R (on the application of Semeda) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied) IJR [2015] UKUT 00658 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Hussein Mohammed Semeda

Applicant

v

Secretary of State for the Home Department

Respondent

The Honourable Mr Justice McCloskey, President
Upper Tribunal Judge Reeds

Judgment

Delivered on 21 October 2015

Application for judicial review: substantive decision

On this substantive application for judicial review and following consideration of the documents lodged by the parties and having heard Mr M Karnik (of Counsel), instructed by Amelius Solicitors on behalf of the Applicant and Mr S Murray (of Counsel), instructed by the Government Legal Department on behalf of the Respondent, at a hearing conducted at Field House, London on 07 September 2015.

(i) Paragraph 403 of the Immigration Rules co-exists, and must be given effect in tandem, with the United Nations Convention Relating To The Status Of Stateless Persons and the Secretary of State's policy instruction.

(ii) In every statelessness case, the four interlocking components of the governing test are whether the person concerned is considered as … a national … by any state … under the operation of its law: Pham v Secretary of State for the Home Department [2015] UKSC 19 applied.

(iii) Given that statelessness applications and decisions are made within the

realm of public law, the governing principles include the Tameside (Secretary of State for Education and Science v Metropolitan Borough Council of Tameside [1977] AC 1014) and the British Oxygen (British Oxygen v Minister of Technology [1971] AC 610) principles.

(iv) The policies of public authorities are not merely material considerations to be taken into account by the decision maker. Rather, they trigger a duty to give effect to their terms, absent good reason for departure.

(v) In some cases it may be necessary to consider the practice of the government of a foreign state as well as its nationality laws.

Decision: the application for judicial review is granted

McCloskey J

Introduction

1. This judgment determines the Applicant's substantive application for judicial review, permission having been granted by order of His Honour Judge Russell QC dated 27 June 2014.

The Governing Legal Rules

2. The impugned decision of the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*"), dated 29 October 2013, is a rejection of the Applicant's application for limited leave to remain in the United Kingdom as a stateless person under paragraph 403 of the Immigration Rules. It is appropriate, at this juncture, to rehearse their material provisions. By paragraph 401, a stateless person is defined as someone who –

(a) satisfies the requirements of Article 1 of the United Nations Convention Relating to the Status of Stateless Persons ("*the 1954 Convention*"), namely who is a person not considered to be a national by any state under the operation of its law;

(b) is in the United kingdom; and

(c) is not excluded from recognition as a stateless person under paragraph 402.

The fourfold requirements for securing leave to remain in the United Kingdom as a stateless person are, per paragraph 403 of the Immigration Rules:

" ..... that the applicant:

(a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
(b) is recognised as a stateless person by the Secretary of State in accordance with paragraph 401;

(c) is not admissible to their country of former habitual residence or any other country; and
(d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless."

Where the outcome of the decision making process yields a statelessness conclusion a grant of leave to remain in the United Kingdom for a period of 30 months is the normal consequence.

The Impugned Decision

3. The decision letter rehearses the information provided by the Applicant in support of his application. This includes information provided during interview. This digest discloses that the Applicant has been in the United Kingdom for approximately seven years and applied unsuccessfully for asylum at an early stage. His application for leave to remain as a stateless person was made on 17 June 2013. It is based on his claim that he is "*an undocumented Kuwaiti Bidoon*". It is suggested that when the Applicant underwent his stateless person interview on 09 July 2013, upon being asked to participate in language analysis as part of the decision making process he refused. By the terms of the decision the Secretary of State accepts that the Applicant is indeed Kuwaiti Bidoon. The critical issue is formulated as being whether he was "*documented or undocumented*". The decision notes that during interview the Applicant confirmed that he had been issued with a birth certificate. The decision further records that in previous Tribunal determinations, while it was accepted that the Applicant is a Kuwaiti Bidoon there was no finding on the "*documented or not*" issue. Continuing, the decision notes that during the asylum screening interview the Applicant stated that he had a Kuwaiti identity card and that his subsequent attempt to retract this statement was later rejected by Immigration Judge Dickinson. On this basis, the decision maker concluded that the Applicant is a documented Kuwaiti Bidoon.

4. Next, the Secretary of State's decision addresses the interview of the Applicant at the Libyan Embassy in London on 06 July 2009, highlighting that subsequently the Acting Consul disclosed the following:

> "*… The detainee has stated that he has visited Libya in 1999 with his mother for one year, but was not able to provide any places or names of locations that he may have visited, or lived in. The detainee would have been approximately 16 years old. This has led the Libyan Acting Consul to deem that the detainee lacks any credibility and that he is not Libyan.*"

While the Applicant disputes this account of the interview, the decision maker notes that he has adduced no supporting evidence. Next, the decision highlights the discrepancy in the Applicant's stateless person interview, arising out of his statement that he was in Libya from 1999 to 2007 (rather than one year, from 1999). The decision maker then suggests a contradiction between the Applicant's earlier statement that his mother is Libyan and his claim not to have Libyan nationality. The decision also draws on a Country of Information Report relating to Libya, dated March 2012, indicating that any child born of a Libyan mother thereby acquires Libyan citizenship. The gist of the Respondent's decision is formulated in these

terms:

> "*Based upon the objective information and the negative credibility findings previously cited, it is not accepted that you are not entitled to some form of Libyan nationality or residence based upon your mother's nationality .....*
>
> *As you have not submitted any fresh evidence to demonstrate that you are not entitled to Libyan nationality and you have refused to undergo language analysis, notwithstanding that you may be a Kuwaiti Bidoon, it is considered that you have a claim to Libyan nationality ....*
>
> *You have provided no evidence to substantiate your claim that you are an undocumented Bidoon. Furthermore, it is considered that you have a claim to Libyan nationality .....*
>
> *Therefore you do not qualify for leave to remain as a stateless person.*"

The Applicant's claim was, therefore, refused under paragraph 404 of the Immigration Rules.

The Applicant's Challenge

5. The grant of permission to apply for judicial review (*supra*) was formulated in the following terms:

> "*The uncertainty as to the Applicant's nationality, referred to by the Respondent in the Acknowledgement of Service as 'ambiguous', indicates that there is an arguable case that the Applicant may be stateless.*"

I observe, with deference to the Judge, that the issue in these judicial review proceedings cannot be the question of whether the Applicant is stateless. Rather, the issue is whether the Secretary of State's determination that the Applicant is not stateless is contaminated by any recognised public law misdemeanour canvassed in the Applicant's grounds of challenge. In this respect, I make the immediate observation that the formulation in [4] of the grounds, summarising the Applicant's case, does not readily satisfy this test:

> "*..... The Defendant's refusal to grant the Claimant leave to remain as a stateless person is unlawful as the Defendant has failed to adequately and properly consider the facts of* [the] *application.*"

This is opaque at best. In the passages which follow, the case is made that the Respondent had a duty of enquiry; that such duty required further investigation/interaction with the Libyan Embassy; and that the Respondent unlawfully failed to undertake same. The grounds also appear to formulate the contention that the impugned decision is vitiated by Wednesbury irrationality.

6. The analysis that the original grounds of challenge are vague, diffuse and non-compliant with SN v SSHD (striking out – principles) IJR [2015] UKUT 227 (IAC) at [29]-[32] is, I consider, unavoidable. However,

some measure of coherence was restored by the amendment authorised at an intermediate stage of the proceedings and the ensuing written and oral submissions of Mr Karnik on behalf of the Applicant. His disentangling of the less than felicitous pleading reduced the Applicant's grounds of challenge to the following two basic contentions:

(a) There was a failure to give proper effect to the Secretary of State's published policy.

(b) Further, or alternatively, the impugned decision is vitiated by irrationality.

The Applicant also seeks to re-open, if permitted, a ground upon which permission to apply for judicial review was refused. The gist of this ground is that the impugned decision is infected by error of law on the basis that the decision maker focused on the question of whether the Applicant was stateless, rather than the question of whether he is a documented or undocumented Kuwaiti Bidoon.

The Secretary of State's Policy

7. The first of the Applicant's two grounds of challenge, as summarised above, is founded on the Secretary of State's guidance, or policy, published on 01 May 2013. This is entitled "Applications for Leave to Remain as a Stateless Person" (identified as "**V1.00**"). This is described as an "Instruction" which - "…….. *provides guidance on the new Immigration Rules which came into effect on 06 April 2013 on the consideration of applications for leave to remain as stateless persons*".

Paragraph 2.2 of the Instruction states:

> "*The case worker will assess the case on the available information,* ***conduct research as necessary and make written enquiries to seek further evidence or information ….***".
>
> [Emphasis added.]

Paragraph 2.2 further indicates that a personal interview will be arranged in cases where the process envisaged above does not establish sufficient evidence of statelessness. This paragraph continues:

> "*The burden of proof rests with applicants, who are expected to do all they* ***reasonably*** *can to demonstrate their statelessness. A clear lack of co-operation or evidence of bad faith may lead to refusal of an application.* ***Caseworkers must however be ready to undertake research or make enquiries of other national authorities where the applicant has been unable to obtain relevant information.***"
>
> [Emphasis added].

This latter theme is reiterated in paragraph 3.2, which introduces the concept of caseworkers assisting the Applicant "*in establishing the necessary evidence, whether by research or enquiry*". In paragraph 3.3 it is

suggested that, for caseworkers, there will normally be two main categories of information, namely that pertaining to the applicant's personal circumstances and "*evidence concerning the law and practice in the country in question*".

8. In paragraph 3.3 of the Instruction it is stated:

> "*Information provided by foreign authorities may be of central importance to stateless determination procedures, although not necessary if there is otherwise adequate evidence ….*
>
> *It is the subjective position of the other State that is critical in determining whether an individual is its national for the purposes of the stateless person definition.*"

Developing this theme, paragraph 3.4 states:

> *An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question ……*
>
> *An understanding of the laws of nationality and their administration in practice in the State or States concerned is essential to the consideration of a claim to be stateless ….*
>
> *Establishing whether an individual is not considered as a national under the operation of its law requires an analysis of how a State applies its nationality laws ….*"

The issue of documentation is addressed in the following terms:

> "*In non-automatic procedures, where an act of the State is required for acquisition of nationality, there will generally be a document recording that act, such as a citizenship certificate, and such documentation will be decisive in proving nationality. The absence of such evidence may mean that nationality was not acquired, but this cannot be taken for granted and the caseworker may well decide to obtain further evidence from the applicant or to check with the relevant overseas authority.*"

This is followed by the passage:

> "*Where the national authorities have in practice treated an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws,* ***it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national.***"
>
> [Emphasis added.]

The highlighted words purport to be a statement of the law and, as our analysis in [29] *infra* and the conclusions which follow make clear, it is of no

little importance.

9. The evidence also includes a Home Office "Country and Information Guidance" publication of February 2014 relating specifically to Kuwaiti Bidoons. We highlight the following passages:

> "*The Kuwaiti state regards the Bidoon as illegal residents …. the vast majority of nationality applications remain outstanding. The Kuwaiti Government maintains that the majority of Bidoon are nationals of other countries, therefore that they are not stateless ….*
>
> *The majority of the Bidoon live in the state of Kuwait …..*
>
> *The crucial document for determining whether Bidoon are documented or not is the 'security card'. This conclusion is based on the country guidance case of NM …….*
>
> *A claimant may hold a range of documents and still be regarded as 'undocumented' if they do not hold a security card ……*
>
> *Kuwaiti Bidoon by descent either from a stateless or foreign father, or whose ancestors failed to apply for or gain nationality in 1961, will generally be stateless …..*"

This publication contains the following passage relating to the acquisition of nationality by descent:

> "*Kuwaiti women can pass their nationality on to children (upon reaching the age of majority) when the couple divorce or the father dies, when the father is unknown or has failed to establish legal paternity ….*
>
> *Under Kuwaiti nationality law, children born to a Kuwaiti woman and a Bidoon man are considered stateless.*"

Appended to this Home Office publication is a letter of the Foreign and Commonwealth Office, which includes the following statement:

> "*There is a distinction between documented and undocumented Bidoon. Put simply, documented Bidoon have legal rights in Kuwait and undocumented Bidoon do not ….*
>
> *The Government states that the majority of undocumented Bidoon are concealing their true nationality and that they or their forebears entered Kuwait illegally.*"

It is noted from the associated evidence that possession of a security card is prerequisite to being *"documented"* and, hence, being recognised by the Kuwaiti state as one of its nationals.

The Applicant's Challenge

10. While the argument of Mr Karnik, on behalf of the Appellant, acknowledges, unavoidably, that prior to receipt of the Applicant's statelessness application the Secretary of State's officials had

made certain enquiries of both the Libyan and Kuwaiti Embassies in the United Kingdom, he submits that the making of the Applicant's application subsequently triggered the Secretary of State's policy guidance (viz the Instruction outlined above) and, thus, gave rise to proactive duties of enquiry and assistance. Mr Karnik's submissions harness to this the contention that the Secretary of State's officials failed to consider and/or to give effect to the decision in NM, specifically [34] and [82] – [88], highlighting that this decision is not even mentioned in the decision letter of 29 October 2013. His submissions further highlight the following passages in the decision:

> "*….. It is not accepted that you are not entitled to some form of Libyan nationality or residence based upon your mother's nationality ….*
>
> *It is considered that you have a claim to Libyan Nationality …..*
>
> *It is considered that while you may be Kuwaiti Bidoon, you have submitted no evidence to reverse the findings of the Judge at your asylum appeal that you would be a documented Kuwaiti Bidoon, or that you would not be admitted to your true country of origin. It is therefore considered you have failed to demonstrate that you are a person who is not considered as a national by any state under the operation of its law …..*
>
> *It is not accepted that you are a stateless person or that you are not entitled to nationality. Therefore, you do not qualify for leave to remain as a stateless person.*"

In this context, Mr Karnik's submissions also draw attention to the following passage in the witness statement of the Secretary of State's official:

> "*As set out in the decision letter …. the Applicant either has a claim to Libyan Nationality or he is a 'documented' Kuwaiti Bidoon. As the Kuwaiti Embassy has already confirmed and accepted the Applicant as a Kuwaiti Bidoon, there was and is no necessity for UKVI to approach them again.*"

Mr Karnik submits that this betrays a clearly erroneous approach: there is no evidence of any such recognition by the Kuwaiti Embassy.

11. The contours and thrust of the second of the Applicant's grounds of challenge are considerably leaner than the first. The irrationality ground complains that the Secretary of State failed to take into account that Immigration Judge Dickinson, in his decision of 06 March 2009 dismissing the Applicant's asylum appeal, erred in law in relation to Libyan nationality law in his assessment of the Applicant's ability to acquire Libyan Nationality by descent. Properly, this error is not contested on behalf of the Secretary of State and is, in our view, manifest. In developing this argument, Mr Karnik highlighted the contrasting assessment of FTT Judge Brass who, in his decision determining the Applicant's appeal against the refusal of asylum support dated 14 January 2010, stated, at [12]:

> "*…. I am satisfied that it would appear that this Appellant is not entitled to Libyan nationality by way of his mother.*"

It is contended that the impugned decision of the Secretary of State is infected by a failure to either consider this judicial assessment or to give same proper weight.

12. The submissions of Mr Murray on behalf of the Secretary of State drew attention to a range of factors in the history of this case: the discrepancies in the Applicant's accounts relating to the duration of his sojourn in Libya, ranging from one year to nine years; the statement attributed to the Applicant when interviewed that he had previously been in possession of a national passport issued in Aljahara (Kuwait) which he "*threw away*" prior to travelling to the United Kingdom; the Applicant's statement to a Libyan embassy official in 2009 that his father is Kuwaiti and his mother is Libyan; the Acting Consul's firm statement that the Applicant is not a Libyan national; the discrepancies in the evidence given by the Applicant to the AIT in February 2009; the Tribunal's finding that the Applicant and his mother had been in Kuwait (for an unspecified period) prior to 1999, when they travelled to Libya, where they resided until his entry to the United Kingdom on 16 July 2008; and the Tribunal's findings adverse to the Applicant's credibility.

Our Conclusions

13. We begin with the observation that the relevant rules of international law viz Article 1 of the Convention and those of domestic law namely paragraphs 401-403 of the Immigration Rules are in harmony. We consider it unexceptional that in any case where a statelessness decision is to be made under the operative provisions of the Immigration Rules (the "*Rules*"), the crucial question for the decision maker is, in the language of Article 1(1) of the 1954 Convention, whether the person is "*considered as a national by any state under the operation of its law*". This definition demands careful analysis. It consists of four interlocking components: "*considered as ……. a national …. by any state ….. under the operation of its law*". Decision makers must address each of these components in every case.

14. It is no coincidence that statelessness was made the subject of an international treaty during the same era when elaborate international provision was made for refugees. Statelessness, as a matter of law, denotes the lack of any nationality. While some stateless persons are also refugees, not all asylum claimants are stateless and not all stateless persons are refugees. Statelessness is a global phenomenon which has multiple causes. It invites reflection on the two conventional mechanisms whereby nationality is acquired, namely (a) through birth on the territory of a state (*jus soli*) and (b) from birth through descent (*jus sanguinis*). Statelessness is addressed not only in the 1954 Convention but also in the Convention on the Reduction of Statelessness (1961), the American Convention on Human Rights, the African Charter on the Rights and Welfare of the Child and the European Convention on Nationality.

15. The UNHCR has an important mandate in the field of statelessness. Though its responsibilities were initially limited to stateless persons who also had the status of refugees, they were expanded following the adoption of the 1954 and 1961 Conventions. In March 2010, by UN General Assembly resolutions, UNHCR was designated as the agency with

global responsibility for examining individual cases and assisting claimants in the presentation of their claims to the relevant national authorities. UNHCR also has responsibility for the identification, prevention and reduction of statelessness and the international protection of stateless persons. November 2014 marked the beginning of a 10 year UNHCR global campaign to end statelessness. The main NGO active in this field is the International Stateless Persons Organisation, founded in March 2012. In April 2013 the United Kingdom formally adopted a new procedure for the determination of statelessness cases: see [7] above. This was doubtless stimulated at least in part by the joint UNHCR – Asylum Aid report published in November 2011.

16. At a practical level, the question of whether the definition of statelessness is satisfied will frequently require an assessment of whether the person concerned possesses or has access to a document, such as a passport or a national identity card or something kindred, which denotes that the individual is recognised by one of the states of the world as one of its nationals. This will form part of the enquiry, assessment and decision in the generality of cases of this kind. Furthermore, it is appropriate to observe that most cases are likely to involve a significant measure of evaluative assessment, to be contrasted with stark fact finding, on the part of the decision making official.

17. The decision making process in all statelessness cases is overlaid by the mantle of public law. The principle of public law most obviously engaged is the requirement to identify and then take into account all relevant considerations. Linked to this is the Tameside principle:

> "*..... It is for a court of law to determine whether it has been established that in reaching his decision .....* [the Secretary of State] *had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider .....*
>
> *Or, put more compendiously, the question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*"

(per Lord Diplock in Secretary of State for Education and Science v Metropolitan Borough Council of Tameside [1977] AC 1014, at 1065b).

In the particular context of statelessness cases, it is appropriate to emphasise the latter part of Lord Diplock's seminal formulation: the decision maker must take reasonable steps to acquaint himself with the relevant information. In the evolution of public law during the four subsequent decades, this has sometimes been coined the "duty of enquiry". It is not an absolute duty. Rather, it imports the standard of reasonableness. In the present context, it coexists with, and gives emphasis to, the obligations of enquiry specifically imposed on the decision maker by the Secretary of State's policy guidance (*supra*).

18. The main thrust of the Applicant's challenge is that the Secretary of State, in making the impugned decision, failed to have regard

to and/or give effect to the relevant policy guidance, namely the Instruction which we have outlined in some detail in [8] – [9] above. Where a challenge of this kind is made, it is necessary to identify the public law duties associated with such an instrument. In Lumba (WL) v SSHD [2011] UKSC 12, Lord Dyson stated at [35]:

> "*The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute .....*"

This is unexceptional dogma, to be considered in conjunction with – and not in isolation from – Lord Dyson's formulation of two further cornerstone principles of public law:

> "[21] ... *it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision makers"*

(The well known British Oxygen principle).

And at (26):

> *"... a decision maker must follow his published policy ... unless there are good reasons for not doing so".*

19. There is very recent authority on this subject. In Mandalia v Secretary of State for the Home Department [2015] UKSC 59 the focus was on a so-called "Process Instruction" addressed to the Secretary of State's case workers. Lord Wilson, delivering the unanimous decision of the Supreme Court, having reflected on the ascription of the legal effect of policy to the doctrine of legitimate expectation continues, in [29]:

> "*So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 163, as follows:*
>
> > *'[68] ..... Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.'"*

The effect of these developments in the law is that the policies of public authorities are not merely material considerations to be taken into account by the decision maker. Rather, they trigger (as regards the public authority) a duty to give effect to their terms, absent good reason for departure and

(as regards the citizen) a corresponding right or expectation. We would highlight one further feature of the decision in Mandalia. The Court will frown on attempts to subject documents such as instructions to case workers to any "*high level of pedantry*" when construing their meaning: see [33]. Subtlety and sophistication which would not be reasonably appreciated by the citizen will gain no traction.

20. I return to the Applicant's first ground of challenge, which contends that the impugned decision of the Secretary of State is vitiated by a failure to give proper effect to the policy rehearsed in [8] – [9] above. In an endeavour to counter this first ground of challenge, a witness statement on behalf of the Secretary of State was lodged mid-proceedings. This mechanism, implicitly, betrays a recognition of the force of the principles of public law in play. Notably, the author of the statement was not the decision maker. The evidence which she provides is limited to her "*assessment*" of the UKVI records. Furthermore, it is acknowledged that the caseworker who made the decision is no longer employed by UKVI and, evidently, made no contribution to the witness statement. In these circumstances, the claim by the deponent that "*… the decision maker had full regard to the policy when making their decision*" simply does not bear scrutiny. Nor is it bolstered by the references to the caseworker's training or the "*usual practice of all decision makers*". Virtually all of the statement is pure comment, adding nothing of value to the evidential matrix. The effect of this analysis is that the mechanism which has been deployed in an attempt to counter the centrepiece of the Applicant's case has, in our judgment, failed.

21. Lord Dyson's formulation (*supra*) provides the starting point, but is not exhaustive of the public law duties associated with and flowing from the Instruction. These duties, as a minimum, required the decision maker to be alert to the Instruction, being an indisputably material consideration, and to give conscientious attention to its contents. Our evaluation of the evidence as a whole impels inexorably to the conclusion that these elementary duties were not discharged. As our formulation of the principles engaged acknowledges, however, this diagnosed failure is not necessarily determinative of the first ground of challenge. This is so by virtue of the factor of flexibility, in terms of both policy content and legal principle, coupled with every public authority's discretion to depart from policy where good reason for doing so can be demonstrated. These further principles could, in the abstract, operate to exonerate, or nullify, the failing assessed above.

22. In this context, we concur with Mr Murray's submission that the Instruction is not formulated in rigid terms. In particular, we accept that those passages upon which the Applicant places most reliance invest the decision maker with choices, or discretion. Thus we acknowledge that it is not obligatory to take specified steps and to follow certain courses in every decision making process of this kind. This analysis is fortified by the overlay of public law principles. However, there was a duty on the caseworker to be alert to these choices and to conscientiously consider them. Having rejected the evidence noted in [21] above, we can identify no other evidence, direct or inferential, to warrant the conclusion that this basic duty was performed. Furthermore, the importance of this duty is reinforced by the analysis that the further steps and enquiries specified in the Instruction are clearly expected to be undertaken in the generality of

cases. To this we add that it cannot realistically be contended that further enquiries would inevitably have been pointless. Finally, it is not contended that this is a case of justified departure from a policy. Accordingly, we conclude that the Applicant has made good his primary ground of challenge.

23. The irrationality challenge, the second ground, focuses mainly on the aforementioned decision of the AIT. We accept Mr Karnik's analysis that this decision contains two notable errors: first, the Judge's incorrect exposition of Libyan nationality laws and, second, his factual error relating to the maximum possible duration of the Applicant's sojourn in Libya (eight years, not ten). A further aspect of this challenge is the conflicting assessment in the later decision of the FtT (Asylum Support) that the Applicant's is not entitled to Libyan nationality by descent via his mother. While we acknowledge Mr Murray's submission that this Tribunal cannot circumvent the credibility findings adverse to the Applicant in the AIT's decision, this does not engage with the thrust of this ground.

24. Once again, we consider it appropriate to adjudicate on the second ground of challenge by identifying and applying the main public law duty on the decision maker. In this context, the duty engaged was to take into account all material facts and factors. This included the two previous judicial determinations. These determinations required of the decision maker careful analysis and reflection, as opposed to wholesale and slavish submission. The effect of the Wednesbury principles is that in public law, provided that all material facts and considerations are recognised and scrutinised by the decision maker, the ensuing decision will be unimpeachable unless the elevated standard of intervention of irrationality is overcome.

25. There has been evidence of the nationality laws of Libya at every stage. The content of this evidence has been consistent. Given the protracted and inconclusive nature of the saga which has, regrettably, materialised, this discrete issue is crying out for the injection of clarity and certainty. Factually, the high water mark of the Secretary of State's case is that the Applicant resided in Libya from 1999 to 2007. The unequivocal import of the decision maker's assessment is that the Applicant is "*entitled to some form of Libyan nationality or residence*" based solely upon his mother's Libyan nationality. This assessment, a pure question of law, is confounded by the evidence of Libyan nationality laws. Such evidence yields the conclusion that a person who is the direct descendent of a Libyan national (viz persons such as the Applicant) must reside in Libya for a period of 10 years in order to acquire Libyan nationality. As noted in [12] above, this analysis is not contested on behalf of the Secretary of State.

26. The question of whether the Applicant is a national of Libya is a mixed question of fact and law. We take this opportunity to pronounce that, having regard to the extant evidence of (a) the relevant factual matters and (b) Libyan nationality laws, the Applicant is not a national of Libya. We trust that this unambiguous statement will facilitate and expedite finality in this saga. The effect of this analysis is that the Secretary of State's decision is vitiated by error of law. This, in our judgment, is the appropriate prism to apply to the Applicant's second ground of challenge.

27. We further observe that the decision making process in a

statelessness case may involve some subtlety and sophistication, arising from the recognition in international law of a distinction between *de jure* and *de facto* statelessness. In this context, the focus is on the words of Article 1 of the 1954 Convention. By virtue of Article 31(1) of the Vienna Convention on the Law of Treaties, the construction of these words requires that they be read in good faith and in the light of the object and purpose of the Convention.

28. In its recent decision in Pham v Secretary of State for the Home Department [2015] UKSC 19, the Supreme Court, in considering this issue, reflected on the special role of the UNHCR (noted above) and, specifically, its guidance published in February 2012 and June 2014. This contains some emphasis on the implementation of a state's nationality laws and state practice in this regard. Lord Carnwath did not express a concluded view on either the relevant provisions of the UNHCR guidance or the policy guidance of the Secretary of State which we have summarised above: see [28] – [29]. However, delivering the majority judgment, he answered the first question of law to be determined in the following terms, at [38]:

> "*…. I would accept that the question arising under Article 1(1) of the 1954 Convention in this case is not necessarily to be decided solely by reference to the text of the nationality legislation of the state in question … reference may also be made to the practice of the Government …..*"

Reverting to our breakdown of the several components of Article 1(1) of the 1954 Convention, in [13] above, we consider that this conclusion highlights the importance of the words "*not considered to be a national by any state*". Secondly, this conclusion establishes that a broad meaning is to be ascribed to the words "*under the operation of its law*". Notably, the Supreme Court did not endorse the reasoning of the Court of Appeal.

29. We conclude that the impugned decision is unsustainable in law on a further basis. In every case where a statelessness decision is to be made under the operative provisions of the Immigration Rules the crucial question for the decision maker is, in the language of Article 1(1) of the 1954 Convention, whether the person is "*considered as a national by any state under the operation of its law*". Both the international legal rules and their domestic counterparts require a determination of the recognition issue in the present. This we consider to be clear from the language used. Future forecasts are alien to this exercise. However, the main ground upon which the Applicant's application was refused was the assessment that he was considered to have *"a claim to"* Libyan nationality. We consider that the decision maker misdirected himself in law. The question which should have been addressed, and answered, was whether the Libyan government recognised the Applicant as one of its nationals at the time when the decision was made. The decision maker, in our judgment, failed to pose and answer this key question . Moreover, it was in conflict with the policy Instruction, specifically the passage highlighted towards the end of [9] above. This emphasises:

> *"….it is* [the] *position* [of the government concerned] *rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national".*

Thus the decision maker has, simultaneously, lapsed into an error of law and a breach of the policy. We grant permission to the Applicant to amend his grounds to incorporate this additional challenge.

Order

30. Giving effect to our analysis and conclusions above, we decide and order as follows:

(a) The Secretary of State's decision is hereby quashed.

(b) The Applicant is entitled to his costs, to be assessed in default of agreement.

(c) Permission to appeal to the Court of Appeal is not appropriate as this case raises no question of law of any major significance or broad application, going no further than an exercise in applying well established principles to the particular factual matrix.

Postscript

31. In the further decision making process which must now be undertaken, the Applicant would be well advised to remember that there is a duty of mutual co-operation and, further, that any unreasonable refusal on his part to actively co-operate and participate could operate to his disadvantage. Decision making in statelessness cases is not a one way street. There is scope for future development of the law with reference to the conduct of the claimant in the formulation and presentation of his claim and his role in the ensuing decision making process.

Signed :

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: 08 October 2015