Case No: CO/2281/2013

Neutral Citation Number: [2014] EWHC 2192 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2014

Before :

CLARE MOULDER
(Sitting as a Deputy High Court Judge)

- -

Between :

The Queen on the application of Syed Shah	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr Anthony Vaughan (instructed by **Duncan Lewis**) for the **Claimant**
Miss Katherine Olley (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing date: 19 June 2014

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Judgment

Clare Moulder (Sitting as a Deputy High Court Judge) :

Introduction

1. This case challenges the 3 year delay on the part of the defendant in deciding the claimant's application for reconsideration of the defendant's refusal of leave to remain under Article 8 ECHR having regard in particular to the impact on the claimant's ability to secure sole care of his son, a British citizen. Permission was granted on the papers on the application for judicial review by Michael Fordham QC, sitting as a deputy High Court judge on 11 July 2013. Subsequently on 27 May 2014 the defendant made a decision in this case so a mandatory order is no longer sought. However the case as advanced before me at the oral hearing challenges the lawfulness of the delay from June 2011 until a decision was issued and the claimant seeks both a declaration that the defendant's delay in deciding the claimant's application for leave to remain is unlawful, including contrary to article 8 ECHR, and an award of damages for such article 8 violation.

Issues

i) Does section 55 of the Borders, Citizenship and Immigration Act 2009 and/or paragraph 2.20 of the "Every Child Matters" policy require that the defendant expedite the processing of immigration applications affecting children in the UK?

ii) If so, has the defendant complied with that duty?

iii) In any event is the delay in deciding the claimant's application Wednesbury unreasonable, or conspicuously unfair?

iv) Is the delay contrary to article 8ECHR?

Background

2. The claimant entered the UK with his father in June 2003 on a visitor's visa. He then overstayed. In April 2009 he married his British partner, Ms Nasreen Vaid. In November 2010 the claimant's son, R, was born in the UK and is thus a British citizen by birth. Immediately following the birth of the claimant's son, R was made subject to a child protection plan owing to his mother's mental health problems.

3. In February 2010 the claimant had applied for leave to remain on the basis of article 8 ECHR, but in September 2010 the defendant claimed to have no record of this application. On 7 January 2011 the claimant submitted further representations to the defendant. This application was rejected on 27 May 2011. In June 2011 the claimant requested reconsideration of the refusal and challenged the legality of the decision. The defendant acknowledged receipt of the reconsideration request on 24 June 2011.

4. On 14 August 2012 the claimant's solicitors wrote to the defendant "to update the Home Office on his current circumstances which have significantly changed since 2011". The letter stated that the claimant had separated from his wife due to the instability of her mental health and the implications that this was having on his ability to maintain care of R . The letter gave details of ongoing Children Act proceedings

and the dispute between the claimant, his wife and R's grandparents as to custody. It was asserted that the delay was prejudicing the claimant's position in those proceedings, and a decision was requested "as a matter of urgency". (CB 104 – 111).

> "Our client instructs that he wishes to remain in the UK with his child and remain as his sole carer. The family courts have exercised [sic] some concern as to our client's immigration status in the UK and it remains apparent that if it were not for his immigration status, our client would be the most appropriate carer for [R]."

5. On 15 November 2012 the claimant's solicitors urged the defendant to expedite consideration of the application "as a matter of extreme urgency" given the detriment being suffered by the claimant in the Children Act proceedings. (CB 148 – 151)

> "It is submitted that the family court would be assisted by a decision in regards to our client's immigration matter, and that the delay of issuing the same would adversely affect the outcome of the family proceedings to our client's detriment.
>
> We wish to emphasise that our client is suffering an extreme detriment from the unresolved issues regarding his immigration status, as this is having an adverse effect on the outcome of the family proceedings."

6. On 14 January 2013 the Home Office wrote to the family court stating: "I am unable to advise on a timescale or an outcome" on the reconsideration application; that reconsideration decisions "are not a barrier to removal" and that "the UK Border Agency has no legal basis under which to reconsider decisions."

7. On 17 January 2013 following a hearing in the Principal Registry of the Family Division, the judge made a Special Guardianship Order in favour of R's maternal grandparents. The judge also made a contact order in favour of the claimant.

8. On 22 January 2013 a pre-action protocol letter was submitted in respect of the defendant's ongoing delay in deciding the reconsideration application. No response was received. This claim for judicial review was issued on 27 February 2013.

Does section 55 of the Borders, Citizenship and Immigration Act 2009 and/or paragraph 2.20 of the "Every Child Matters" policy require that the defendant expedite the processing of immigration applications affecting children in the UK? Has the defendant complied with that duty?

Relevant law

9. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides: –

> "55 Duty regarding the welfare of children
>
> (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)any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(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).”

10. The statutory guidance issued to the Secretary of State’s officers under section 55 is “Every Child Matters”. The claimant relies on paragraphs 2.6 – 2.7 and 2.20 which read as follows:

> “2.6 The UK Border Agency acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies. [Emphasis added]
>
> 2.7 The UK Border Agency must also act according to the following principles:
>
> …..
>
> 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
>
> …….

> Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience. [Emphasis added]
>
> 2.20 There should also be recognition that children cannot put on hold their growth or personal development until a potentially lengthy application process is resolved. Every effort must therefore be made to achieve timely decisions for them." [Emphasis added]"

11. In *ZH (Tanzania) v SSHD* [2011] 2 AC Lady Hale at para 23 stated:

> "For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC: "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." This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law."

12. The Committee on the Rights of the Child is established under the CRC and publishes its interpretation of the UNCRC in the form of general comments. The committee's general comment number 14 (29 May 2013) reads at page 7:

> "A. Legal analysis of article 3, paragraph 1
>
> 1. "In all actions concerning children."
>
> (b) "concerning"
>
> 19. The legal duty applies to all decisions and actions that directly or indirectly affect children….. Therefore "concerning" must be understood in a very broad sense.
>
> 20. Indeed, all actions taken by a state affect children in one way or another. This does not mean that every action taken by the state needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.
>
> Thus, in relation to measures that are not directly aimed at the child or children, the term "concerning" would need to be clarified in the light of the circumstances of each case in order to be able to appreciate the impact of the action on the child or children."

Claimant's submissions

13. Relying on the extracts of paragraphs 2.7 and 2.20 of the defendant's policy "Every Child Matters" counsel for the claimant submitted that section 55 requires the defendant to treat applications made by children with greater priority than other applications. He further submitted that by virtue of section 55 a duty of expedition also applies to applications made by adults where children in the UK are likely to be affected by the decision on that application.

14. Counsel for the claimant relies on the decision in *R(SM) v SSHD* [2013] EWHC 1144 (Admin) which found that the defendant's policy which set fixed criteria for determining the length of the grant of discretionary leave precluded a case specific analysis of the claimant's case, which was required by section 55.

15. Counsel further submits that section 55 can impose a duty to take positive steps to ensure that the duty to promote the welfare of children is complied with, relying on dicta of Baroness Hale at paragraph 86 of *R(HH) v Westminster City Magistrates Court* [2012] UKSC 25; Elias LJ at paragraph 40 of *HK (Afghanistan) v SSHD* [2012] EWCA 315 and Silber J at paragraph 61 of *R(OA) v SSHD* [2012] EWHC 3128 (Admin).

Defendant's submissions

16. Counsel for the defendant submitted that paragraph 2.20 of the policy is clear and it applies only to applications made by or including the child. Even if paragraph 2.20 were to be extended (which in the defendant's submission would amount to rewriting that part of the policy) such a need would not arise on the facts of this case. Counsel submits that there has never been any attempt by the defendant to remove the claimant and the claimant's son has had consistent contact with the claimant since birth.

17. The extension of the policy would lead to unfairness amongst different types of applicants.

Discussion

18. I accept the submission of counsel for the claimant that the wording of section 55 is broad enough to encompass not only child applicants, but also the children of applicants who are affected by the decision. I accept the welfare principle in article 3 UNCRC applies to "all actions concerning children" but I note that paragraph 20 of the "general comment" set out above states:

> ".. In relation to measures that are not directly aimed at the child or children, the term "concerning" would need to be clarified in the light of the circumstances of each case, in order to be able to appreciate the impact of the action on the child or children".

19. Paragraph 2.7 of the policy states that:

> "children should have their applications dealt with in a timely way."

This paragraph is clearly referring, in my view, to child applicants.

20. Paragraph 2.20 is not on its face, referring only to child applicants and states that:

> "Every effort must therefore be made to achieve timely decisions for them."

21. However, paragraph 2.20 is part of a section of the policy entitled "Work with Individual Children" and the opening paragraph 2.18 states:

> "This guidance cannot cover all the different situations in which the UK Border Agency comes into contact with children. Staff need to be ready to use their judgment in how to apply the duty in particular situations and to refer to the detailed operational guidance which applies to their specific area of work. In general, staff should seek to be as responsive as they reasonably can be to the needs of the children with whom they deal, whilst still carrying out their core functions."

22. Paragraph 2.19 states:

> "It may be helpful to set out here, by way of example, some of the key policy commitments which apply at different stages of the process…."

It then deals with various stages of arrival and removal, including detention.

23. Taken therefore in the overall context of this section, it seems to me that paragraph 2.20 is dealing only with child applicants. Accordingly, in my view the specific requirement of paragraph 2.20 that "every effort must therefore be made to achieve timely decisions for them" is only concerned with child applicants.

24. As far as concerns the alleged breach of section 55, counsel for the claimant submits that the only way that regard can be had to the welfare of the child is to have arrangements in place to expedite applications affecting children in the UK. He submits that it is unlawful to have a single queue for all applications for reconsideration.

25. In my view, the position as follows:

i) the Secretary of State has accepted, pursuant to her obligations under section 55, that there is a need to deal with child applicants in a "timely manner" which minimises the uncertainty that they may experience and in recognition of the fact that children cannot put on hold their growth or personal development until a potentially lengthy application process is resolved;

ii) where the child is a British citizen there is no uncertainty in the sense of the prospect of forced removal; however, the precarious immigration status of a parent may well impact the child, not only emotionally, but also in relation to the parent's ability to work and therefore provide financially for the child;

iii) "timely" in my view is not the same as "expedite" in so far as the latter term suggests a need to hasten or prioritise all child applications. The term "timely" rather means that applications must be dealt with in a time frame which is appropriate to the case. In other words, it requires a case specific approach;

iv) the defendant currently treats all applications including applications from children in the order in which they are received; this clearly precludes a case specific approach as the defendant does not seek to assess the need for a particular timeframe for child applicants;

v) the obligation under section 55 extends to children in the UK of an adult applicant and therefore in order to discharge her duty under section 55, the Secretary of State should put in place arrangements to safeguard the welfare of such children. The precise arrangements are matter for the Secretary of State. However, currently no such arrangements would appear to be in place and the Secretary of State is therefore in breach of her duties under section 55 in regards to this category of children.

26. I do not accept the submission of counsel for the defendant that to deal with applications other than solely in the order in which they are received cannot be acceptable because it would result in unfairness as between different categories of applicants. The defendant has to discharge her statutory duty and therefore is obliged to make arrangements to safeguard the welfare of children. This is a category of applicants (applicants who are children or adult applicants who have children in the UK) in respect of which the law requires that the defendant should consider the welfare of the children concerned as a primary consideration.

Conclusion

27. For the reasons stated above in my view, paragraph 2.20 of the policy does not require that the defendant expedite processing of immigration applications by adults who have (non-applicant) children in the UK. If I am wrong in this and the policy does extend in this regard to non-applicant children, then in my view it is an obligation to make every effort to achieve a timely decision. It is not an obligation to expedite such applications.

28. However, whether or not I am correct in this conclusion, as stated above in my view section 55 does extend to non-applicant children and accordingly the defendant having failed to make any arrangements in respect of such children, is in breach of its duty under section 55.

Is the delay in deciding the claimant's application Wednesbury unreasonable, or conspicuously unfair?

Claimant's submissions

29. Counsel for the claimant submitted that the claimant had regularly chased the defendant by the letters for example of 14 August 2012 and 15 November 2012. The defendant did not respond; this caused real difficulties for the hearing in the family court and the failure on the part of the defendant to expedite the matter resulted in unlawfulness.

30. Counsel for the claimant also submitted that the actions of the defendant were unlawful on Wednesbury principles. Counsel submitted that the claimant's article 8 application was very strong and the delay was denying the claimant the benefit of the status to which he is entitled. Counsel submitted that this was akin to a case where there was an accrued right to remain and in such cases, the court was less permissive of delay. Under the new immigration rules, appendix FM, the claimant ticked all the boxes. This indicated where the proportionality basis should be struck and in fact he has now been granted leave under those rules. Counsel relied on the case of *R(Mambakasa) v SSHD* [2003] EWHC 319 (Admin).

31. Counsel for the claimant refers to the observation of Collins J in *R (FH) v SSHD* [2007] EWHC 1571 (Admin) at paragraph 8 that the case of *MM*:

> "related to an initial claim to asylum. But, even so, I do not think that 12 months should be regarded as any sort of benchmark. No doubt, delays of 12 months or more in dealing with an initial claim to asylum may well need an explanation, but, provided the approach of the defendant was based on a policy which was fair and applied consistently, such delays could not be regarded as unlawful"

and at paragraph 30:

> "it follows from this judgement that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy, or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court." [Emphasis added]

32. He also submitted that in this case the delay in deciding the application prejudiced the claimant's case to be R's sole carer and that the defendant was given plenty of warning about this. He referred to the letters at CB/104 and CB/148. In the letter dated 14 August 2012 from the claimant's solicitors it states:

> "in April 2012 our client instructed us that he had now separated from [his wife] and that he has now put himself forward as the sole carer for[R] in the care proceedings. We are instructed that [his wife] has also put herself forward as the sole carer for [R] and that the local authority are also assessing [R's] maternal grandparents as alternative carers for [R]….
>
> removing our client from the UK would have extremely adverse consequences for the son, who remains in foster care at present. We further submit that a failure to grant our client with leave to remain would result in his family proceedings being dealt with in an unjust manner and the best interests of the child being adversely affected."

33. The relevant passage from the letter dated 15 November 2012 from the claimant's solicitors is set out above.

34. Counsel also relied on the Social Work Update Assessment Report dated 7 September 2012 which was prepared following a direction from the family courts that a parenting assessment be undertaken of the claimant since he had separated from his wife. Various matters referred to in that report are affected by his immigration status: the claimant is only able to work on a voluntary basis and is not paid and counsel submitted that his ability to obtain housing was consequently affected. At paragraph 10.9 of the report it states:

> "[the claimant] remains an overstayer with no recourse to public funds. He has not to date (although requested several times) provided documentation from the Home Office giving information about his current situation or evidence of when it is likely to be concluded."

At paragraph 11.1:

> "[the claimant] is clearly not in a position to care for [R] independently given the uncertainty regarding his immigration situation. It is unclear when his situation will change."

35. In relation to the other points of concern raised by the social worker in her conclusion, counsel for the claimant submitted that these are matters which could be dealt with if the claimant had appropriate support and pointed to the report dated 9 January 2013 [SS/2], indicating that the claimant had been attending a support group to improve his parenting skills. Counsel also referred to the witness statement of the claimant produced for the purpose of these proceedings in which the claimant stated that in the light of the findings in the social worker's report and the Home Office refusal of 14 January 2013 to provide the court with a timescale for processing his leave to remain application, he was advised that he would not be successful in obtaining a residence order and the best he could hope for would be regular contact with his son.

36. Counsel also relies on the letter sent by the UKBA to the family court (A/158) dated 14 January 2013:

> "On the 21 June 2011 [the claimant] requested that UKBA reconsider the decision. This remains outstanding to date; I am unable to advise on a timescale or an outcome as each case is considered on its own merits.
>
> Reconsideration requests are not a barrier to removal and the applicant(s) currently have no legal basis to be in the UK. Although some reconsiderations have previously been considered on an exceptional basis or have been considered as part of enforcement decisions, the UK border agency currently has no legal basis under which to reconsider decisions. The applicant should now make arrangements to leave the UK or regularise their stay in another capacity.

I hope this information proves useful to the court."

37. Counsel for the claimant submitted that contrary to what was stated in the letter, there is a policy to reconsider decisions and that this letter caused real difficulty for the hearing.

38. Finally counsel submitted that there was ongoing prejudice caused by the delay in that although the court has a discretion to discharge the Special Guardianship Order the longer [R] stays with his maternal grandparents the more difficult it would become to challenge the order.

Discussion

39. This case concerns an application for reconsideration rather than an application. The defendant in her letter acknowledging receipt of the application for reconsideration [CB98] states that she is:

> "currently experiencing lengthy delays in processing reconsiderations due to the high volume of requests of this nature UKBA have received over the last 12 months.
>
> I would like to take this opportunity to assure you that every effort will be made to consider this request without unnecessary delay, however, it is with regret that we are unable to provide you with a specific timescale at this stage."

40. In deciding whether the defendant has acted in a timely manner, it must be appropriate to consider the volume of applications for reconsideration against the limited resources of the defendant and the fact that it is a reconsideration subsequent to a determination (which itself is not challenged as not having been made in a timely manner).

41. In relation to the submission that any adverse impact on article 8 rights is relevant to the reasonableness of administrative delay, in my view no such adverse impact has been identified. The claimant has been granted leave and in my view the assessment of his rights under Article 8 had to take place before any entitlement to leave could be asserted. I reject the submission that any Article 8 right arose at an earlier date by reason merely of the claimant's circumstances but prior to any determination by the defendant. I do not accept that the case of *Mambakasa* assists the claimant in this case. In *Mambakasa* at paragraph 66, Richards, J giving his reasons for concluding that the delay in that case was unreasonable states at paragraph (vi):

> "the grant of refugee status following the IAT's determination ought in this case to have been a simple administrative tasks. There was nothing in the circumstances of the case to require any substantial exercise of judgement. The discussion at the hearing on 8 to January shows that the grant was expected to follow as a matter of course."

42. Disregarding the other factors which were taken into account in that case, but which formed part of the reasoning, it seems to me that this is not a case where a

determination had been made and the defendant's task could be described as a "simple administrative task." However, clear-cut the claimant may assert his position to have been, the decision required (as is clear from the decision letter of 27 May 2011 and the request for reconsideration erroneously dated 7th of January 2011, from the claimant's solicitors) was a reconsideration of the claimant's application for leave to remain under article 8 on an exceptional basis outside the rules. Even following the introduction of appendix FM in my view the decision of the defendant still required an exercise of judgement and was not a simple administrative task.

43. Counsel for the claimant seeks to bring the case within the exception identified by Collins J in *FH* where "*the claimant is suffering some particular detriment which the Home Office has failed to alleviate*."

44. Although I accept the evidence that the Home Office were advised of the ongoing care proceedings, as well as the evidence that the precariousness of his immigration status had a detrimental impact on the social worker's assessment [SS/1] of his ability to act as carer for [R], I do not accept that the detriment in the sense that is alleged, namely that it prejudiced the claimant's case to be R's sole carer is established on the evidence. The recommendation of the social work report at 11.1 and set out above continues as follows:

> "[the claimant] continues to have an arduous and difficult relationship with [his wife] and maternal family and is of the view that he has not contributed to this. There are areas in his parenting identified in this report that need addressing for him to be able to fully meet[R's] needs. In addition to this [the claimant's] current circumstances and relationship with [his wife] and maternal family. I am not of the view that it is likely that these issues can be addressed within [R's] timescale. Therefore I am unable to recommend that [the claimant] be considered as a long-term carer for [R]."

45. Therefore whilst I accept that if his immigration status had not been precarious he might have had a chance, I do not think the evidence supports a finding that he "would" have had a chance as counsel for the claimant submitted.

46. As far as the letter dated 14 January 2013 is concerned counsel submitted that this caused real difficulty for the hearing in the family Court. In his witness statement the claimant states that it was as a result of the social worker's report and the Home Office's letter of 14 January 2013 that he was advised that he would not be successful in obtaining a residence order and he was obliged in the circumstances to accept that advice. However, although the letter of 14 January 2013 on its face might appear to damage the ability of the claimant to challenge the guardianship proceedings, the claimant took the decision not to challenge the guardianship proceedings and the evidence of the social work report tends to indicate that there may have been other significant factors which led to his decision that he would not challenge the proceedings. Accordingly in my view the claimant has not established that the failure on the part of the defendant was the reason he decided not to challenge the guardianship proceedings.

47. Insofar as the Defendant submitted that the delay does not cause any prejudice as the claimant is not threatened with removal I accept the submission of counsel for the claimant on the authority of *MS(Ivory Coast) v SSHD* [2007] EWCA Civ 133 that the matter has still to be decided and the claimant cannot be left in limbo.

48. In relation to the ongoing prejudice alleged by the claimant of being less able to challenge the guardianship order in the future as a result of the delay, it seems to me this is not supported by any evidence and again the conclusions of the social report and the concerns in respect of matters unrelated to the claimant's immigrations status remain an impediment to the claimant being successful in any future challenge.

Conclusion

49. Accordingly whilst I accept that a period of 3 years in reaching a decision on the reconsideration was a considerable period of delay, in any immigration case awaiting a decision on leave to remain there is likely to be prejudice to the applicant by delay and the judgment in *FH* has made clear that cases in which delay on the part of the defendant will be held to be unlawful are few. I accept that the defendant was made aware (at least in general terms) of the prejudice in this case and it is clear from the social worker's report that there was some prejudice to the claimant's case as a result of the delay in resolving his immigration status.

50. However there is no evidence to suggest that the delay on the part of the defendant was the sole or even the main reason why the claimant was not appointed sole carer. The social work report identifies a number of factors and the claimant did not challenge the guardianship proceedings. On the facts of this case for the reasons set out above the claimant has not established that the detriment, as formulated by the claimant, of not having the opportunity to present his case as sole carer was something which can be said to be something which the defendant has failed to alleviate. Even if the matter had been dealt with promptly by the defendant, the other matters raised in the social worker's report and referred to above would appear to have been significant obstacles to any application on the part of the claimant and therefore in my view this court cannot conclude on the evidence before it that the test as expressed in *FH* is met.

Delay contrary to Article 8

Claimant's submissions

51. Counsel for the claimant submitted that a failure to grant documentary confirmation of a right to reside is likely to constitute an interference with the right holder's article 8 rights. Counsel relied on the statement of Lord Woolf CJ in *Anufrijeva & others v SSHD* [2003] EWCA Civ 1406 at paragraph 46:

> "where the complaint is that there has been culpable delay in the administrative processes necessary to determine and to give effect to an article 8 rights, the approach of both the Strasbourg court and the commission has been not to find an infringement of article 8, unless substantial prejudice has been caused to the applicant. In cases involving custody of children, procedural delay has been held to amount to a breach of article 8 because

> of the prejudice such delay can have on the ultimate decision- thus in H v United Kingdom (1987) 10 EHRR 95, the court held, at p112, 89, article 8 infringed by delay in the conduct of access and adoption proceedings because the proceedings "lay within an area in which procedural delay may lead to a de facto determination of the matter at issue", which was precisely what had occurred….."

52. In *H v UK* the court was faced with a period of delay in proceedings of 2 years and 7 months relating to access and adoption 5 months of which were attributable to the local authority, which was seriously prejudicial to the applicant.

53. Counsel for the claimant submitted that the defendant's delay left the claimant in a state of limbo for 3 years, which has inhibited the enjoyment and development of family ties between the claimant and his son. It has prevented the claimant from being able to earn a living and provide for his son and hindered his ability to present his case before the family Court for the reasons set out in the claimant's submissions above.

Discussion

54. As I have indicated above in the circumstances of this case, in my view the claimant has not established substantial prejudice as a result of the defendant's delay sufficient to lead to a conclusion that the delay was an interference with the right holder's article 8 rights. The factual situation is different from that in *H*, in that the guardianship proceedings, unlike adoption proceedings, are not a de facto determination of the matter. The claimant accepts that under section 14 D (5) of the Children Act 1989 the claimant is able to secure the discharge of the Special Guardianship order where there is a "significant change in circumstances since the making of the special guardianship order." Counsel for the claimant further acknowledges in his skeleton that if the claimant is granted leave to remain (which of course has now occurred) this could establish a sufficient change in circumstances for the purposes of section 14 D (5) since it eliminates the risk of removal and with it the risk of interruption to his son's care arrangements in the future; it also enables the claimant to provide an economically stable environment for his son.

Conclusion

55. For the reasons stated above therefore I do not find that the delay in granting leave to remain constituted an interference with the claimant's article 8 rights.

Damages under Article 8

56. Since I have concluded that the delay in this case does not amount to a violation of the claimant's article 8 rights, there can be no entitlement to damages under section 8 of the Human Rights Act 1998. Section 8 (3) provides that no award of damages is to be made unless, taking account of all the circumstances of the case, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. In the circumstances of this case even if I had concluded that the claimant was entitled to a declaration that the delay was a violation of the claimant's article 8

rights, I would not have awarded damages under Article 8 for the reasons set out below .

Claimant's submissions

57. Counsel for the claimant accepted that damages under Article 8 is an exercise of discretion (para 53 and 55 of *Anufrijeva*) and that maladministration will only infringe Article 8 where the consequence is serious (para 47 of *Anufrijeva*).

58. Counsel for the claimant further accepted that the facts in this case are different from the facts in *H* where a child was put with adoptive parents but submits that the longer [R] is with his grandparents the more difficult it is to get the Special Guardianship Order set aside. Counsel also stressed the length of delay in this case and the nature and degree of distress and worry as the claimant has been aware of the fact that the delay in deciding his immigration status is adversely impacting the prospect of having his son live with him in the long term.

Conclusion

59. On the facts of this case the effect of the delay is not sufficient to justify an award of damages applying the principles established in *Anufrijeva* and *H*. The claimant can apply for the Special Guardianship Order to be set aside there is no finality in the way that an adoption order is final and the claimant has continued to have contact with [R] in the meantime. I do not accept the submission that the distress and worry in the claimant's case is more acute than the situation in *Mambakasa* since the claimant had no accrued right to reassure him. Rather, in my view the converse is the case, in *Mambakasa* the family members were awaiting implementation of a decision to grant entry clearance and therefore had already accrued rights.

Conclusion

60. For the reasons set out above I have concluded that:

i) There is a duty on the defendant under section 55 of the Borders, Citizenship and Immigration Act 2009 to make arrangements to deal with applications which concern children in the UK in a way which safeguards and promotes the welfare of children and this duty is not confined to child applicants.

ii) The policy "Every Child Matters" does not as a matter of construction extend to applications from adult applicants with (non-applicant) children in the UK. There was therefore no breach of policy in this case but there was a failure to make arrangements pursuant to the duty in section 55.

iii) The delay in dealing with the application for reconsideration did not amount to an unreasonable delay at common law as the claimant failed to establish on the evidence that he suffered a particular detriment which the Home Office has failed to alleviate.

iv) There was no breach of the claimant's article 8 rights as a result of the delay on the basis that I have found that the claimant has not established that the

defendant's delay caused him substantial prejudice and accordingly there can be no entitlement to damages under section 8 of the Human Rights Act 1998.