Secretary of State will normally, on application to her, regularise that person's position by the grant of leave to remain.

13. Following the decisions of the tribunals, applications were made to the UK Border Agency for leave to remain. The applications and associated correspondence made clear that in the case of all the applicants an immediate grant of indefinite leave to remain (ILR) was being sought. In each case, however, the decision maker, Mr Mark Harrison, granted discretionary leave to remain (DL) for three years. The dates of the grants of DL were 23 September 2010 in the case of JW and 13 October 2010 in the case of her son JD; 12 November 2010 in the case of TS and her daughters SM and TM; and 18 August 2011 in the case of PS and her children SR and DB. It is those decisions on those dates (with the concomitant, if unexpressed, refusals to grant ILR on those dates) which are now the subject of these claims. Mr Harrison maintained those decisions despite subsequent correspondence, a formal Pre Action Protocol letter and, indeed, the issue and subsistence of these proceedings.

14. There is no current challenge by or on behalf of the three adult mothers to the grant in their cases of DL limited to three years. But all the claimant children challenge the grant to them of DL and say that if the decision maker had

correctly applied the law, namely section 55 and the associated jurisprudence, he would, or at any rate might, have granted ILR.

The legal framework

15. Section 3(1)(b) of the Immigration Act 1971, which it is not necessary to reproduce verbatim, provides that where a person is not a British Citizen (which these claimants are not) "he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period". It is pursuant to section 3 that the Secretary of State may give leave to remain in application of the Immigration Rules, and also, as in this case, by exercising a discretion outside the rules.

16. Section 55 of the Borders, Citizenship and Immigration Act 2009, which came into force on 2 November 2009, provides as follows:

> "55(1) The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) …..
>
> (2) The functions referred to in subsection (1) are –
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality …; (b) …; (c) …; (d)…
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> ….."

17. It is accepted by Ms Broadfoot on behalf of the Secretary of State that the making of a decision pursuant to section 3(1)(b) of the 1971 Act with regard to leave to remain and its duration, is the discharge of a "function" within the meaning of, and for the purpose of, section 55(1) and (2) of the 2009 Act.

18. I will later refer more fully to the decision of the Supreme Court in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, but at this point it is important to stress that it is crystal clear that all members of the Supreme Court in that case were agreed (and leading counsel in that case for the Secretary of State acknowledged) that the word "children" where it appears in section 55(1)(a) is not simply a generic reference to children as a body or class, but includes and imports also a reference to the "children involved". Lady Hale, with whose judgment all the other members of the court agreed, said at paragraph 24:

> "… this duty [viz under section 55] applies, not only to how children are looked after in this country while decisions about immigration … are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of Article 8 (2)."

19. The reference there to the purpose of Article 8 (2) was because of the context of that case. But the breadth of the proposition in paragraph 24, which refers to "the decisions themselves" "about immigration" clearly indicates that an actual decision whether or not to grant leave remain, and if so, for how long (which is a decision about immigration) is itself a decision to which the duty under section 55 applies and requires that regard is given to the need to safeguard and promote the welfare of the child(ren) involved (if, as these children were, they are in the United Kingdom).

20. I will refer more fully later to the content and effect of that duty.

Guidance

21. Section 55(3) refers to guidance. In November 2009, to coincide with the coming into force of section 55, the Secretary of State (jointly with the Secretary of State for Children, Schools and Families) issued "Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children". The guidance was expressly issued under section 55. It is called "Every Child Matters" and was current at all times material to this case and remains current. I can only quote very selectively from it in this judgment. Paragraphs 1.13 – 1.17, headed "Work with Individual Children and their Families", place emphasis on safeguarding and promoting the welfare "of individual children". Paragraph 1.14 refers to listening to children and young people and that what they have to say is taken seriously and acted on. Paragraph 1.16 states that work with children should be "informed by evidence". Part 2 of Every Child Matters relates specifically to "The role of the UK Border Agency in relation to safeguarding and promoting the welfare of children". Paragraph 2.7 states that the UK Border Agency must act according to principles which include "… the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children"; and "children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience." Paragraph 2.20, upon which Ms Weston and Ms Rothwell place considerable reliance, states:

> "There should also be recognition that children cannot put on hold their growth or personal deployment until a potentially lengthy application process is resolved. Every effort must therefore be made to achieve timely decisions for them."

22. Ms Weston and Ms Rothwell stress that "recognition that children cannot put on hold their… personal development" applies no less to the process of

successive applications for grants of time limited DL as to timely resolution of any given application.

23. Finally Ms Weston and Ms Rothwell stress the phrase "Unless it is clear from the outset that a child's future is going to be in the UK …" where it appears in paragraph 2.21. They submit that that indicates that when making decisions concerning children officials must grasp the nettle at the outset and make a realistic appraisal whether "it is clear from the outset that a child's future is going to be in the UK" and make decisions accordingly. That grounds the overarching submission at the heart of this case that it is so obvious that the future of all these children is going to be in the UK, where they were all born, where they have all continuously lived, and from which they and their mothers cannot be removed, that decisions to grant time limited DL, which will obviously be renewed, are merely prolonging uncertainty for the children for no practical or useful purpose, and certainly for no purpose with regard to safeguarding and promoting their welfare.

The Discretionary Leave policy document dated 27 October 2009

24. The Secretary of State may grant leave to remain within the Immigration Rules, but these claimants do not qualify under any route within the rules. The Secretary of State may also, and often does, grant leave outside the rules but in exercise of her same discretionary powers under section 3 of the 1971 Act. The exercise of discretion outside the rules requires to be, and is, guided by a published policy, which is described in its introduction and elsewhere as an "instruction" to officials and caseworkers. The document appears, therefore, both to state the policy and also to instruct officials and caseworkers. The policy current before 2009 was amended on 27 October 2009 to make reference to section 55 of the 2009 Act which was then coming into force. The amendment took the effect of adding a short section into the first page of the "Introduction" to the policy. However, as I understand it, no other or consequential amendment or addition was made to any part of the remainder of the policy itself.

25. The added section in the Introduction reads as follows:

> **"Application of this instruction in respect of children and those with children**
>
> Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.
>
> Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' [viz: "Every Child Matters"] sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be a risk from harm."

26. Under a heading "Criteria for Granting Discretionary Leave" the policy makes plain that where "return" (but clearly also removal of a person who was born here and has always lived here) would involve a breach of Article 8 on the basis of family life established in the UK, "they [sic] should be granted Discretionary Leave". As it had been decided by the tribunals and accepted by the Secretary of State that removal of each of these children would involve a breach of Article 8, it followed that they should be granted Discretionary Leave under the policy and that has never been in issue. The issue relates to duration.

27. Further provisions of the policy include:

> **"Duration of Grants of Discretionary Leave**
>
> **Standard Period for Different Categories of Discretionary Leave**
>
> It will normally be appropriate to grant the following periods of Discretionary Leave to those qualifying under the categories set out above. All categories will need to complete at least six years in total, or at least ten years in excluded cases, before being eligible to apply for ILR.
>
> Article 8 cases – three years.
>
> Article 3 cases – three years.
>
> Other ECHR Articles – three years.
>
> **Non-Standard Grant Periods**
>
> There may be some cases – for example, some of those qualifying under Article 8 or the section on other cases – where it is **clear** from the individual circumstances of the case that the factors leading to Discretionary Leave being granted are going to be short lived.
>
> For example:
>
> - an Article 8 case where a person is permitted to stay because of the presence of a family member in the United Kingdom and where it

is known that the family member will be able to leave the United Kingdom within, say, 12 months;

- or a case where a grant of leave is appropriate to enable a person to stay in the UK to participate in a court case.

In these cases it will be appropriate to grant shorter periods of leave.

Non-standard grants should be used only where the information relating to the specific case clearly points to a shorter period being applicable. Reasons for granting a shorter period should be included in the letter to the applicant.

Shorter periods of leave should only be granted after reference to a senior caseworker.

Applications for Further Leave

A person will not become eligible for consideration for settlement until they have completed six years of Discretionary Leave or, in the case of persons subject to the exclusion criteria, until they have completed at least ten years of Discretionary Leave. Anyone granted Discretionary Leave will therefore have to have at least one active review before they become eligible for consideration for settlement.

Applications for Settlement

A person will normally become eligible for consideration for settlement after completing six continuous years of Discretionary Leave. However, where a person is covered by one of the exclusion categories they will not become eligible for consideration for settlement until they have completed ten continuous years of Discretionary Leave…..

An individual may apply for ILR/settlement at the six or ten year stage shortly before Discretionary Leave expires. The application will be considered in the light of circumstances prevailing at that time."

28. All counsel agree that the words "settlement" and "indefinite leave to remain" are, for these purposes, synonymous.

The jurisprudence in relation to section 55 of the 2009 Act

29. Section 55 was enacted to give effect in domestic law to the removal in 2008 of the reservation which the United Kingdom had previously entered against applying Article 3(1) of the United Nations Convention on the Rights of the Child 1989 (UNCRC) in immigration matters.

30. In ZH (Tanzania) v Secretary of State for the Home Department, in which judgment was given on 1 February 2011, the Supreme Court gave authoritative consideration to the import and effect of section 55, when read with the UNCRC and a number of other international instruments. The context of ZH was immigration, but the issue in that case concerned Article 8

and removal, which, as I have already observed, is very different from the choice between a grant of time limited DL or of ILR. Nevertheless what the Supreme Court said in relation to section 55 is clearly of wider application to immigration decisions generally. I have already quoted paragraph 24 of the judgment of Lady Hale. The UNCRC itself requires that "… the best interests of the child shall be a primary consideration" and the Supreme Court has grappled with the concept of "a primary" consideration. At paragraph 25 of ZH Lady Hale said:

> "Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration.""

31. At paragraph 33 Lady Hale said:

> "… the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But … the children were not to be blamed for that."

32. Paragraph 44 of the judgment of Lord Hope in ZH is substantially to the same effect.

33. In paragraph 46, Lord Kerr expressed more strongly the importance or weight to be attached to the best interests of the children, as he was later to acknowledge in paragraph 145 of his judgment in HH v Deputy Prosecutor of the Italian Republic, Genoa (see below). In ZH at paragraph 46 he said "Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them …. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present …." However, as I read ZH and the judgments of all seven Supreme Court Justices in HH, no others have yet stated the approach in such strong terms as Lord Kerr.

34. In HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 125, in which a court constituted of seven Justices gave judgment on 20 June 2012, the issue concerned the tension between extradition of a parent under international treaty obligations and the Article 8 rights of that parent's children. That is a situation far removed from the present case and one which clearly involves very different considerations. As first emerges in the judgment of Lady Hale at paragraph 33, there was clearly disagreement and divergence between the seven Justices as to the order in which a decision maker should approach the task of assessing the best interests of the child (being "a primary consideration") and assessing any countervailing factors, and then balancing the one against the other; see the judgments of Lady Hale at paragraph 33, Lord Hope at paragraphs 89 and 90, Lord Mance at paragraphs 98 – 100, Lord Judge at paragraph 125, Lord Kerr at paragraphs 143 and 144, and Lord Wilson at paragraph 153. Although we had some

discussion about it during the hearing, this is not territory into which I need humbly tread. What HH appears to me to leave intact and unaltered is that in any decision making to which section 55 applies, the welfare of the individual child concerned must be carefully considered, assessed and weighed in the decision making process. As Lord Mance said at paragraph 98 "… the child's best interests … must always be at the forefront of any decision maker's mind …"

Issue (i): Is the policy and instruction compliant with section 55?

35. In my view, the short answer is: no.

36. The exercise of the overall discretion under section 3(1)(b) of the Immigration Act 1971 involves making at least two discrete discretionary decisions: whether to give leave to remain at all; and if so, whether for a limited or for an indefinite period. If the decision is to give leave for a limited period, then a third discretionary decision is how long that limited period should be. Further discretionary decisions may fall to be made under section 3(1)(c) which relates to attaching conditions but it is not in point in the present case.

37. The language of section 3(1)(b) itself is very general, and in exercising the discretions the decision maker must perform or discharge any other relevant statutory duty which is not excluded expressly or by necessary implication, which section 55 is not. In my view the duty under section 55 must be performed or discharged when exercising every stage of the discretions under section 3(1)(b). The introduction to the Discretionary Leave policy and instruction makes express reference to section 55. This grounds the submission of Ms Broadfoot, on behalf of the Secretary of State, that the words of the introduction "import the duty under section 55 into the whole policy and into every decision taken under the policy." [my emphasis] I cannot accept that the words in the introduction, when read with the more detailed provisions of the policy, do have this effect. I observe, also, that the construction for which the Secretary of State's advocate, Ms Broadfoot, contends, is flatly contradicted by the view of the Secretary of State's official, Mr Mike Gallagher, as described in paragraphs 53 to 56 below.

38. I mention that the reference within the introduction to "Officers must not apply the actions …. without having due regard to section 55 …" is somewhat curious. Section 55 itself requires the Secretary of State and the decision maker to have regard to the welfare of the child(ren) concerned. The duty of the decision maker is not strictly to "have due regard to section 55" but to apply section 55 and have (due) regard to the welfare of the children. This, however, may be a very pedantic point. Further on, the passage in the introduction does clearly and correctly state that: "Our statutory duty to children includes the need to demonstrate ….. The child's interests being made a primary, although not the only consideration." This echoes the duty under the UNCRC and anticipates what the Supreme Court was later to say in ZH (Tanzania).

39. The essential submission of Ms Broadfoot on behalf of the Secretary of State is that the passage in the introduction, including, as it does, the express

reference (using its long title) to "Every Child Matters", coupled with the use of the word "normally" in the passages in the policy under the headings "Duration of Grants of Discretionary Leave" and "Applications for Settlement", quoted above, is sufficient to make clear to decision makers that they must give fact specific consideration, as a primary consideration, to the welfare of the child(ren) concerned when considering not only whether to grant leave but, if so, its duration.

40. In my view, however, agreeing as I do with the submissions of Ms Weston and Ms Rothwell, the policy and instruction document later precludes the decision maker from case specific discharge of the duty under section 55, as explained in the jurisprudence, when considering duration.

41. The first of the two references to "normally" upon which Ms Broadfoot relies is under the heading "Duration of Grants of Discretionary Leave" and the sub-heading "Standard Period for Different Categories of Discretionary Leave." The "standard" periods are, generally, three years. In my view the use of the word "normally" is plainly because of the contrast with the sub-heading "Non-standard Grant Periods" which appears further down the same page. The whole of the passage dealing with "Non-standard Grant Periods" refers and relates to circumstances in which a shorter period than three years may be appropriate. So the use of the word "normally" is simply to connote that a "Standard Period" of three years is the "norm" but that there may be non-standard, shorter periods outside the norm. What is very clear, express, and unqualified in the passage under "Duration of Grants of Discretionary Leave" is the sentence: "All categories will need to complete at least six years in total … before being eligible to apply for ILR." The words "All categories", which appear without any qualification or exception, must extend also to, and include, children. The point is repeated and emphasised by the passage a few pages later under the heading "Applications for Further Leave". This also appears to apply generally, without any express qualification or exception, to "A person" and "Anyone". It provides that "A person will not become eligible for consideration for settlement until they have completed six years of Discretionary Leave … Anyone granted Discretionary Leave will therefore have to have at least one active review [viz after three years] before they become eligible [viz after six years] for consideration for settlement." [my emphasis] The passage on the following page under the heading "Applications for Settlement" does again employ the word "normally". But its purpose in its context is clearly to distinguish the "norm" of being eligible for consideration for settlement after six years, from certain categories of persons who are only eligible after ten years. The passage refers to "the six or ten year stage." There is nothing in the passage under the heading "Applications for Settlement" which contemplates any category of person, not even a child, becoming eligible in a shorter period than six years.

42. In my view the effect of the language of the policy and instruction document as a whole is to preclude the decision maker from even considering an applicant, whether adult or child, as being eligible for ILR until he or she has completed at least six years of DL. The use of the word "normally" is explained by the reasons I have described and does not of itself admit of any

exception or qualification in relation to children. The general words in the introduction are excluded from the consideration of the duration of leave by the clear language of the later passages.

43. If the later passages had referred to "All adult categories …" and "A person who is an adult …" and "Anyone who is an adult …", and then made different and express provision in relation to children, the policy and instruction could be compliant with section 55. But the language used effectively precludes case specific consideration of the welfare of the child(ren) from the discretionary decision whether to grant immediate ILR or limited DL. It precludes the application of section 55 to that decision and is, in my view, unlawful.

Issue (ii): If the policy is capable of being compliant, did the decision maker apply it in that compliant way?

44. I will now assume, contrary to my above view, that Ms Broadfoot is right; that the use of the word "normally", where it appears, permits an exception or qualification in the case of children; and that the decision maker is indeed mandated by the words of the Introduction to give case specific consideration to the welfare of the child(ren) and make it a primary consideration. Did Mr Mark Harrison do so? In my view he did not. I wish to stress at once that I do not say that in any way critically of Mr Harrison. Rather, he appears to me to have been a loyal official of the Secretary of State, who applied the policy and instruction in accordance with what I consider to be its only natural reading and meaning. It is accordingly now necessary to consider the content of his decision letters and later letters.

45. The first letters were very short and formal, merely stating that DL had been granted and enclosing the relevant Immigration Status Documents. Mr Harrison first gave fuller reasons in a letter dated 5 January 2011, now at bundle page J 63, in response to a Pre Action Protocol letter. This referred to the withdrawn policy under DP 5/96 which had been withdrawn on 9 December 2008, namely at all times material to this case, and contended that that policy was no longer followed. The letter continued: "When both JW and TS appeals were allowed under article 8 … the appropriate grant of leave of three years was granted by the Secretary of State in line with the Home Office policy on Discretionary Leave. In both the case of JW and her dependant and of TS and her dependants all were granted Discretionary Leave for a period of three years. As such neither was it improper or unreasonable or irrational for the Secretary of State to apply the relevant up to date policy in relation to granting leave under Article 8 … the appropriate policy has been followed and applied to your clients case which was a grant of Discretionary Leave in line with their appeals being allowed on grounds of Article 8."

46. Pausing there, in the above passage there is no hint of any case specific consideration of the welfare of each of the children concerned. There is simply reiteration that discretionary leave has been granted "in line with the …policy", and that the policy had been applied without differentiation to both the adults (JW and TS) and their dependant children.

47. Mr Harrison did, however, go on to make reference to section 55 which had, of course, been referred to in the Pre Action Protocol Letter. He continued:

> "The best interests of the children can include access to schooling, the NHS, Social Services and other services that can be accessed by residing in the United Kingdom. However, it is not the only primary consideration. It is considered that the maintenance of an effective immigration control is also a primary consideration. It is noted that the children are in education in the United Kingdom. In addition to this it has not been disputed that the children have developed family life with each other and their respective mothers. However its noted that the Deputy High Court Judge who granted permission observed that "it is arguable that the defendant's decision does not engage with the specific issues raised with regard to JD or the claimed dependency on family in London". Therefore it is recognised that there is family life developed by the children and their respective mother. However when the discretionary leave expires all the children and their respective mothers can make a further application to remain in the UK, therefore the family unit will be maintained and not broken."

48. That letter is the beginning of the attempts by Mr Harrison to demonstrate that, at the time of making the original decisions, he had in fact given child specific consideration to their welfare.

49. Mr Harrison wrote a series of further letters, all dated 19 September 2012, in relation to each of the children. They are each substantially to the same effect and largely follow a "template", and I quote from that in relation to DB, now at bundle page D79. He wrote:

> "The Secretary of State carefully considered your client's circumstances and specifically considered s55 when she decided to grant your client 3 years DLR in August 2011. However, in the light of your client's application for judicial review and the fact that permission is not opposed, it is considered appropriate in these circumstances for the Secretary of State to more fully articulate the reasoning behind that decision.
>
> …….
>
> Section 55 was not intended to impose any new functions or override existing functions and it was not intended to have any direct effect, or impose requirements, on the amount of leave to be granted.
>
> The Secretary of State does not consider that your client's welfare is better safeguarded or promoted by the grant of ILR as opposed to 3 years DLR. Save for the length of leave, there is limited substantive difference between the benefits of being granted ILR over DLR. The circumstances of your client's case were considered when he was granted DLR. Your client now has access to health care and education in the UK in the same way as a UK national child. There would be no difference in this respect if he had been granted ILR. Similarly, in terms of safeguarding, there would be no difference. Furthermore, three years is a substantial period

of time, during which his status is secure and there is no evidence that, for example, his mental or emotional well-being is adversely affected. When that period of time comes to an end it will be open to your client to make a further application in which all relevant considerations will have to be taken into account. In the circumstances it is not clear in what way your client's welfare is not being safeguarded or promoted by reason of her DLR.

In addition, by granting DLR over ILR the Secretary of State is able to review what the best interests of your client will be at a later date. Thus the Secretary of State can ensure that it remains in your client's best interests to remain in the UK.

But even if it could be said that there might be some difference in welfare terms that flow from the grant of one status over another, there are strong public policy reasons to justify the grant of DLR to your client at this stage instead of ILR. The Secretary of State must ensure that the grant of ILR does not become a means whereby those are unable to support themselves and their dependants, or who have blatantly ignored the immigration laws, proceed immediately into the permanent resident category, ahead of those who have to demonstrate their compliance, and without being able to review their circumstances later to determine whether a further grant of leave was still appropriate. Whilst your client, as a child, is obviously not responsible for the decisions made by the adult(s) in his life, their immigration status and history are relevant to the assessment of any justification. To grant your client ILR straight away would be unfair to all those who come, and remain legally, would discourage the use of the lawful routes into the UK and undermine the Secretary of State's ability to manage migration in a manner which she considers to be the best interests of society as a whole. The Secretary of State considers that the public policy consideration could only be outweighed in an exceptional case.

Having looked over the file again, your client's case does not exhibit any exceptional or compelling features which would justify granting your client ILR rather than DLR."

50. In my view this letter was drafted through the prism of the subsisting claim for judicial review. It is very obviously an after the event attempt to demonstrate a reasoning process which was not described, and is unlikely to have taken place, at the time the decisions themselves were made.

51. The proposition that "… the Secretary of State is able to review what the best interests of your client will be at a later date. Thus the Secretary of State can ensure that it remains in your client's best interests to remain in the UK" is highly paternalistic and includes no recognition of the reality that these children will, realistically, remain here and will, ultimately, be granted settlement or ILR. The effect meantime of granting only DL is to prolong uncertainty for the children as they develop towards their teenage years and acquire growing awareness of their circumstances, for no welfare-related benefit or purpose and with little regard to paragraph 2.20 of "Every Child

Matters" (see paragraphs 21 – 23 above). Further, although Mr Harrison states that "there is limited substantive difference between the benefits of being granted ILR over DLR", counsel for the claimants and CCLC point out that DL may be less advantageous in practice than ILR when a child is seeking to access services and entitlements. This may particularly be the case in the "limbo" period when one period of DL has ended and the Secretary of State has not yet reached a decision to grant a further period, or (after six or more years) to grant ILR. I was informed (and Ms Broadfoot accepted) that an application for a further grant of DL can only be made one month before a current period is due to expire. However, due to resource pressures, the Secretary of State normally takes many months to make and communicate a decision and to issue new status documents. During that "limbo" period, section 3C of the Immigration Act 1971 does provide, as a matter of substantive law, that the prior leave "is extended" while the application is being considered. However, as I was told, it may in practice be difficult in that limbo period to satisfy service providers (eg within the NHS) that the applicant remains entitled to the "extended leave". Further, section 3C(3) provides that leave extended by virtue of section 3C "shall lapse if the applicant leaves the United Kingdom." So during the limbo period, which may last for many months, an applicant, including a child, could not go abroad for a holiday or a school trip.

52. The sentence in Mr Harrison's letter of 19 September 2012 that "Section 55 was not intended … to have any direct effect … on the amount of leave to be granted" appears to me to run flatly contrary to the submission of the Secretary of State's own counsel, Ms Broadfoot, that under the policy document section 55 permeates the whole policy and impacts on every decision. Most tellingly, at the end of the quoted passage Mr Harrison refers to public policy considerations "only being outweighed in an exceptional case" and to the case not exhibiting "any exceptional or compelling features which would justify granting ILR rather than DLR." This appears to add a requirement of "exceptional or compelling features" in a situation where the Secretary of State is required (in whichever order) to make the welfare of the child(ren) a primary consideration; to consider countervailing factors (which of course include considerations of immigration policy as a very important factor); and to balance the two. The language of the letter does not make the welfare of the child(ren) a primary consideration. It makes immigration policy the primary consideration, only to be outweighed by exceptional or compelling features. This is far removed from the construction and effect of section 55 as described by any of the Justices of the Supreme Court in ZH and HH.

53. That this is indeed the approach of the Secretary of State and the UK Border Agency is borne out by the witness statement, also dated 19 September 2012, of Mike Gallagher, a senior official of the Operational Policy and Rules Unit of the UKBA, now at bundle page D20. At paragraph 26 Mr Gallagher says:

> "… section 55 was not, to my knowledge, intended to have any direct effect on the amount of leave to be granted, as arises in these cases, and I am not aware of any material which suggested that it was ."

54. At paragraph 27 Mr Gallagher says:

> "It is difficult to imagine circumstances in which section 55 would require the immediate grant of ILR outside the Rules, although the possibility of such circumstance arising is not excluded."

55. Those passages, written by a senior official, clearly indicate that senior officials in the UK Border Agency do not themselves read and treat the policy and instruction document in the way that Ms Broadfoot submitted it should be read and is applied. The plain assertion of Mr Gallagher is that section 55 was not (and presumably also is not) intended to have any direct effect on the amount of leave to be granted and that, at best, "the possibility of such circumstances arising is not excluded." Mr Gallagher continues at paragraph 28 that "…I suspect that such cases very rarely arise if at all."

56. At paragraph 32, under a heading "Application in this case", Mr Gallagher begins: "Looking at this case again, in my view the circumstances in this case are not exceptional." He thereby immediately imports the added test or requirement of exceptionality which, as I have already explained, is not warranted and which runs counter to section 55 as interpreted by the Supreme Court.

Conclusions and outcome

57. In my view the relevant 2009 Discretionary Leave policy and instruction document is unlawful. It effectively precludes case specific consideration of the welfare of the child concerned in making the discretionary decision whether to grant limited DL or ILR. Further, and contrary to the submissions of Ms Broadfoot, that is the way senior officials at the UKBA intend the policy to be applied, at all events save in an "exceptional case" which "very rarely arises if at all." The policy and instruction fail to give proper effect to the statutory duty under section 55. Even if the policy can be read in the way contended for by Ms Broadfoot (but not by the senior official, Mr Gallagher), that is not the way in which the actual decision maker, Mr Harrison, read and applied it. He, too, would graft on a need for exceptional or compelling features.

58. These reasons, separately or cumulatively, render the actual decisions in the case of each claimant unlawful. I will allow the claims for judicial review and order the Secretary of State to reconsider each claim with a fresh mind and properly applying section 55.

59. The Secretary of State issued a new policy and instruction on Discretionary Leave on 6 April 2013. This new policy primarily reduces the maximum period of a grant of discretionary leave to 2½ rather than 3 years at a time, and requires from 9 July 2012 that an applicant has completed a total of 10 years, or four successive periods of DL of 2½ years, before being eligible for ILR. It does describe the position in relation to children in different language in the Introduction at paragraph 1.2 from the language used in the 2009 policy and instruction. However "Transitional Arrangements" under section 10 of the policy make plain that "Those who, before 9 July 2012, have been granted

leave under the Discretionary Leave policy in force at the time will continue to be dealt with under that policy through to settlement …" The effect of the Transitional Arrangements is, therefore, that the 2009 policy will continue to apply to a considerable, if diminishing, number of applicants for several years to come. The 2009 policy will require amendment to make it lawful in relation to children in the light of this judgment. I deliberately do not express any view as to the lawfulness of the new 2013 policy, which does employ some different language and which has not been the subject of detailed argument or indeed close consideration by myself. Whether the Secretary of State might consider it wise to review also the lawfulness of the 2013 policy, insofar as it relates to children, in the light of this judgment is entirely a matter for her.