Case No: CO/5130/2012

Neutral Citation Number: [2015] EWHC 7 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/01/2015

Before :

DAVID CASEMENT QC
(Sitting as a Deputy High Court Judge)

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Between :

THE QUEEN (on the application of KHADRA AHMED ALI)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Shivani Jegarajah (instructed by **Duncan Lewis (Solicitors) Limited**) for the **Claimant**
Robert Williams (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 20 November 2014

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Judgment

David Casement QC :

1. The Claimant who was born in Somalia on 26 October 1972 and entered the United Kingdom on 2 September 2001 lives with her husband who is a British Citizen and with her six children all of whom are British Citizens. The Claimant challenges the Secretary of State's decision dated 5 November 2012 ("the decision"), which granted her five years to remain in the United Kingdom, on the basis that the Defendant failed to consider and discharge her duty pursuant to section 55 Borders, Citizenship and Immigration Act 2009 and that had she done so she would have granted her indefinite leave to remain thereby making her status consistent with that of her children.

2. On 3 October 2014 the Defendant issued a supplementary decision ("the supplementary decision") expressly addressing section 55 and the best interests of the Claimant's children. The supplementary decision is challenged on the basis that it is merely an ex post facto justification.

Factual Background

3. Following the Claimant's entry to the United Kingdom on 2 September 2001 she applied for asylum on 6 September 2001. That application for asylum was refused on 10 January 2002 however she was granted exceptional leave to remain for one year. On 19 July 2002 the Claimant's appeal against the refusal of asylum was dismissed. By that stage the Claimant had married a British Citizen.

4. The Claimant applied for further leave to remain on 9 January 2003 but that was refused on 15 January 2004. There was an appeal against that refusal but the appeal was dismissed on 9 June 2004 and a further appeal before the Immigration Appeal Tribunal was dismissed on 17 February 2005.

5. On 13 April 2005 the Claimant made an application for further leave to remain relying upon Article 8 of the European Convention on Human Rights. Within the application the Claimant informed the UK Border Agency that she had married a British Citizen on 29 June 2002 and that they had two children, who were also British Citizens.

6. On 11 January 2010 the Claimant provided further submissions including the fact that she now had five children and was expecting her sixth child.

7. As a result of the delay that had occurred in dealing with the Claimant's application she issued these judicial review proceedings on 9 May 2012. The acknowledgment of service filed by the Defendant agreed to undertake a decision within four months. By order of 15 August 2012 Mr Justice Silber adjourned the application for permission and directed that the Secretary of State file a witness statement setting out the position in respect of a decision including, if a decision had not been made, why it had not been made, when a decision was expected and by what date it was guaranteed that a decision would be made.

8. Apparently crossing with that court order the Secretary of State issued a decision on 14 August 2012 refusing to grant the Claimant asylum but granting discretionary leave to remain for two and a half years. That decision letter was recalled on 29 October 2012 in the light of new country guidance in respect of Somalia and on 5

November 2012 the Defendant issued the decision to grant asylum and leave to remain for five years.

9. On 28 January 2013 the Claimant applied for permission to rely upon amended grounds contending that the Claimant was entitled to indefinite leave to remain under the Legacy programme. There was no express reference to section 55 or the best interests of the Claimant's children as founding the basis for the challenge. Permission was granted on 18 February 2013 for the Claimant to rely on the amended grounds.

10. The application for permission was refused by Vincent Fraser QC sitting as a Deputy High Court Judge. On the day prior to the oral permission hearing the Claimant filed second Amended Grounds of Claim seeking to rely on the principle of "restorative justice." There was no express reference placed upon section 55 or the best interests of the Claimant's children as founding the basis of the claim. The permission hearing scheduled for 29 August 2013 was adjourned to allow a formal application to be made. On 2 December 2013, the day before the re-listed hearing for permission, the Claimant served third Amended Grounds of Claim asserting (i) that the Claimant had 10 years lawful residence and therefore was entitled to indefinite leave to remain and (ii) given that the Claimant's children were British Citizens it was in their interests that the Claimant be granted indefinite leave to remain. In respect of ground (ii) express reliance was placed expressly upon section 55.

11. On 14 January 2014 Michael Fordham QC sitting as a Deputy High Court Judge granted permission to seek judicial review in respect of ground (ii) only:

> "*Whether the decision of the Defendant…to grant the Claimant 5 years' discretionary leave to remain, as opposed to indefinite leave to remain, was contrary to the duties imposed by section 55 of the Borders, Citizenship and Immigration Act 2009"*

12. Following the grant of permission in respect of ground (ii) the Defendant wrote to the Claimant indicating that it was willing to reconsider "the decision of 5 November 2012 in relation to the length of leave granted to your client" and invited the Claimant to agree to a consent order to withdraw the claim. The letter also invited the Claimant to provide further submissions and/or evidence in respect of the children's best interests. There was no response to that offer so the Defendant sent further letters seeking further submissions or evidence. Those were sent on 10 April 2014 and 9 May 2014. Eventually there was a response from the Claimant's representatives on 15 May indicating that they would revert back in due course after receiving Counsel's opinion. Having heard nothing further from the Claimant by way of further submissions or evidence the Defendant issued a supplementary decision on 3 October 2014 expressly addressing section 55 and the best interests of the Claimant's children. The supplementary decision concluded that taking into account all of those matters the Defendant would maintain it decision to grant the Claimant leave to remain for five years in accordance with the relevant policy.

13. The supplementary decision is relied upon by the Defendant to assert that these proceedings are rendered academic notwithstanding the lawfulness or otherwise of the decision of the 5 November 2012. Even though the supplementary decision would have had to have been addressed in any event, the Claimant sought permission at the

outset of this hearing to amend the grounds of claim to expressly challenge the supplementary decision. The application to amend was not resisted by the Defendant. Permission was therefore granted to contend that "the [supplementary decision] amounts to a post facto justification of the decision and simply asserts that the Defendant would have considered her statutory duty. But in the absence of any evidence to this effect, such an assertion is insufficient to allay the Judge's concerns and satisfy the Court that the Defendant complied with her duties *at the relevant time*."

Law and Policy

14. Section 3(1)(b) of the Immigration Act 1971 provides that "*where a person is not a British Citizen…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 grant leave to remain either by applying the Immigration Rules, as in this case, or by exercising discretion outside the rules.

15. Article 24 of Council Directive 2004/83/EC ("the Qualification Directive") specifies that, save for some defined exceptions which are not relevant to this case, "*Member states shall issue beneficiaries of refugee status a resident permit which must be valid for at least three years".* It will be apparent that the Secretary of State in the present case has granted leave pursuant to the relevant policy for a period longer than the minimum required by the Qualification Directive.

16. Furthermore, Article 20(5) provides that:

> "*The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors"*

17. Paragraph 339Q(i) of the Immigration Rules establishes the length of leave to be granted to a person who has been granted asylum. It provides:

> "The Secretary of State will issue to a person granted asylum in the United Kingdom a United Kingdom Residence Permit (UKRP) as soon as possible after the grant of asylum. The UKRP will be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the applicant is a danger to the security of the UK or having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of the UK."

18. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides insofar as relevant:

> *"(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"

19. Paragraph 339R establishes the route by which persons who have been granted asylum can achieve indefinite leave to remain:

"*339R. The requirements for indefinite leave to remain for a person granted asylum or humanitarian protection, or their dependants granted asylum or humanitarian protection in line with the main applicant, are that:*

(i) the applicant has held a UK Residence Permit (UKRP) issued under paragraph 339Q for a continuous period of five years in the UK; and

(ii) the applicant's UKRP has not been revoked or not renewed under paragraphs 339A or 339G of the immigration rules; and

(iii) the applicant has not:

a. been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or

b. been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence; or

c. been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or

d. been convicted of an offence for which they have received a non-custodial sentence or other out of court disposal that is recorded on their criminal record, unless a period of 24 months has passed since they received their sentence; or

> *e. in the view of the Secretary of State persistently offended and shown a particular disregard for the law, unless a period of seven years has passed since the most recent sentence was received."*

20. The Asylum Policy Instruction ("API") 'Refugee Leave' provides guidance on the leave granted to individuals who have been granted asylum on or after 30th August 2005. The introduction of this policy represented a departure from the UK's previous policy which was to grant indefinite leave to remain to those granted asylum. This change in policy reflected the UK's international obligations, including the Qualification Directive, which do not require the grant of indefinite leave to remain.

21. Section 1.1 of the API is entitled "*Application of this instruction in respect of children and those with children"*. It sets out, as relevant:

> "*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 at risk from harm"*

22. Section 2 of the API explains the SSHD's policy on the length of refugee leave as follows:

> *"The Five Year Strategy for Asylum and Immigration, published in February 2005, provided that most categories of*

immigrants should be subject to a minimum five year residency requirement before becoming eligible for permanent settlement. This includes refugees. Where the requirements in paragraph 334 of the Immigration Rules are satisfied, refugees should normally be granted five years Leave to Enter / Remain (LTE / LTR) under paragraphs 330 or 335 of the Immigration Rules rather than being given immediate Indefinite Leave to Enter or Remain (ILE /ILR) as previously."

23. Section 2.2 of the API addresses the potential need to grant a longer period to vulnerable persons with special needs and addresses the need to comply with Article 20(3) of the Qualification Directive

> *"The Qualification Directive specifies that three years leave is the minimum period that can be given to those with refugee status. Five years leave to remain will be a sufficient grant of leave save in the most exceptional of circumstances. However, in accordance with Article 20, where, in light of the specific situation of a vulnerable person with special needs a longer period of leave to remain is considered appropriate, the advice of a Senior Caseworker must be sought."(my underlining added)*

24. Having set the challenges in their statutory and policy context as well as the factual context I now set out the basis of those challenges.

The Claimant's Challenges and Submissions

25. The Claimant contends and it is not disputed that the Defendant is subject to a statutory duty pursuant to section 55 to discharge her functions in respect of immigration, asylum or nationality having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. In respect of the Claimant's application for leave she contends that this duty has the effect that the Defendant should have considered prior to the decision of 5 November 2012 the best interests of the children and whether to grant limited or indefinite leave to remain. The Claimant contends in her grounds that had the Defendant done so she would have taken into account factors such as the following:

> "1) given that the Claimant's children (as well as her husband) are British Citizens the children are adversely affected by the uncertainty in respect of the Claimant's limited leave period of five years which expires on 5 November 2017;
>
> 2) there is unfairness that affects the children by reason of their mother having a different status to theirs which unfairness is exacerbated by the fact that the children in this case are British Citizens and whilst their entitlement to remain in the UK is not in question that is not the position of their mother because only limited leave to remain has been given ;

> 3) it cannot be said that allowing the Claimant to have limited leave to remain such that she can only apply after 5 November 2017 for indefinite leave to remain was consistent with the section duty to safeguard and promote the welfare of the children."

26. The Claimant contends that there is no evidence of any consideration by the Defendant in respect to section 55 prior to decision of 5 November 2012, there was a breach of the Defendant's duty under section 55 and for that reason alone the decision should be quashed.

27. In respect of the supplementary decision dated 3 October 2014 the Claimant contends this is a post event justification of the earlier decision.

Defendant's Submissions

28. The Defendant contends that the decision of 5 November 2012 was lawful and that she did discharge her duty pursuant to section 55 notwithstanding the fact that section 55 is not expressly referred to in the decision or in the internal minutes pre-dating the decision. Alternatively if the original decision was unlawful the supplementary decision was a proper reconsideration which has arrived at the same conclusion and the judicial review application is therefore academic.

29. It is contended on behalf of the Defendant that the section 55 duty was, save in exceptional cases, satisfied by the granting of limited leave to remain for five years as part of a staged approach towards settlement. In the absence of any exceptional circumstances justifying a departure from the policy of granting five years leave it is submitted that there was no duty pursuant to section 55 to consider granting a longer period of leave or indefinite leave to remain.

30. The Defendant places reliance upon the decision of The Queen (on the application of Norjabee Alladin) v Secretary of State for the Home Department and The Queen (on the application of Chander Shekhar Wadhwa and others) v Secretary of State for the Home Department [2014] EWCA Civ 1334. It is contended that it is sufficient if the substance of the duty under section 55 was discharged and unnecessary that that the decision refer explicitly to the statute or guidance. It is also contended on behalf of the Defendant that even for child applicants who seek a longer period of leave than that provided for in the staged settlement policy it is incumbent upon those who represent them to identify those matters which are relied upon and not merely to rely upon the fact that the applicant is a child.

31. It is contended that the Claimant, who is at one removed from those cases involving child applicants, has not identified any factors of substance which would justify a consideration of longer leave than that provided for in the staged policy.

32. In the conjoined appeals of Alladin and Wadhwa the principal issue was whether the decisions of the Defendant in that case to give limited (discretionary) leave to remain as opposed to indefinite leave to remain was unlawful as a breach of the section 55 duty. The claimants in those conjoined appeals included children seeking indefinite leave to remain. It was therefore a case where the childrens' interests were directly

engaged because their status to reside in the UK was in question whereas in the present case that is not so, the Children are British citizens.

33. I refer in particular to paragraphs 50 and 51 of the judgment of Lord Justice Floyd wherein, after citing the case of R(TS) v Secretary of State for the Home Department and Northamptonshire County Council [2010] EWHC 2614 he concluded:

> "That case also shows, as Mr Malik recognized, 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 the latter point, see also AJ India v Secretary of State for the Home Department [2011] EWCA Civ 1191 at [43]

34. Lord Justice Floyd went onto say at paragraph 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, if does not follow that the Secretary of State is bound, on a first application, to grant ILR. The consideration 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."

35. I agree with counsel for the Defendant that the following points of principle can be deduced from Alladin and Wadhwa:

i) It is sufficient if the substance of the duty under section 55 was discharged and the decision maker does not have to refer explicitly to the statute or guidance: paragraph 51.

ii) Having a staged route to settlement as opposed to immediate grant of indefinite leave to remain is lawful: paragraphs 53 & 59

iii) Even where children are applicants (which is not the present case), it does not follow from the duty under section 55 that the Secretary of State is bound, on a first application, to grant indefinite leave to remain: paragraph 59

iv) "An applicant who wishes to persuade the Secretary of State to grant her leave for a period longer than that provided by the staged settlement policy has to do more than point to the fact she is a child" : paragraph 59

v) The practice of issuing supplementary decision letters following an initiation of an application for judicial review is not necessarily coloured by the existence of the judicial review claim and can be a "free-standing reconsideration of the case" : paragraph 64

vi) Where indefinite leave to remain was not even requested by the Claimant this is a compelling reason for not granting it: paragraph 71

36. In respect of point 5) above this is of particular relevance to the supplementary decision of 3 October 2014. In respect of that I must determine whether it is a free-standing reconsideration of the case or whether it is, to borrow Lord Justice Floyd's words, "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." (paragraph 64)

Discussion

Decision of 5 November 2012

37. A feature of this case is that the Claimant has not identified any particular disadvantage to her children arising out of the granting of limited leave to remain as opposed to indefinite leave to remain. Whilst the Claimant asserts in general terms that "this will cause anxiety and uncertainty to the children who will see their mother treated in a different way from them" there is no evidence of such and no particularisation of the assertion despite the requests by the Secretary of State to provide such.

38. There is no evidence in the documents before the court that the Defendant specifically addressed the section 55 duty prior to making the decision of 5 November 2012. The Claimant had not specifically raised the section 55 point prior to that decision being made however the duty under section 55 rests upon the Defendant whether the Claimant raises the point or not. It is clear that the Defendant was aware that the Claimant had children who were British Citizens and the duty under section 55 is broad enough to include children whose residence is not in question, because they hold citizenship, but it is a parent who is the applicant.

39. However in the present case the decision involved granting the Claimant limited leave to remain in the UK for five years until 5 November 2017 whereupon she will be able to be considered for indefinite leave to remain. I readily accept the submission that in this case it is in the best interests of the children to be with both of their parents however the grant of a five year period of leave to remain under the rules addressed the substance of the duty imposed under section 55 because it enabled the children to remain with their parents in the UK. In the absence of any factors which called for further consideration in respect of the best interests of the children that was sufficient to discharge the substance of the duty under section 55.

40. The Claimant contends the Secretary of State did not give separate consideration to the section 55 duty in reaching the decision of 5 November 2012. Even is that be correct there can be no real doubt that had the Secretary of State given it separate consideration and expressly set out her reasoning in the letter, the decision would have been the same given the facts of this case.

41. The Claimant has not identified any factors which were said to exist which could be said to require a consideration of longer leave than that granted under the rules. It was submitted on behalf of the Claimant that the British citizenship of the children provided an exceptional feature in this case which meant it was particularly unfair

upon them for the Claimant not to be granted indefinite leave to remain. That is a submission which I cannot accept as a general proposition and which I reject in the absence of specific evidence as to disadvantages that will be faced by the children by reason of the Claimant being granted limited as opposed to indefinite leave.

42. After the granting of permission the Defendant sought to obtain information from the Claimant in respect of the children and any disadvantage that there may be as a result of the decision. The Claimant has failed to engage with that process and no further information has been provided by the Claimant.

43. This is a clear case of the substance of the section 55 duty being discharged by the granting of five years leave to remain to the Claimant under the rules in circumstances where her children's status was not in question and there is nothing to suggest that there are factors showing detrimental impact upon the children which require consideration as to whether indefinite leave should be granted. As is clear from paragraph 59 of Alladin and Wadhwa that *"an applicant who wishes to persuade the Secretary of State to grant 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."* The Claimant is at one removed from that position because she is not a child but is the mother of children whose status and residence are not in question.

Supplementary decision

44. If, contrary to my finding above, the decision of 5 November 2012 was unlawful, the supplementary decision of 3 October 2014 was a free-standing reconsideration of the case and expressly referred to the section 55 duty. The Claimant had been requested in correspondence to engage with the Defendant to provide information regarding any detrimental impact upon the children but the Claimant decided not to engage with that process.

45. In the absence of such engagement the Defendant utilised the information available to her and carried out a detailed analysis and consideration of section 55 and the circumstances of the present case. During the course of the hearing submissions were made on behalf of the Claimant to the effect that this was a "post facto justification." I disagree. The Defendant has sought information from the Claimant and in the absence of that proceeded to consider the section 55 duty. There is no proper basis for suggesting that the supplementary decision was a pretence or was otherwise coloured by the judicial review proceedings.

<u>Conclusion</u>

45. I conclude that the substance of the Secretary of State's duty pursuant to section 55 was discharged by the decision of 5 November 2012 to grant the Claimant five years leave to remain pursuant to the staged settlement policy. In any event the decision letter of 3 October 2014 was a free-standing reconsideration of the issue and has rendered these proceedings academic. The relief sought is therefore refused.

46. Ancillary issues including costs will be dealt with at a further hearing unless the parties are able to reach agreement. A further hearing may take place by telephone if that is convenient for the parties.