Neutral Citation Number: [2014] EWCA Civ 1334

Case Nos: C4/2013/1951
C2/2014/0795

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HHJ Allan Gore QC
[2013] EWHC 1406 (Admin)
AND ON APPEAL FROM THE UPPER TRIBUNAL
Upper Tribunal Judge Warr

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2014

Before :

LORD JUSTICE LAWS

LORD JUSTICE FLOYD
and
LORD JUSTICE VOS

- -

Between:

THE QUEEN (on the application of NORJABEE ALLADIN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
And Between :	
THE QUEEN (on the application of CHANDER SHEKHAR WADHWA and others)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Zane Malik and **Rajiv Sharma** (instructed by Farani Javed Taylor Solicitors and **Central Law Practice Solicitors**) for the **Appellants**
Katherine Olley (instructed by **The Treasury Solicitor's Department**) for the **Respondent**

Hearing date: 29 July 2014

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Judgment

Lord Justice Floyd:

Introduction

1. The principal issue in these two appeals is whether the decisions of the Secretary of State for the Home Department ("the Secretary of State") to give limited (discretionary) leave to remain ("DLR") as opposed to indefinite leave to remain ("ILR") are unlawful because they were given in breach of the Secretary of State's duty under Section 55 of the Borders Citizenship and Immigration Act 2009.

2. In the first appeal, Ms Norjabee Alladin appeals the decision of HHJ Allan Gore QC sitting as a Deputy High Court Judge dated 30 April 2013 by which he dismissed her claim for judicial review of the decisions of the Secretary of State dated 15 June 2011 and 22 September 2011 to grant her and her family members DLR for three years as opposed to ILR.

3. In the second appeal, Mr Shekhar Wadhwa and his family appeal the decision of Upper Tribunal Judge Warr which refused him permission to apply for judicial review to challenge the decision of the Secretary of State dated 11 April 2013 to grant them only DLR for 30 months instead of ILR.

Statutory and policy framework

4. Before turning to the facts in more detail, I must set out the legislative and policy frameworks and review some authorities in which they have been considered.

5. Section 3 of the Immigration Act 1971 as amended provides that:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) 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.."

6. Subsequent provisions within section 3 provide for the laying before Parliament of immigration rules.

7. Article 3 of the United Nations Convention on the Rights of the Child provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

8. Section 55 of Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") provides:

> "(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, ...
>
> (2) The functions referred to in subsection (1) are-
>
> > (a) any function of the Secretary of State in relation to immigration, asylum or nationality; ...
>
> (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)."

9. Guidance of the kind referred to in section 55(3) was provided in November 2009 in a document entitled "Every Child Matters – Change for Children" subtitled "Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote welfare of children", and issued jointly by the Home Office and the Department for Schools and Families ("Every Child Matters"). Part 2 is entitled "The role of the UK Border Agency in relation to safeguarding and promoting the welfare of children". Paragraph 2.7 states as follows:

> "2.7 The UK Border Agency must also act according to the following principles:
>
> - Every child matters even if they are someone subject to immigration control.
>
> - In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.
>
> - Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
>
> - Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.

> - Children should have their applications dealt with in a timely way and [one] that minimises the uncertainty that they may experience."

10. These paragraphs reflect what Baroness Hale said in *ZH (Tanzania) v SSHD* [2011] 2 WLR 148 at paragraph 29 and 33:

> " 29… what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo)*, it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.
>
> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, 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."

11. We have been supplied with three relevant versions of the Home Office Policy on Discretionary Leave which I shall call versions 1, 2 and 3. Version 1 (provided at tab 4 of the authorities bundle for this appeal) was last amended in October 2009. Version 2 was that last amended on 6 April 2013 and was originally thought to be that in tab 6 of the authorities bundle but, following a question from the court, this has proved not to be the case. What is now agreed to be the correct version 2 was provided to the court after the hearing attached to an email dated 1 August 2014 from Mr Johnston of the Treasury Solicitor. Version 3 was last amended on 24 June 2013. Version 1 applies in the case of Ms Alladin and version 2 in the case of Mr Wadhwa. Version 3 is the current version.

12. Version 1 carried, for the first time, a section dealing with the application of the policy to those with children, no doubt to coincide with the enactment of the 2009 Act:

> "**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' 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."

13. The criteria for granting discretionary leave contained in version 1 recognise that where the return of an individual would involve a breach of their right to family life established in the UK, there should be a grant of DLR. It was no doubt on this basis that Ms Alladin was granted DLR by the decisions which are now challenged. A further section deals separately with the period of grant of discretionary leave. It explains that in an Article 8 case it will normally be appropriate to grant a period of 3 years DLR, and that an applicant will need to complete at least 6 years in total before being eligible to apply for ILR. The policy explains that there may be some cases where shorter periods are appropriate, but, importantly, there is no express reference to longer periods, or to immediate grants of ILR.

14. Version 2 also contains the section I have quoted above concerning the application of the policy to children. The only amendments to this section as compared with version 1 are agreed to be immaterial. As to the duration of the grant of leave, although there are other differences, it was again agreed that the only material differences for the purposes of this case were that the period for which DLR may be granted was now 30 months at a time, as opposed to 36 months under the previous policy, and that an applicant now needed to complete 10 years (normally 4 periods of 2.5 years) before being eligible to apply for ILR. It was under this policy that Mr Wadhwa was given DLR.

15. Although we were taken to Version 3, it did not apply at any material time and it is preferable that we say nothing about it.

16. The relevant parts of the Immigration Directorate Instructions provide as follows:

> "**Humanitarian Protection and Discretionary Leave**
>
> …

The criteria to be met for a grant of **Discretionary Leave** are set out in the API on *Discretionary Leave*. The majority of grants of Discretionary Leave are likely to be made in protection cases. There are, however, a limited number of circumstances in which a non-protection case may qualify for a grant of Discretionary Leave, for example, where removal would:

- breach Article 3 of the ECHR on account of the person's medical condition;

- breach Article 8 of the ECHR (right to private and family life) most likely to arise in marriage and, from 5 December 2005, civil partnership cases;

- result in a flagrant denial of rights under other articles; or

- in other compelling circumstances (in protection cases)…

1.2 **Leave Outside the Immigration Rules**

It has always been possible to grant someone limited or indefinite leave to enter/remain outside the Immigration Rules. Where it is not possible to grant leave under the Immigration Rules, or to grant asylum or Humanitarian Protection or Discretionary Leave, any other leave to enter or remain outside the Immigration Rules must be granted under a further category 'Leave Outside the Rules' (LOTR). The only two circumstances where it will be necessary to consider granting LOTR will be in mainly **non-asylum and non-protection** cases:

• where someone qualifies under one of the immigration policy concessions; or

• for reasons that are particularly compelling in circumstance.

2.2 **Particularly compelling circumstances**

There may be particular compelling circumstances where someone may request either limited or indefinite LOTR. Any such case should be considered on its individual merits and in line with any relevant policy at the time. Caseworkers/immigration officers should always first give full consideration to whether someone first qualifies under the provisions of the Immigration Rules, or the Humanitarian Protection and Discretionary Leave criteria or any relevant policy instruction.

It is not possible to give instances or examples of case-types that might be defined as 'particular compelling circumstances'. However, grants of such LOTR should be rare, and only for

> genuinely compassionate and circumstantial reasons, or where it is deemed absolutely necessary to allow someone to enter/remain in the UK, when there is no other available option.
>
> **Limited LOTR**
>
> An application for LOTR under any of the immigration concessions must be strictly considered in line with the relevant policy instruction. If it is decided that LOTR should be granted, then limited leave should be granted for a specified period for the necessary duration of stay required. Likewise, where it is decided to grant leave because of particular compelling reasons, limited leave should only be granted in accordance with the individual circumstances of the case, again only for the necessary duration of stay required.
>
> The granting of limited LOTR should not convey any expectation of further leave or eventual settlement. As soon as the period of limited LOTR comes to an end, the person will be expected to leave the UK unless he applies to extend his leave, or has an entitlement to remain on some other basis.
>
> 3.2. **Indefinite LOTR**
>
> Most persons applying to stay in the United Kingdom will require leave for only a specific, limited period (see para 3.1. above). However, there may be a very small number of instances where it is considered appropriate to grant indefinite LOTR because the particular compelling circumstances of the individual case are such that it is almost certain that there will be no change in circumstances within five years."

The decision in SM and others

17. In *R (SM and others) v SSHD* [2013] EWHC 1144 (Admin) ("*SM*"), Holman J considered a challenge to Version 1 of the Discretionary Leave policy in the case of children whose ages ranged between 6 and 10 years old. All the children had made applications to UKBA "*which made clear that in the case of all the applicants an immediate grant of indefinite leave to remain was being sought*" (paragraph 13); but all had been granted only 3 years DLR. Holman J explained at paragraph 36, in my view correctly, that the exercise of the discretion under section 3(1)(b) of the 1971 Act involves the making of a number of discretionary decisions, namely whether to grant leave to remain at all; if so, whether for a limited or an indefinite period; and if for a limited period, for how long. In a section of his judgment headed "*Is the policy and instruction compliant with section 55*?" Holman J said this:

> "40. In my view … 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…

> 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"

18. Holman J went on to consider, assuming that Version 1 was compliant, whether the decision-maker in that case had in fact applied the policy in a way which gave case specific consideration to the welfare of the children. As in this case, the initial decision letters had been short and formal. He considered that later letters were "*drafted through the prism of the subsisting claim for judicial review*" and were "*an after the event attempt to demonstrate a reasoning process which was not described, and is unlikely to have taken place.*" Mr Malik suggested that we should look at material subsequent to the grant of discretionary leave in the present case in a similarly unfavourable light. For reasons which I shall explain his use of these passages in *SM* is not a legitimate or useful one.

19. At paragraph 57 and 58 of his judgment in *SM* Holman J concluded that the policy had in fact been applied in a way which was not compliant with the statutory duty under section 55. He considered that this was sufficient to render the actual decisions in the case of each child claimant unlawful and allowed their claims for judicial review.

20. It is now necessary to give a more detailed account of the facts of the individual cases which are presently before us, and how they were dealt with in the courts and tribunals below.

Alladin history

21. Ms Alladin is a citizen of Mauritius. She arrived in the UK on 27 December 2003 together with her husband and her two older children (born on 28 March 2001 and 14 April 2002). They entered on a six-month visitors' visa. Since then she has had two further children born to her in the UK, (on 20 July 2005 and 23 December 2009). The four children are therefore currently 13, 12, 9 and 4 years old respectively.

22. Following the arrival of the family in the UK, the Secretary of State granted Ms Alladin's husband leave to remain as a student with her and the children ultimately until 30 June 2009. A further application by him to remain with his family as a Tier 4 General Student ultimately resulted in leave to remain being granted until 23 February 2011. On 7 February 2011 Ms Alladin, along with her family members, applied for ILR, outside the Immigration Rules, relying on Article 8 of the European Convention. ILR was refused on 15 June 2011 but the Secretary of State granted the family 3 years DLR until 14 June 2014. The terms of the Secretary of State's letters to the solicitors for the family members granting DLR read as follows:

> "A decision has been taken that it would be appropriate, because of the particular circumstances of your client's case, to

> grant him/her leave to enter/remain on a discretionary basis outside the Immigration Rules for a specified period."

23. There were also letters addressed to the individual applicants in these terms:

> "I am writing to inform you that, although you do not qualify for leave to remain in the United Kingdom under the Immigration Rules, it has nevertheless been decided that discretion should be exercised in your favour. You have therefore been granted limited leave to remain in the United Kingdom in accordance with the principles of the Home Office Policy Instruction on Discretionary Leave."

24. A pre-action protocol letter was sent to the UK Border Agency (UKBA) on 9 September 2011, inviting a grant to the family of ILR. In the letter it was suggested that the grant of DLR was "*going to cause both the applicant and [her] dependents problems*". It was said that the grant of DLR and not ILR had started to cause the younger children problems at school in that, when school trips were organised, the children "*are either unable to attend or have to deal with the hassle of visas*." The letter concluded by requesting that the decision of 15 June 2011 be overturned and that the appellant be granted ILR without any further delay.

25. UKBA replied on 22 September 2011. It explained that decisions for leave to remain could not be reversed unless the original decision was not taken in line with policy and immigration law at the time of the decision. The onus was on the applicant to demonstrate that they satisfied those requirements. It explained

> "Careful consideration has been given to your representations. However it is not accepted that the decision to refuse indefinite leave to remain breaches your client's children's rights under article 8. Your client and her family are not required to leave the United Kingdom as a result of this decision, *and moreover have been granted discretionary leave to remain on account of their rights under the ECHR*. Therefore it is not considered that there will be any interference with the family's private or family life, as they are not liable to be removed.
>
> Indefinite leave to remain outside the Immigration Rules may be granted where there are sufficiently compelling or compassionate circumstances which justify a grant outside the Rules. However it is not considered that a grant of indefinite leave to remain is appropriate in your client's case.
>
> *Your client and her family have been granted discretionary leave to remain in the United Kingdom until 14 June 2014 on the basis of Article 8 ECHR*. They are not required to leave the United Kingdom and are free to reapply for further leave to remain on the expiry of their current leave. *Your claim that a grant of leave of such a limited period is going to cause both the applicant and his dependants problems is therefore not accepted*" emphasis supplied.

26. The present claim for judicial review was commenced on 14 December 2011. The grounds of review asserted that the grant of only limited leave to remain:

> "…would inflict distress upon these children. For example school trips are a real hassle and the children have to deal with obtaining visas or not attending at all."

27. Following the grant of permission and shortly before the judicial review application was to be heard, UKBA wrote to the applicant and her family on 4 April 2013. The letter is headed "Supplementary Decision Letter" and states that the further submissions made had been treated as a request to reconsider the decision of 15 June 2011. The letter first dealt with some points which had been made about the welfare of the applicant's second child, saying that he was now doing very well and that there were no concerns at school. It then reviewed the background saying.

> "In reaching her decision, the Secretary of State had regard to the length of residence of your family, particularly your children…
>
> The eldest of the four children...is now 12 years old and has lived in the United Kingdom since the age of 2 years, a period now of over 9 years. [The second child] is now aged 10 and has lived in the United Kingdom since he was twelve months old. They are both attending school. [The third child], who was born in the United Kingdom is now seven years old and it is assumed that she too is attending school. It is accepted that they have established a private life in the UK and that any interference with this private life by removing them from the UK would have been disproportionate. The youngest child...who was also born in the United Kingdom is now aged three. His strength of connection to the United Kingdom is considered to be less significant than his older siblings.
>
> Section 55 of the [2009 Act]...places a duty on the Secretary of State to safeguard and promote the welfare of children in the UK. One of the primary duties of the UK Border Agency is to ensure controlled, fair migration by applying and enforcing the Immigration Acts and the Immigration Rules including the removal from the United Kingdom persons who have no legal entitlement to remain in the United Kingdom, whilst granting protection to those who need it.
>
> The UK Border Agency will identify and act on any concerns about the welfare of children with whom they come into contact. To this regard, the position of your children...has been considered in light of the requirements on the UK Border Agency as defined under Section 55 of the 2009 Act, and section 11 of the Children Act 2004 and also in the light of the Supreme Court ruling in the case of ZH (Tanzania) [2011] UKSC 4.
>
> In light of your children's strength of connections to the United Kingdom, and with regard to the best interests of your children under Section 55 of the BCIA 2009, a decision was made on 15 June 2011 to grant discretionary leave on Article 8 grounds.

> Careful consideration has been given to all your representations, and in particular the material referred to above that was submitted on 18 January 2012.
>
> As noted above, the SSHD accepts that the circumstances of your case warrant a grant of discretionary leave. However, the SSHD does not consider that the circumstances of your case are so exceptional as to warrant a departure from the discretionary leave policy and an immediate grant of ILR.
>
> The Secretary of State does not consider that your children's welfare is better safeguarded or promoted by the grant of ILR as opposed to three years DL. Save for the length of leave, there is limited substantive difference between the benefits of being granted ILR over DL. Your children have 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 they 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 their status is secure and there is no evidence that their well being is being adversely affected. When that period of time comes to an end it will be open to you to make a further application in which all relevant considerations will be taken into account.
>
> 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 policy reasons to justify the grant of DL to you and your children at this stage, instead of ILR. The Secretary of State must ensure that the grant of ILR does not become a means whereby those who cannot meet the Immigration Rules proceed immediately into the permanent resident category without being able to review their circumstances at a later date to determine whether a further grant of leave is still appropriate. To grant ILR immediately would discourage the use of lawful routes to residence and undermines the SSHD's ability to manage migration in a manner which she considers to be in the best interests of society as a whole. The SSHD considers that the public policy considerations could only be outweighed in an exceptional case.
>
> Once your DL expires and if at this point a further application for leave is made, the SSHD will again consider your client's position under her statutory obligations existing at the time. In this way your situation will be considered and her circumstances will be fully taken into account. A grant of ILR would assume that it will be in your best interests to remain in the UK without further consideration, which may not be the case.
>
> As such it is considered that by granting DL, the SSHD has executed her duties properly and thoroughly and has considered your client's best interests pursuant to her duty under s55..."

28. In short, the Secretary of State was saying that, in the circumstances of these particular applicants, the difference between DLR and ILR was not sufficiently great to outweigh the policy considerations for maintaining a staged or graduated policy of granting ILR.

29. In Ms Alladin's case, Mr Gallagher, a civil servant within the Operational Policy and Rules Unit in the Home Office, made a witness statement in which he explained the approach to granting leave outside the rules, namely discretionary leave, leave to remain and indefinite leave to remain. DLR was most frequently granted where there were grounds for a claim based on human rights. In developing a system of DLR the Secretary of State sought to manage progression to permanent settlement in a way that acknowledges the interests of the country as a whole. In particular she was concerned to ensure that those who had ignored or could not meet the requirements of the immigration rules did not proceed immediately into the permanent residence 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.

30. Hence DLR on Article 8 grounds was normally granted for a period of 30 months, followed by a review to see whether a further period of DLR was justified. It was only after a second period of DLR that an application for ILR was considered. The Secretary of State considered that this struck a fair balance between the rights of those who could not be removed for human rights reasons and the wider interests of society as a whole. Those interests included the fact that the principle of lawful compliance, on which the rest of the immigration system is based, is to be upheld. The principle that permanent residence should be based on the accumulation of periods of leave was also firmly established. In this way it was possible to promote lawful compliance by preventing unfavourable comparisons between those who are granted settlement within the Immigration Rules and those who seek settlement following a long period of overstaying. For the first group compliance with the Immigration Rules may have involved not having been dependent on public funds, lawful residence in the UK for a specified period in a category leading to settlement (i.e. not having entered as a temporary visitor) sufficient knowledge of language and life in the UK demonstrated by passing a test. To grant immediate settlement on the basis of overstaying would be to trivialise the requirement to use the lawful routes into the UK and undermine the Secretary of State's ability to manage migration in a manner which the Government considers to be in the interests of society as a whole.

31. In paragraph 30 Mr Gallagher stated that there was no difference in terms of safeguarding from harm and access to facilities necessary for a healthy childhood between those children here with DLR and those with ILR.

Alladin decision

32. Before the judge Ms Alladin complained of three matters. These were:

    a. Whether the Secretary of State's decisions were unlawful for being made in breach of her duty under section 55 of the Borders Citizenship and Immigration Act 2009;

    b. Whether the Secretary of State's decisions were unlawful for being inconsistent with her own published policy;

    c. Whether the Secretary of State's decisions were unlawful as she failed to give any or adequate reasons

33. The deputy judge acted on the basis that the Secretary of State's policy in question was lawful: see paragraph 20. He went on to hold (paragraph 24) that the only legitimate inference that could be drawn from the grant of DLR for three years was that the Secretary of State accepted the section 55 and Article 8 submissions for the purpose of the application. That was sufficient to dispose of the first ground which complained of a lack of regard for the duty under section 55.

34. The judge also found that there had been no failure to apply the Secretary of State's published immigration policy. He decided that the relevant provisions of the IDI required the Secretary of State to decide first, whether the applicant qualified under the Immigration Rules, for Humanitarian Protection, or for Discretionary Leave, and if the applicant qualified under one of those heads, then the applicant attracted the outcome dictated by those routes. It is only if the applicant does not attract qualification under one or other of those routes that the policy gives her a residual discretion to consider granting leave outside the rules. He held that in this case, by virtue of the Secretary of State's acceptance of the Article 8 and section 55 arguments, she had found that this family was entitled to the exercise of her discretion to grant DLR, and accordingly she had applied her policy. By implication he considered that there was no obligation under the policy to consider the grant of ILR at all. The judge also rejected the reasons challenge and that challenge is not renewed on this appeal.

35. Permission to appeal was refused on the papers by Beatson LJ but was granted after an oral hearing by Maurice Kay LJ on 5 February 2014.

Wadhwa history

36. Mr Wadhwa is an Indian national. His three dependents are his wife, his son (born 21 July 2003) and his daughter (born 27 August 2012). The children are thus now 11 and 2 respectively.

37. Mr Wadhwa arrived in the UK with his wife who was then 7 months pregnant with her son on 13 May 2003 on a six-month visitor's visa valid from 29 April 2003 to 29 October 2003. The parents overstayed.

38. By letter dated 5 November 2009 Mr Wadhwa made an application "*for discretionary leave to remain in the United Kingdom on exceptional circumstances outside the immigration rules*". The letter exhibited a personal statement of the applicant in which he asks for "*discretionary leave to remain*". Both the letter and the statement drew attention to the applicant's son.

39. This application was refused on 11 February 2010 with no right of appeal. The UKBA explained in their letter that the Secretary of State was not satisfied that he had provided material evidence or satisfactory reasons in support of his application, and drew attention to the fact that such private and family life as he had developed in this country had been developed whilst he was here unlawfully.

40. The appellant made a further application for leave to remain on 2 July 2010. On 4 March 2011 the Secretary of State refused the further application for leave to remain without a right of appeal. In the letter of that date it is said that:

> "It has been noted that your client's child is aged 7, however the 7 year concession is obsolete and this factor has been considered under Article 8."

41. Later in the letter the following appears:

> "It is accepted that your clients may have established his private family life in the United Kingdom, however only 6 months out of 7 years has been under lawful stay."

42. As a consequence, Mr Wadhwa was issued with notice of liability to removal but, on 13 April 2011, was granted temporary admission. On 11 October 2011 Mr Wadhwa made further submissions through his solicitors, drawing particular attention to section 55 of the 2009 Act. Naturally, given that he was subject to removal directions, the focus of these submissions was on the consequences for him and his family of removal from the United Kingdom. The submissions do not suggest that Mr Wadhwa should be given ILR.

43. Those submissions were followed up by a letter of 4 January 2012, accompanied by a personal statement by Mr Wadhwa's wife. The statement focused exclusively on the consequences for her family of a return to India. In January 2013 the appellant informed the Secretary of State of the birth of his second child. In January and March the Secretary of State requested further information by letters to which the appellant responded on 6 March 2013 (although they said they had already supplied the information). On 11 April 2013 the Secretary of State granted the appellant 30 months DLR. Shortly afterwards his wife and children were granted DLR as well. The letter granting this leave was in the following terms:

> "… a decision has been made to grant your above named client and his dependants Discretionary Leave to Remain in the United Kingdom"

44. One might be forgiven for thinking that a letter in these terms represented full compliance with the applications which the applicant had been making since 2009. Instead, it prompted an application for permission to apply for judicial review. The relief sought by way of judicial review was set out in paragraph 43 of the Particulars of Claim as :

> "(a) An order requiring the Defendant to grant to the Claimants [ILR]; or
>
> (b) an order requiring the period of grant to be reviewed with reference to the [duty under section 55 of the 2009 Act].

45. Permission to apply for judicial review was sought on 9 July 2013 but refused on the papers as unarguable by Ms Maura McGowan QC sitting as a Deputy High Court Judge on 10 September 2013. On 1 November 2013 the case was transferred to the Upper Tribunal pursuant to a direction of Deputy Master Knapman.

Wadhwa Decision

46. The renewed application for permission to apply for judicial review came before Upper Tribunal Judge Warr on 15 November 2013. A number of issues were argued before him which were no longer live before us, including an issue as to which edition of the relevant guidance applied to Mr Wadhwa's case. Having dealt with those points the judge said the following:

> "8. The point is then made by [counsel for the Secretary of State] that even were the matter to be considered under the current guidance governing discretionary leave … the outcome would be no different…
>
> 10. ... [counsel for the Secretary of State] says there is no evidence of any significant impact on the children as a result of having to wait for a longer time and having to make more applications. ...
>
> 11. In so far as this case was decided under a policy similar to that which was considered in the case of ***SM*** [2013] EWHC 1144 (Admin) I accept [counsel for the Secretary of State's] submission that it would make no difference in this case if the current guidance which is ***SM*** compatible were applied for the reasons which I have given..."

47. Upper Tribunal Judge Warr accordingly refused permission to apply for judicial review. Permission to appeal to this court was granted by Maurice Kay LJ on the papers on 8 May 2014 so that the appeal, although dealing with a later version of the policy, could be heard at the same time as the appeal in Aladdin.

Grounds of Appeal

48. Mr Malik submitted that the appeals raised three short points:

    a. The Secretary of State's policy under which the appellants were given leave to remain was unlawful, and in consequence the decisions were unlawful.

    b. The decisions were in any event unlawful because they were given in breach of the duty under section 55 of the 2009 Act.

    c. As an alternative ground to (a) and (b) in the case of Aladdin only the Secretary of State's decisions were inconsistent with the IDI.

49. On the first of these points Mr Malik stressed the fact that the Secretary of State was required to take two decisions, to both of which the duty under section 55 of the 2009 Act applied. He pointed out that the version of the guidance which applied in Ms Alladin's case was the one considered by Holman J in *SM*, and that which applied to Mr Wadhwa's case was not materially different. If the underlying policy was unlawful, then decisions taken pursuant to it were necessarily unlawful as well.

50. On the second point Mr Malik submitted that the duty in section 55 to have regard to the statutory guidance is mandatory and requires the decision-maker to have regard to the statutory guidance in relation to promotion of the welfare of children *before* taking the decision. He cited paragraph 24 of the decision of Wyn-Williams J in *R (TS) v*

Secretary of State for the Home Department and Northamptonshire County Council [2010] EWHC 2614 (Admin):

> "The expression "have regard to" appears in many statutes in many different contexts. Usually, however, the courts interpret the phrase to mean that a duty is imposed upon a decision maker to have regard to that which is identified in the particular statutory provision which he must consider. The duty is mandatory and one which must be fulfilled prior to the making of the decision in question. The duty requires the decision-maker to embark upon a sufficient and proper decision making process so as to discharge the duty with an open mind. The question in every case in which it is alleged that a decision maker has failed to have regard to the factor identified in the statute is whether the decision maker has in substance had regard to the matter identified. In the written decision produced by the decision maker he does not have to refer, expressly, to the relevant statutory duty; however the terms of the written decision must be such that it is clear that the substance of the duty was discharged."

51. That case also shows, as Mr Malik recognised, that it was sufficient if the substance of the duty was discharged and that the decision maker did not have to refer explicitly to the statute or the guidance. As to this latter point, see also *AJ India v Secretary of State for the Home Department* [2011] EWCA Civ 1191 at [43].

52. On the third point, which is only a ground of appeal in the case of Alladin, Mr Malik submits that the judge had held, wrongly in his submission, that on a proper interpretation of the IDI, if the Secretary of State concluded that someone was entitled to DLR it was not open to her to consider granting ILR. If the judge was right about this then the IDI were an unlawful fetter on the Secretary of State's discretion under section 3(1)(b) of the 1971 Act. But Mr Malik submitted that the judge was wrong so to read the IDI: they do not prohibit the Secretary of State from going on to consider ILR if the case meets the criterion for DLR. It was implicit in his submissions that the Secretary of State had regarded her discretion as curtailed in this way, and the decision was therefore unlawful on this alternative ground.

53. Ms Olley on behalf of the Secretary of State does not ask us to revisit the conclusion arrived at by Holman J in *SM* that the Secretary of State's policy was unlawful, at least to the extent that it prevented case-specific consideration of the welfare of the child. She acknowledges that the Secretary of State did not appeal the decision in *SM* and instead chose to amend her policy to that which we have as version 3. We must therefore, she acknowledges, proceed on the footing that the policy in force at the time of the June and September 2011 decisions in Ms Alladin's case was unlawful. It followed that she could not support the decision of HHJ Gore QC on this point, which proceeded on the basis that the policy was lawful. Ms Olley accepts also that version 2 of the policy is not materially different for the purposes of the present case, and accordingly we must proceed on the footing that that policy was unlawful as well. That is the policy which was in force at the time of the Supplementary Decision letter in the case of Alladin and the decisions in the case of Wadhwa. She submits, however, that the decision in *SM* does not establish that the policy of having a staged route to settlement

as opposed to immediate grant of ILR is itself inherently unlawful. She submits, correctly in my judgment, that it is firmly established by decisions in this court that it is a matter for the Secretary of State to decide "… *whether to exercise her discretion to grant leave to remain, and if so, for how long*" see *IT (Sierra Leone) v SSHD* [2010] EWCA Civ 787 at [15] per Pill LJ.

54. The real question, submitted Ms Olley was whether the illegality of the policy infected the decisions taken in this case. That would not be the case if the decisions properly reflected section 55 of the 2009 Act and Article 8 ECHR. She submitted that section 55 added little in the present cases where the appellants have been granted discretionary leave. The fundamental aspects of the welfare of the children were already catered for. Their position is not precarious. There was no evidence of any detriment suffered by them as a result of the grant of a period of DLR as opposed to an immediate grant of ILR. Even if it could be argued that the grant of ILR provided a higher level of protection than DLR, that still did not mean that the grant of ILR was obligatory. As Baroness Hale made clear in *ZH* the best interests of the child are a primary consideration, but not the only consideration. They can be outweighed by other considerations.

55. Relying on the evidence of Mr Gallagher, Ms Olley submits that there is an important public interest consideration at stake. This was to be weighed against the small marginal benefit if any as between DLR and ILR. She stresses that at no point in the proceedings has there been any convincing argument, let alone evidence that the grant of DLR has caused the appellant children to be prejudiced in any way.

56. On ground (c) Ms Olley did not, as I understood her, support the judge on the interpretation of the IDI. She contended that the policy allowed for parallel as opposed to linear consideration of DLR and ILR. Where there was an application for ILR, it was open to the Secretary of State to accede to it by granting DLR in pursuance of the staged approach to settlement.

Discussion

57. The authorities on the exercise of the duty under section 55 are clear, and are now well understood as applying both to the decision as to whether to grant leave to remain at all, and to decisions concerning the duration of leave. There is no issue about that in the present case, and nothing that I say is to be taken as detracting in any way from the statements of high authority, such as those I have cited from in *ZH*.

58. That said, however, I should not grant judicial review in the present cases unless the appellants can show a real prospect that the Secretary of State might, if directed to retake the decisions according to the guidance, come to a different decision. Put another way, have the appellants demonstrated that the error of law on which they rely (be it following an inflexible policy or failing to have regard to the section 55 duty) is a material one?

59. There can, in my judgment, be no doubt that the Secretary of State is entitled in principle to adopt a staged approach to settlement. Even where children are the applicants, it does not follow that the Secretary of State is bound, on a first application, to grant ILR. The considerations outlined in the evidence of Mr Gallagher amount to factors which are worthy of consideration, and deserve to be placed in the balance after

the best interests and welfare of the children have been considered. It follows that an applicant who wishes to persuade the Secretary of State to grant her leave for a period longer than that provided for by the staged settlement policy has to do more than point to the fact that she is a child.

60. In the case of Ms Alladin, the only specific respect in which it was suggested that the welfare of the children would be better protected by a grant of ILR, as opposed to DLR, was "hassle" in connection with the need to obtain visas for school trips. That, as it seems to me, is more of a problem for the adult applicants than it is for the children. Subject to one submission made by Mr Malik in relation to it, and to which I will have to return, I cannot fault the treatment given to the interests of the welfare of these children in the Secretary of State's Supplementary Decision letter of 4 April 2013.

61. Mr Malik sought to supplement the absence of material in support of Ms Alladin's case by reference to what was said by Cox J in *R (HSMP Forum (UK) Limited) v Secretary of State for the Home Department* [2009] EWHC 711 (Admin) at paragraphs 75 to 76 That case was concerned with the impact of the change of a qualifying period (from 4 to 5 years) on migrant workers who had already embarked on the Highly Skilled Migrant programme. The increase in qualifying period delayed the point at which such workers could obtain ILR. Cox J rejected a submission that the impact of the incremental delay in obtaining ILR did not have a negative impact on those who had been expecting to obtain it sooner. The list of matters to which the evidence referred in that case included the difficulty in obtaining mortgages without ILR, a lack of employment or promotional opportunities without ILR, the scheme restrictions on travel abroad, and the impact of the requirement for settlement before one is eligible for student funding. I fail to see how considerations such as this can assist the case of the applicants in the Alladin case. If anything it serves to highlight the complete absence of any comparable evidence in their case.

62. Rather more to the point might be Holman J's observations at paragraph 51 in *SM* albeit that they were again based on evidence that is lacking here:

> "… 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 … 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." (emphasis in original).

63. I accept that not being able to go on school trips is a tangible disadvantage (although it is a disadvantage no doubt shared by many settled migrants and others who cannot afford to go on them). It is limited to any period of "limbo" however. The practical difficulties with the NHS are of even less substance, given that one should proceed on the assumption that the NHS will recognise the lawful status of the applicants if the appropriate documentation is produced.

64. As I have foreshadowed, Mr Malik attacks the supplementary decision letter of 4 April 2013 on the same basis as some of the later letters considered by Holman J in *SM*. In other words he suggested that it was "*drafted through the prism of the subsisting claim for judicial review*" and was "*an after the event attempt to demonstrate a reasoning process which was not described, and is unlikely to have taken place.*" For obvious reasons I do not understand Holman J to have stated any general principle concerning the weight to be attached to decisions and evidence served by the Secretary of State subsequent to the initiation of an application for judicial review. I have set out above the reasoning in the supplementary decision letter in this case. For my part I can see no possible basis for suggesting that it was a pretence at making good a reasoning process which had never taken place, or that its contents were somehow coloured or affected by the existence of the judicial review claim. To my mind it is a free-standing reconsideration of the case.

65. The one criticism that can be made of the Secretary of State's letter of 4 April 2013 is that it was said that the circumstances of the case were not "*so exceptional as to warrant a departure from the discretionary leave policy*". Viewed in isolation it might be said that this means that the Secretary of State was treating the policy as the primary consideration and relegating the interests of the children to second place. Reading the letter as a whole, however, that is not what the letter did. It specifically considered whether there were any aspects of welfare which would be better safeguarded or promoted if ILR rather than DLR was granted and concluded there were none or that they were very limited. The letter then goes on to say that even if some welfare benefit could be identified attached to ILR it was outweighed by the public interest. I cannot see how the letter, read as a whole, can sensibly be said to have relegated the interests of the children to second place. Whilst superficially attractive, the criticism of the letter has no substance.

66. Thus, although the illegality of the policy is accepted, I am unable to accept that it follows that there is a realistic prospect that the Secretary of State might come to a different decision if she reconsidered her decision in the case of Alladin. That is because the reasoning in the 4 April 2013 letter is, as it seems to me, not open to any

realistic criticism and would be the reasoning that she would adopt if we were to require her to retake the decision.

67. The alternative ground of appeal in Ms Alladin's case faces similar difficulties. I accept Mr Malik's submission, as did Ms Olley, that the IDI do not prevent the Secretary of State from considering the grant of ILR in a case where she was in any event prepared to grant DLR. It follows that the judge's basis for refusing judicial review was wrong. The IDI on their proper construction allow the Secretary of State to consider the grant of ILR even in a case where she is prepared to grant DLR. The consideration of the duration of the grant of leave is not a linear process.

68. That said, the Secretary of State, in her supplementary decision letter, has considered whether the applicant's circumstances warranted a grant of ILR, has carefully evaluated those circumstances against the countervailing considerations arising and come to the conclusion that they do not justify a grant of ILR. In so doing, the Secretary of State was acting in accordance with her policy which did not prevent her from considering ILR. There is therefore nothing unlawful in the decision which she has taken.

69. It follows that there is either no purpose in or no basis for quashing the decisions in the case of Alladin. There was no material illegality on the facts of this case in the grant of discretionary leave to remain for three years.

70. As I have intimated, a striking feature of Mr Wadhwa's case is that at no stage did he make a clear request to the Secretary of State for the grant of ILR. In those circumstances it would be wrong to criticise the Secretary of State for granting DLR in the belief that she was acceding to the only application made. Consistently with the absence of any request for ILR, none of the material sent to the UKBA in support of the application pointed to any disadvantage associated with the grant of DLR as opposed to ILR.

71. Mr Malik submitted that the positive duty required the Secretary of State nevertheless to consider what might be said in support of ILR, notwithstanding the absence of any request for that status or any material specifically directed to it. He relied in this case as well on the passages from *R(HSMP Forum (UK) Limited) v Secretary of State for the Home Department* and from *SM* which I have considered in the case of Alladin. I cannot accept those submissions. The fact that ILR was not even requested is a compelling reason for not granting it. Apart from the fact that there were children involved, there was nothing in the present case to alert the Secretary of State to any need on behalf of the applicant for ILR. She was perfectly entitled to reach the conclusion that the applicant himself considered that the section 55 duty would be satisfied by such a grant.

72. Despite the admitted illegality of the policy, therefore, I do not consider that there was any material error in granting Mr Wadhwa and his family 30 months DLR. This was essentially the basis on which UTJ Warr refused permission to apply for judicial review, and I consider that he was right to do so.

73. It follows that I would dismiss both appeals.

Lord Justice Vos

74. I agree.

Lord Justice Laws

75. I also agree.