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Case No: C4/2009/0106/QBACF

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Munby
CO/6530/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2009

Before :

LORD JUSTICE WARD
LORD JUSTICE WILSON
and
LADY JUSTICE HALLETT DBE

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Between :

The Queen on application of AM (Kenya)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Richard Drabble QC and Mr Ranjiv Khubber (instructed by **Messrs Turpin and Miller**) for the Appellant
Mr Sarabjit Singh (instructed by **Treasury Solicitors**) for the Respondent

Hearing date : 24th June 2009

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Judgment

Lady Justice Hallett:

1. The appellant applied to the Secretary of State for the Home Department to grant her the discretionary benefit of a policy known as "the" Family Indefinite Leave to Remain (ILR) Policy. He refused and she was notified of the decision in a letter dated 1st May 2007. She was given permission to apply for judicial review of the decision. Munby J in a judgment delivered on 18th December 2008 refused her application. She now has permission to appeal his decision.

Factual Background

2. Jane Wanjiku Nyoike arrived in this country from Kenya and claimed asylum at Heathrow airport on 15th October 1995. Seven years later, on 4th October 2002, the appellant, who says she is the daughter of Ms Nyoike's brother, also arrived in the UK from Kenya. She was then aged 14 having been born on 10th November 1987. She is an orphan. Her mother, who was HIV positive, drowned herself in January 1999. Her younger sister died in April 2000 of malaria aged 4. Her father died the same year of HIV-AIDS. Left alone, she was taken in by her mother's family but ill-treated by them. She ran away to live on the streets. She was rescued in 2002 by an American who worked with street children and who was able to locate her aunt Ms Nyoike. I should interpose here that the Secretary of State remains unconvinced that the two are related in the way claimed but we have been invited to proceed on the basis that they are.

3. The appellant was brought to this country by an agent and went to live with her aunt. The aunt has acted in loco parentis to her for the last six years and the appellant sees her as her mother in both psychological and emotional terms. The aunt reciprocates those feelings and says that the appellant has been financially and emotionally dependent upon her since she arrived in the UK.

Applications for asylum and ILR

4. The aunt's claim for asylum was initially rejected by the Secretary of State but was allowed on appeal by an Adjudicator on 24th July 2000. On 13th December 2000 the Secretary of State wrote to the aunt. She accepts that she received the letter. The Secretary of State informed her that the decision had been taken to grant her indefinite leave to enter in the United Kingdom as a refugee recognised under the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. The date on which her application was recorded as having been determined was 13th December 2000. On 29th January 2001 the Immigration Officer at Heathrow wrote to the aunt again. The letter is stamped "Given indefinite leave to enter the United Kingdom." The aunt claims she never received the letter. On 22nd November 2001 an advice centre wrote on her behalf to the Secretary of State.

5. On 9th October 2002 the aunt, relying on her own grant of ILR, swore a statutory declaration in support of the appellant's application for ILR as her dependent. This was a year before the Family ILR policy at the heart of this appeal was announced. The application was acknowledged by the Secretary of State on 6th December 2002.

6. Chasing letters about the aunt's claim were sent by her solicitors on 16th December 2003 and 3rd February 2004. On 5th March 2004, the aunt's solicitors threatened

judicial review. On 29th April 2004 the Secretary of State responded with a letter similar to the earlier letter dated 29th January 2001. Enclosed in the letter was an 'Immigration Status Document', endorsed with indefinite leave to enter the United Kingdom; the letter explained that "It is this endorsement that constitutes proof of your immigration status in the United Kingdom."

7. Meanwhile, the policy of which the aunt and, therefore, the appellant seek to take the benefit was announced on 24th October 2003. The reasons for the announcement are well established. By 2003 the Home Office found itself faced with a sizeable backlog of asylum applications. This presented a number of difficulties which included the annual cost of supporting asylum seekers, the time and expense of dealing with asylum applications from family members and the difficulty of getting all members of a family together ready for removal. The Home Office took a pragmatic view and introduced the Family ILR policy which was intended as a "one off desk clearing exercise". It is a concessionary policy which allows qualifying families to be granted ILR outside the Immigration Rules in certain circumstances. It had the advantage of recognising the situation of families who have been settled in this country for some years and have started to develop ties with the community. For a fuller exposition of the background to, and reasons for, the Family ILR policy we have been referred to the judgments in AL (Serbia) v SSHD [2006] EWCA Civ 1619, R (Rudi) v SSHD [2007] EWHC 60 (Admin) and R (Dr Franco) v SSHD [2007] EWHC 407 (Admin).

8. The policy has since been amended a number of times. It is common ground that we are concerned with the current version of the Family ILR policy, embodied in a document dated 21 June 2006 (but taking effect from 12 June 2006). This is headed "One-Off Exercise to Allowing Qualifying Asylum Seeking Families to Stay in the UK". The basic criteria for deciding if a family qualifies for the exercise were twofold:

    1. The applicant made an application for asylum before 02/10/00
    2. The applicant had at least one dependant aged under 18 (other than a spouse or civil partner) in the UK on 2nd October 2000 or 24th October 2003.

9. The application for asylum was further defined as an asylum claim that (i) has not yet been decided, (ii) has been refused and is subject to appeal, (iii) has been refused and there is no further avenue of appeal but the applicant has not been removed, (iv) has been refused but limited leave has been granted; (v) decided in their favour and limited leave to remain as a refugee has been granted. Dependents were further defined as a child of the applicant, their spouse or civil partner who was financially and emotionally dependent on the applicant, and who formed part of the family unit in the UK, on the relevant date (ie 2nd October 2000 or 24th October 2003).

10. Dependants of the qualifying applicant could then qualify for ILR "in line" to the qualifying applicant provided they met the following definition: "a dependant is any spouse, civil partner or child of that applicant, or any child of their spouse or civil partner, who formed part of the family unit in the UK on 24th October 2003".

11. It is important to note that even if a family unit met all the criteria as defined, there were a number of exclusions for example where any member of the family had a previous conviction for a recordable offence.

12. Under the amended policy the Home Office retained a discretion the note to which read:

> "Discretionary consideration
>
> This note sets out the principles which will ordinarily be applied in operating this policy. Consideration will be given to exercising discretion to grant ILR, however, where ILR does not fall to be granted under the terms of the policy set out here. Such discretion will be exercised only in the most exceptional compassionate cases. Families who believe that their circumstances merit consideration on this basis must provide full details and supporting evidence."

13. On 17th December 2004, with the appellant's application for ILR on what I shall call compassionate grounds still pending, the appellant's solicitors made an application for ILR under the Family ILR policy on behalf of both the aunt and the appellant, claiming they came within the basic criteria of the policy. The appellant's solicitors wrote on 10th March 2005 again threatening an application for judicial review. The Secretary of State in a letter dated 30th March 2005 requested further information which was supplied by letter dated 27th April 2005. Another chasing letter was sent on 29th June 2005. An acknowledgment dated 5th July 2005 apologised for the delay but said that the Secretary of State was awaiting verification of certain documents, following which the case would be treated as a "priority". Yet months passed. The appellant's solicitors wrote again on 21st February 2006. When that letter too went unanswered, on 16th March 2006 the appellant's solicitors wrote to her Member of Parliament. This seems to have prompted a reaction, at last, because finally on 30th June 2006, the Secretary of State wrote stating the 2002 application was rejected.

14. The official writing on the Secretary of State's behalf began by commenting that the appellant was an illegal entrant and liable to removal action. He or she acknowledged the appellant's circumstances and her dependence on her aunt as a child but observed that the appellant was by then 18 and of an age when she is expected to be independent of others and able to establish a private and family life of her own. Nevertheless the author went on to consider whether it would be appropriate "exceptionally" to allow the appellant to remain outside the Immigration Rules and whether removal would breach her article 8 rights. He explained as follows: "In these circumstances we are not persuaded that the position of your client's family constitutes a sufficiently compelling reason for making an exception to the normal practice of removing those who have entered or remained in the UK unlawfully". The author of the letter was of the view that insufficient evidence had been produced that the appellant is a blood relative of her aunt as claimed, but even if the appellant is who she claims to be the author considered that the relationship could be maintained satisfactorily from overseas as it was for the 3 ½ years before the appellant came to the UK. It was said there is nothing to stop the appellant seeking entry clearance to visit her aunt and nothing to stop the aunt continuing to send financial assistance. The author noted the life in the U.K. upon which she sought to rely had been established as an unlawful entrant. Balancing the appellant's circumstances with the need to maintain effective border control the Secretary of State decided she should not benefit from her unlawful entry.

15. There has been no appeal from that decision (because of the "high threshold required to be successful in an article 8 case") and no free standing article 8 claim has been advanced on the appellant's behalf in these proceedings. Thus, we are driven back in the present appeal to the 2004 application under the Family ILR policy of which no mention was made in the letter of 30th June 2006.

16. In the summer of 2006, the appellant's solicitors again enlisted the assistance of her Member of Parliament. The Home Office responded in a letter dated 21st August 2006 to the effect that they were "aware" of the appellant's potential eligibility under the terms of the Policy and "we will reach a decision as soon as possible." The appellant's solicitors wrote again to the Member of Parliament on 20th October 2006. This extracted from the Home Office a letter dated 5th February 2007 which said that the information given in the letter of 21st August 2006 was "not correct", that the Home Office had no record of a claim under the Policy, that the aunt had been found to be ineligible for consideration under the Policy on 28th October 2005, and that "As matters currently stand, there is no outstanding action pending on Mrs [sic] Mwangi's case". The letter concluded by suggesting that Ms Mwangi might decide to return voluntarily to Kenya, failing which it threatened enforced removal.

17. The appellant's solicitors wrote to the Home Office on 12th April 2007 re-asserting in some detail the appellant's application under the Policy, stating that the appellant and her aunt had never received the 28th October 2005 decision and again threatening an application for judicial review. The Home Office responded on 1st May 2007. I should rehearse the contents of the letter in full:

> "We write further to your letter 12th April 2007, regarding the consideration of Ann Mwangi on the application of Jane Nyoike for a grant of Indefinite Leave to Remain, (ILR).
>
> Jane Nyoike was refused ILR under the Family ILR exercise as the main applicant on 28th October 2005, the reason for this refusal was that Jane Nyoike had already been granted ILR under her Asylum claim therefore she would not be eligible for an additional grant of ILR under the exercise.
>
> However, the Exercise and its Policy are not so rigid as to not exercise discretion and depart from policy where truly exceptional circumstances exist. However there is no evidence to suggest that there are exceptional circumstances or compassionate grounds in order to justify a departure from policy. Therefore we are satisfied that our decision is correct and in accordance with the Family ILR policy.
>
> We apologise for the delay and any inconvenience caused to your client."

18. Munby J rightly commented in robust terms on the time the decision-making processes took namely from 9th October 2002 until 30th June 2006 to determine the claimant's initial application and from 17th December 2004 until 1st May 2007 to determine the application which is now under challenge. As he observed such delays

would be concerning in any context; in the case of an orphaned child who in October 2002 was not yet 15 years old they are simply unacceptable.

Application before Munby J

19. Before Munby J there were 3 grounds of challenge to the 1st May 2007 decision:

    i. The Secretary of State was wrong to find the aunt did not fall within the Family ILR policy.
    ii. The reasoning in the decision letter of 1st May was inadequate.
    iii. The decision was irrational, unreasonable and or disproportionate.

20. The appellant's case in a nutshell was that her aunt fell within the first limb of the basic criteria of the policy because her aunt had made an application for asylum before 2nd October 2000 and it technically remained "undecided" until she received proper notification. The appellant claimed that she should be treated as a dependent within the policy for the purposes of the aunt's claim and for her own claim in line because of the closeness of her relationship with her aunt. She argued it was "akin to that of parent and child". On that basis, the appellant contended that they missed inclusion in the strict terms of the policy by a whisker. Her circumstances were so exceptional, it was said the Secretary of State was irrational in refusing to exercise his residual discretion in the appellant's favour. Further, to dismiss her circumstances in one sentence in the decision letter was simply inadequate and showed the Secretary of State had failed to address her claim properly.

21. The argument in relation to the first limb of the basic criteria depended upon a close analysis of the aunt's status in the UK. The argument in summary was to this effect: the policy differentiates between two different but related matters: a grant of Refugee status and the subsequent grant of Indefinite Leave to Remain. If a person does not have both of these forms of status at the material time they can benefit from the policy. I do not need to dwell further upon this line of argument because it was not pursued before us. However, there is an overlap between the reasons Munby J gave for rejecting the first ground of challenge and the third. I shall, therefore, summarise what he said.

22. He noted that the Adjudicator decided on 24th July 2000 that the aunt was entitled to protection as a refugee and that there was no challenge to that finding. From then on she was entitled to the full protection of the Geneva Convention. She had the status of a refugee. The only remaining question was the form her immigration status would take in domestic law compatible with her status as an acknowledged refugee entitled to the protection of the Convention. On 13th December 2000 long before the policy under review was introduced the Secretary of State decided to give the aunt indefinite leave to remain which is compatible with her refugee status. There is no question of her being removed. She is not a failed asylum seeker but a successful asylum seeker. She has not been granted limited leave to remain and so is not an individual who may be liable to removal in the future. The administrative and financial benefits intended by the Policy do not follow if the Policy is applied to the aunt. The policy cannot and was not intended to grant the benefit of ILR to someone such as the aunt who already has the benefit of ILR. The aunt was not part of the backlog, she was not someone to whom the policy was ever intended to apply. Munby J at paragraph 36 of his judgment found:

> "36. So the first ground of challenge fails. Neither the aunt, as I have held, nor the claimant as Mr Khubber concedes can bring herself within the Policy.
>
> 37. The simple fact, in my judgment, is that neither the aunt nor the claimant is within either the letter or spirit of the Policy. Their circumstances, where, to repeat, the aunt's status had been determined on 13 December 2000, long before the introduction of the Policy on 24 October 2003, have in truth as Mr Singh correctly submitted, nothing to do with the justification for or the rationale behind the policy"

23. The third ground of challenge follows on naturally and I shall, therefore, take it next. In deciding whether or not the decision was disproportionate, unreasonable, and or irrational Munby J decided that whatever test one applied the appellant failed. He reverted to his findings on ground 1. He repeated that the aunt fell wholly outside the Policy and accordingly the appellant did also. He said this in paras 45 to 48 :

> "45. Mr Singh submits that it was not irrational, unreasonable or disproportionate for the Secretary of State to refuse to treat the claimant as exceptionally eligible under the Policy given that *neither* the aunt nor the claimant was able to bring themselves within the letter of the Policy. As he pointed out, the aunt, for the reasons I have already explained, fell wholly outside the Policy and for that reason alone (and quite apart from the fact that the claimant did not fall within the definition of a dependant) the claimant, he says, also necessarily fell outside the ambit of the Policy and could not benefit from it. As he correctly put it, the Policy is intended to benefit family units – the dependant needs a main or principal applicant to qualify and vice versa. There is, as he says, no scope under the Policy for only one or the other to be included: see, for example, the way in which the "exclusions" are framed by reference to circumstances applying to either the principal applicant *or any* of the dependants.
>
> 46. I agree with Mr Singh, and essentially for the reasons he gives. The simple fact, as I have already said, is that neither the aunt nor the claimant is within either the letter or the spirit of the Policy; and their circumstances have in truth, as Mr Singh correctly submitted, nothing to do with the Policy or with the justification for or rationale behind the Policy.
>
> 47 Mr Khubber submits that the claimant "narrowly missed" all the necessary requirements of the Policy and that what he calls the "near miss aspect" of the case is clearly relevant to the residual discretion under the Policy. The claimant's case is, he says, sufficiently analogous to those who *are* entitled to benefit from the Policy as to bring her clearly within the scope of the residual discretion. Granted the premise, I would have some sympathy for the conclusion that Mr Khubber seeks to derive

> from it, but the flaw in the argument is that this was never a "near miss" case or anything remotely approaching it.
>
> In my judgment, the Secretary of State was plainly entitled to decide as he did and for the reasons he gave. This, to repeat, was never a policy which had anything to do with people in the situation in which the claimant and the aunt found themselves, either on 24 October 2003 when the Policy was announced or on 17 December 2004 when the claimant made her application under the Policy. So how could it be unreasonable or disproportionate, let alone irrational, for the Secretary of State to decide as he did?"

24. As to ground 2, the reasons challenge, Munby J gave it short shrift. He read the decision letter of 1st May 2007 as saying this: 'accepting everything you say I do not accept they show exceptional circumstances justifying departure from the policy'. He saw no reason to believe the Secretary of State had given the decision less than anxious scrutiny. He found there was no room for doubt as to what the Secretary of State had decided and why. He concluded the Secretary of State was not obliged to elaborate further on a subject which did not admit of much elaboration.

Appeal

25. The grounds of appeal as originally drafted and upon which permission to appeal was granted were fourfold. I paraphrase:

    i. There was an error of law in that the Secretary of State failed to address sufficiently or at all the compelling compassionate grounds for granting the appellant ILR either in the decision making process or in the decision letter of 1st May 2007. Accordingly the decision cannot withstand proper judicial scrutiny and Munby J should have so found.
    ii. There was an error of law in that the judge treated the fact the appellant and her aunt cannot meet the basic criteria as being virtually determinative of the issue whether the residual discretion applied to her. The finding the discretion did not apply to her was disproportionate and irrational.
    iii. There was an error of law in that the judge failed to appreciate the "delicate and important relationship between Article 8, the policy under challenge and the scope of a judicial review challenge".
    iv. There was an error of law in that the judge erred in concluding that the appellant's aunt did not meet the requirements of the policy at the material time.

26. Mr Drabble QC who appeared before us on behalf of the appellant put his case a different way. As I have already explained he has abandoned ground 4. He invited us to focus on what he described as the appellant's "exceptional compassionate" circumstances which the Secretary of State appears to have ignored. He conceded that the judge was entitled to conclude the aunt fell outside the "letter" of the Policy, but he took issue with the finding the aunt and the appellant were not within the "spirit" of it, if this was intended to mean that their case was not closely analogous to families who qualify under the Policy. He reminded the court this was a close family unit in

which the criteria of dependence were easily met and in which two blood relations had made claims for ILR. The appellant's claim was still pending when her claim under this policy was launched. He submitted that had the application in this case been made on those facts but with the relationship changed to mother and daughter, the Secretary of State would have been bound to accept her case was analogous to those who came within the letter of the policy.

27. I confess I was troubled with this line of argument given Munby J's clear finding that neither the aunt nor the appellant came within the letter *or the spirit* of the Policy. Munby J heard full argument on the rationale and justification for the policy. We have not. I have, however, done my best to familiarise myself with the Policy and the background to it. The result is, apart from Mr Drabble's reminding us of the appellant's case and his repeated assertion that the appellant's case is closely analogous to those covered by the Policy, I saw and heard nothing to undermine Munby J's finding. Munby J gave what seemed to me to be compelling reasons for his conclusions. I shall summarise: the principal applicant the aunt was never intended to benefit from the Policy and did not fall within its terms. She was not part of the backlog. The potential benefits of the policy did not apply to her. She could not bring herself within limb 1 of the basic criteria as defined in the Policy: she had been given leave to remain long before the Policy was introduced and she had been given indefinite leave to remain. Nor could she not bring herself within limb 2. She has no dependants as defined. Further the appellant herself failed because she is not the child of the main applicant. Thus, there was no qualifying principal applicant and no qualifying dependant. This was not the kind of family unit at which the Policy was directed. They fell a long way short. It cannot be irrational, unreasonable or disproportionate to decline to give the applicant and her aunt the benefit of a policy which had nothing to do with them.

28. Thus, in my judgment, Munby J's conclusions are unassailable. They permit of only one interpretation: the appellant's circumstances have nothing to do with the Policy, the justification for it or the rationale behind it.

29. Nevertheless, I have considered the two further questions which to my mind are interrelated: whether the fact the Secretary of State (whose policy and discretion this is) has raised the question of the residual discretion in his decision letter brings the discretion into play and if so whether his reasoning was adequate/rational.

30. Arguably, it would have been open to the Secretary of State to refuse the application simply on the basis that the claim did not meet the basic criteria as defined and was not the kind of application at which the Policy was directed. The Policy and the discretion were never in play and there was never any scope for the exercise of discretion on the facts here. Mr Drabble did not seem to demur from the proposition that this would have been a course open to the Secretary of State. His only challenge then would have been to the suggestion this appellant's claim was not sufficiently analogous to 'Policy cases' to be entitled to benefit from the Policy under the residual discretion. Had that been his only challenge I have already explained what my approach would have been.

31. I confess I was initially attracted to Mr Drabble's submission that the words "the Exercise and its Policy are not so rigid as to not exercise discretion and depart from policy where truly exceptional circumstances exist" tend to suggest the Secretary of

State, whose policy and discretion this is, appeared to accept the scope for exercising his discretion under the Policy. If so, I also saw force in his submission that on their face the words "there is no evidence to suggest there are exceptional grounds or compassionate grounds" are nonsense. The appellant clearly has evidence of compassionate grounds. If that was all that was required, the terms of the decision letter would raise the question in one's mind as to whether anyone at the Home Office had paid proper attention to the detail of the appellant's claim.

32. However, I see considerable force in Mr Singh's submission that the court should avoid an over legalistic approach to the words of a lay officer: The words must be taken in context which is that the Secretary of State had concluded the policy did not apply to the applicant or her aunt. In that context, there was no evidence to suggest that there are exceptional circumstances of the kind required to justify a departure from the policy. No amount of sympathetic consideration of the appellant's background was going to bring her within the terms of the policy or the spirit of it.

33. I accept the letter could have been better phrased, for example it might have read: "I have considered your application carefully and, for these purposes, I am prepared to accept all that you claim. However, neither you nor your aunt qualify for ILR under the terms of the Policy. You do not meet any of the basic criteria as defined. I have considered whether it would be right to exercise my residual discretion under the policy to grant you ILR. I accept you have produced some evidence of compassionate grounds, but I do not accept the evidence brings you within the ambit of the Policy and or that your circumstances amount to truly exceptional circumstances within the meaning of the Policy. I, therefore, decline to exercise my discretion in your favour."

34. However, comparing the two versions, in my view the appellant would have been no better off had she received my version. The decision remained the same. The reasons remained the same and both were clear. There was no room for doubt about what the Secretary of State decided and why.

35. Thus, I do not accept that the decision letter indicates the Secretary of State has made an irrational or unreasonable decision, failed properly to address the appellant's claim and or failed to provide inadequate reasons. As Munby J observed there was little more explanation he could give.

36. To my mind, there was no error of law as suggested in grounds 1, 2 and 4.

37. I turn to ground 3 and the relevance of Article 8 of the ECHR. In his written submissions Mr Drabble and Mr Khubber criticised Munby J 's rejection of the trio of decisions of the House of Lords put before him by the appellant (Beoku-Betts v SSHD 2008 UKHL 39, Chikwamba v SSHD 2008 UKHL 40 and EB (Kosovo) v SSHD 2008 UKHL 41) as irrelevant on the facts of this case.

38. Mr Drabble conceded, as he must, that there was no free standing Article 8 challenge to the Secretary of State's decision. Nevertheless he sought to persuade us that article 8 remained relevant. The case-law on Article 8 has developed apace, particularly since the letter dated 30th June 2006. This, he submitted, demonstrates that removal of the appellant in these circumstances is highly likely to be held to breach Article 8 and this must be a highly relevant consideration in deciding whether exceptional circumstances exist.

39. The fundamental flaw in this argument is that the claim is based solely on a concessionary policy which I would find does not apply to the appellant. I respectfully agree with Munby J that "no amount of reference to Article 8 or Article 8 jurisprudence can overcome the essential and, in my judgment, insuperable flaws in the claimant's case….."

40. As Mr Singh reminded the court a not dissimilar argument to that relied upon by the Appellant was made by the claimant in R (on the application of De Franco) v SSHD [2007] EWHC 407 (Admin), a case which also concerned the Family ILR Policy. The claimant in De Franco submitted that by not including within its terms someone such as her who had a compelling Article 8 claim, the policy led necessarily to violations of Article 8. The claimant also submitted that the policy amounted to a concession that it was not proportionate to interfere with the family or private life of those who came within its terms, and it was inconsistent and irrational not to have given such a concession to her.

41. Black J rejected this submission. She stated that the flaw in the claimant's case was that the claimant sought to "examine the policy in isolation from the other rights of a claimant in the position of this claimant". She observed:

> "The policy is not intended to be a comprehensive charter of rights but a concessionary policy operating within the wider system of immigration law. It is clear from his analysis that the claimant can, indeed, be said to have a stronger claim to the grant of leave than some of those who are within the policy. However, the policy was not intended to identify all those in the backlog who had a compassionate case to remain, nor was it predicated on the aim that each individual falling within it would have a stronger case for leave than any individual outside its terms. It properly had other objectives than just meeting a compassionate need and the Executive had to be accorded a relatively wide margin of discretion in drafting it. Any criteria were bound to produce anomalies. Had the policy terms excluded the claimant and left her with no means to advance her claim, she may have had a much more persuasive argument that it was irrational. In reality, however, she has or has had other avenues open to her. The most recent redrafting of the policy expressly articulates that consideration will be given to exercising the discretion to grant indefinite leave to remain where it does not fall to be granted under the terms of the policy, albeit that the indication is given that such discretion will be exercised only in the most exceptional compassionate cases. In addition, Miss Giovannetti accepted that the claimant would have a right to advance a fresh claim under Article 8 based on her current circumstances if they met the criteria in paragraph 353 of the Immigration Rules"

42. I respectfully agree with those observations which to my mind are a complete answer to the appellant's attempted reliance on Article 8 as far as this claim is concerned.

43. The appellant here is not without remedy. If she has a legitimate free standing claim to remain in the UK under Article 8, the appropriate course for her is to make further submissions to the respondent under paragraph 353 of the Immigration Rules and invite the respondent to either accept those submissions or treat them as a fresh claim. If she has a strong claim, as has been suggested, that is the appropriate avenue to explore and it should be done sooner rather than later. There has been enough delay in this case already (which has not, I emphasise, been the fault of the appellant). The sooner this case comes to a final conclusion the better.

44. Thus, to my mind, there would be little point in granting the discretionary remedy sought. If this court were to intervene, allow the appeal and quash the decision the result, as Mr Singh submitted, is inevitable. The Secretary of State will declare what has always been his case that the appellant and her aunt are not eligible for ILR under this policy either in accordance with its strict terms or in accordance with the residual discretion. The appellant would be no further forward and more time would have elapsed.

45. The Appellant had a high threshold to meet in order to succeed before Munby J. In essence, she had to show that the respondent's decision that truly exceptional circumstances within the meaning of the Policy were not present in her case was a decision which no reasonable Secretary of State could have arrived at or was otherwise unlawful. Even if he had found the appellant did come within the spirit of the Policy it was not Munby J's role or the role of this court to make findings about what exceptional compassionate factors were present and decide for ourselves whether, had we been in the shoes of the Secretary of State, we would have exercised a discretion in the Appellant's favour. As Lord Bingham observed in R (on the application of Corner House Research and others) v Director of the Serious Fraud Office [2008] UKHL 60, [2008] 3 WLR 568, the following question had to be asked in judicial review proceedings: "The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make" .

46. The appellant faced a second high hurdle in persuading this court Munby J erred in finding the Appellant did not meet this high threshold. I am driven to the conclusion she has failed again. Whether or not the appellant's claim to remain on exceptional compassionate grounds should be reconsidered as Munby J suggested is not a matter for me. The only matter for this court is whether Munby J fell into error and in my judgment he did not. I would dismiss this appeal.

Lord Justice Wilson:

47. With hesitation I agree that the appeal should be dismissed.

48. My hesitation arises out of the terms of the decision letter dated 1 May 2007. Having pointed out that, prior to her applying for a grant to herself and the appellant of indefinite leave to remain under the "one-off exercise" policy dated 24 October 2003, the aunt had already been granted asylum and so was ineligible under the policy, the writer stated:

> "However, the Exercise and its Policy are not so rigid as to not exercise discretion and depart from policy where truly exceptional circumstances exist. However there is no evidence to suggest that there are exceptional circumstances or compassionate grounds in order to justify a departure from policy."

49. It was the view of Munby J. that:

> "There is nothing in the terms of this albeit brief letter which even begins to demonstrate that the Secretary of State did not give the claimant's case the anxious scrutiny to which she was entitled."

I do not share the judge's view of the letter. Mindful though I am of Mr Singh's strictures against seizing too legalistically upon the words "no evidence" in the letter, I consider it more apposite to state that there is nothing in its terms which demonstrates that the Secretary of State *did* give the appellant's case the anxious scrutiny to which she was entitled. The appellant's history of orphanhood in Kenya and her total dependence upon her aunt ever since her arrival in England, as set out in her statement enclosed with the solicitors' letter to the Secretary of State dated 17 December 2004 and, in particular, in their letter dated as late as 12 April 2007 (to which the decision letter was a direct reply), clearly raised a case for consideration on compassionate grounds. Indeed, after announcing his decision at the outset of his judgment, Munby J. had himself suggested that there were "circumstances here that might merit a compassionate reconsideration of her plea to be allowed to remain in this country".

50. Mr Singh sought to mitigate the inadequacy of the decision letter in two ways. First, so he submitted, it should be read not in isolation but in conjunction with the letter of the Secretary of State dated 30 June 2006 by which the appellant's other application for indefinite leave had been rejected. This earlier letter, said Mr Singh, demonstrated that the Secretary of State had borne the allegedly compassionate circumstances well in mind. But, in that he had there refused to accept even that the appellant had established family life with the aunt in England for the purpose of Article 8 of the ECHR 1950, the earlier letter provides no comfort that the Secretary of State had rationally surveyed the appellant's case. Second, so Mr Singh submitted, it was important to note that the decision letter was in response to an application not for discretionary consideration outside the policy but for application of the policy on the basis that the aunt and the appellant fell within its terms. Although this second point has some force, I have been much troubled by the fact that, in the decision letter, the Secretary of State chose to refer to his residual discretion and proceeded to reject its applicability in terms which I regard as irrational.

51. In the end, however, I am persuaded that, in the circumstances of this case, the whole topic of the discretionary consideration provided by way of a footnote to the "one-off exercise" policy dated 24 October 2003 is a red herring. In relation to a policy which allows for departure in exceptional circumstances, "it is important that the starting point against which the exceptional circumstances have to be rated is properly evaluated": per Auld LJ in *R v. N.W. Lancashire Health Authority ex p. A* [2000] 1 WLR 977 at 992H. So the compassionate circumstances fall to be considered not in a vacuum but in the context of the policy. Mr Drabble rightly described the appellant's

case as being that it "fell within the spirit of the policy and hence the residual discretion". I regard it as by no means always straightforward for the decision-maker to conclude whether facts which *ex hypothesi* fall outside the terms of a policy nevertheless fall within its "spirit". In this particular case, however, as both Munby J. and Hallett L.J. have explained, the necessary conclusion is obvious. Quite apart from the exclusion of an aunt/niece relationship from the definition of dependency, which of itself might have been overcome by recourse to the policy's spirit, the aunt's existing asylum status was wholly inconsistent with the purpose of the policy and rendered invocation of it a non-starter. Were we to allow the appeal and thus to quash the decision dated 1 May 2007, the Secretary of State would in my view inevitably reaffirm the decision by reference to the location of the circumstances well outside even the spirit of the policy; and, try though I have, I have been unable to persuade myself that, by the letter dated 1 May 2007, the Secretary of State disentitled himself from taking that conclusive point.

Lord Justice Ward:

52. This young woman arrived in the United Kingdom 7 years ago. She was still 14 when she arrived and her 14 years could hardly have been more traumatic as has already been described. Since her arrival in this country she has lived with her aunt to all intents and purposes as mother and daughter. Are we really going to send her back to Kenya? That question is not for me to answer: it is the Secretary of State for the Home Department who has to decide. I have to decide simply whether his decision was rational and whether he gave adequate reasons for it. I concentrate on the latter aspect.

53. Although Hallett L.J. has fully set out the facts, I wish to highlight some aspects of the history. What I shall call the first application to be granted leave to remain was made on 9th October 2002, five days after the appellant arrived in the United Kingdom. Receipt of that letter was acknowledged on 6th December 2002. It was not until four years later on 30th June 2006 that the application was decided against the appellant. I regard it as quite scandalous that it took the Secretary of State nearly four years to deal with that application and if it had not been for threats to proceed by judicial review the probability, judging that from the way this case has been handled, is that the application would still be lying unattended in the bowels of the Home Office.

54. Meanwhile in August 2004 the policy to allow qualifying asylum seekers' families indefinite leave to remain was extended to those who had a dependent under 18 who was in the United Kingdom either on 2nd October 2000 or 24th October 2003. On 17th December 2004 solicitors acting for the appellant and her aunt applied under the policy making it plain that the application of 9th October 2002 was still pending. That letter enclosed a statement from the appellant giving a detailed account of her circumstances in Kenya and in this country, enclosed certified copies of the death certificates of the appellant's parents and provided a family tree to explain the relationship between the appellant and her aunt. It took 2 ½ years to decide that application and the decision letter of 1st May 2007 is now under challenge in these proceedings for judicial review.

55. Munby J. was scathing about the Home Office's incompetence. He said it was:

> "a depressing commentary on the efficiency of its decision-making processes that it took the Home Office from 9th October 2002 until 30th June 2006 to determine the claimant's initial application and from 17th December 2004 until 1st May 2007 to determine the application which is now under challenge. Such delays would be concerning in any context; in the case of an orphan child who in October 2002 was not yet 15 years old they are simply unacceptable."

Commenting on the last sentence of the letter of 1st May 2007 which ended:

> "We apologise for the delay and any inconvenience caused to your client",

Munby J. observed:

> "'Inconvenience' is the word customarily used to describe the consequences for railway passengers whose train is late, whether by minutes or hours; it might be thought an utterly inadequate word with which to describe the effect on this orphan of having to wait so unconscionably long for a decision from the Secretary of State."

I agree with those criticisms: the state of affairs revealed is nothing short of a national disgrace.

56. The Secretary of State's lamentable conduct forces me to scrutinise his actual decision making with care. Mr Richard Drabble Q.C. makes a number of points which have been dealt with by my Lady, but makes one which, like all good arguments, has compelling simplicity. He submits that the Secretary of State was plainly and simply wrong to write in his decision letter:

> "However there is no evidence to suggest that there are exceptional circumstances or compassionate grounds in order to justify a departure from policy."

57. That is, submits Mr Drabble, and I agree, a tacit admission that if there were exceptional circumstances or compassionate grounds, they could justify a departure from policy. Can it be said, on any view of this case that there was *no* evidence to suggest exceptional circumstances or compassionate grounds, with the emphasis added by me? That admits of only one answer. There was on any and on every view of the facts of this case, an abundance of evidence capable of amounting to exceptional circumstances or compassionate grounds. No reasonable Secretary of State could say otherwise. It would be perverse to decide that this child's tale of woe did not arouse compassion in the heart of anybody with a fluid ounce of the milk of human kindness running through his or her veins. Hear what Munby J. said in paragraph 2 of his judgment:

> "The Secretary of State was entitled to decide as he did and for the reasons he gave. Whether, however, the Secretary of State should now, in the light of all that has happened, proceed to

> remove the claimant, as threatened, is, nonetheless a matter she might care to reconsider. In my judgment, the claimant cannot, and if truth be told, never could, bring herself within the Policy. But I cannot help thinking, nonetheless, there are circumstances here which might merit a compassionate reconsideration of her plea to be allowed to remain in this country."

Again I wholeheartedly agree with the learned judge.

58. He was right to recognise, as I do, that the Secretary of State was entitled to decide whether or not the circumstances of the appellant's life were exceptional enough and whether her plight did justify leave being granted on compassionate grounds.

59. The issue in this appeal is whether the Secretary of State meant what he said when he wrote "There is no evidence to suggest that there are exceptional circumstances or compassionate grounds". The fundamental requirement that reasons must be given for a decision is based on the need for the person affected by the decision to understand why the case was decided against him or her. So what would the appellant have understood upon receipt of that letter, what would any ordinary person think on reading it, what do I think when I read it? Does it mean what it says or do the words "There is no evidence" amount to "Home Office-speak" which upon translation means, "Of course there is bags of evidence to suggest you have had a horrid time and I have read every word of it, pondered deeply upon it but upon careful consideration have concluded that the evidence which you have provided does not amount to exceptional circumstances or compassionate grounds." Where I respectfully differ from Hallett and Wilson L.JJ. is that I refuse to read the letter in that way.

60. My reasons are these:

(1) It is an intelligible sentence written in simple language and the simple words should mean what they say. The words say there is *no* evidence, not that there *is* evidence but that it does not amount to much.

(2) Moreover, the abysmal conduct of the Home Secretary in his or her consideration of this case does not inspire in me any confidence that the decision-maker knew what was happening in this case.

61. Let me explain. On 10th March 2005 the appellant's solicitors threatened to bring judicial review proceedings for the failure to deal with the first application. In that letter they made reference to the second application and commented that the delay of 3 ½ years in considering the application by an orphaned child for leave to remain in line with her nearest surviving relative was by then so prolonged as to be unlawful, pointing to the adverse consequences the long delay was having upon the appellant. The Home Office response of 30th March 2005 was to request further information which was furnished on 27th April 2005. The appellant's solicitors sent a chasing letter on 29th June 2005. On 5th July 2005 the Home Office promised to "treat your client's case as a priority". One is relieved to learn that the Home Office have a sense of humour. But silence followed – inevitably. On 21st February 2006 the appellant's solicitors called for expedition. On 16th March 2006 the appellant tried a change of tactics and referred the matter to her Member of Parliament. His intervention seemed to have jolted the Home Office into action and as a result they made their decision of

30th June 2006 refusing the first application. It did not deal with the second application. So the appellant wrote again to her Member of Parliament asking him to take up with the Home Office their failure to deal with the second application. He must have written to the Immigration and Nationality Directorate for they responded to him on 21st August 2006 thanking him for his letter but "*Mrs* A… W… M… and her family … who have requested that their case be considered under the Family ILR exercise."

The applicant was *Ms* not Mrs M… and one begins to wonder whether confusion was rife. The letter continued:

> "We are aware of Mrs M…'s potential eligibility under the terms of this exercise and she need not apply. I am not able to say precisely when we will know whether Mrs M… and her family qualify but we will reach a decision as soon as possible. If it appears that Mrs M… may be eligible, a Family ILR questionnaire will be issued to allow us to fully consider the case."

62. Two months passed and on 20th October 2006 the appellant again asked her Member of Parliament to press the Home Office for a decision. It took the Home Office 3 ½ months to reply and their reply dated 5th February 2007 said this, again with reference to "the immigration status of Mrs A… W… M…, *known to us as Ms A… W… M…*" (my emphasis):

> "I apologise for the information we gave you in our letter of 21st August as it was not correct. We have reviewed Mrs M…'s case and have no record of receiving a letter from her representative, applying on her behalf, for leave to remain here under the Family ILR exercise. In order to qualify for consideration under the exercise Mrs M… must have claimed asylum before 2nd October 2000 and have dependent children under the age of 18 years on 23rd October 2003. We have no record that Mrs M… claimed asylum or has any dependent children. Therefore she cannot qualify to be considered under the criteria of the ILR exercise.
>
> Mrs M… claims to have arrived in the United Kingdom on 4th October 2002 with the help of an agent. On 9th October 2002 she submitted an application as a dependent of her aunt, Ms J… W… N…. Her aunt was found to be ineligible for consideration under the ILR exercise on 28th October 2005. Mrs M…'s application as a dependent relative was refused on 30th June 2006 with a right of appeal. Mrs M… has not exercised this right. … As matters currently stand there is no outstanding action pending on Mrs M…'s case and in the absence of any compelling compassionate circumstances, she has no basis of stay in the United Kingdom."

Those letters betray such confusion of identity and such a failure to understand the matters put to them that it makes me despair that the Home Office really knew what was happening.

63. On 12th April 2007 the appellant's solicitors again threatened judicial review for the failure of the Home Office to deal with the application for the Family ILR dispensation in response to the application of 17th December 2004. That was the spur which prompted the decision being taken on 1st May 2007.

64. My conclusion from that recitation of the sad history is that I cannot be sure that the Home Office knew which application was before it, who was making it, or on what grounds it was being advanced. Because I have no confidence that the Home Office knew what it was doing from one moment to the next I refuse to grant them any latitude by favourably reading the decision letter as saying that they did know what they were doing, that they did have a great deal of evidence but that the facts thus revealed did not in the judgment of the Home Office amount to exceptional circumstances or compassionate grounds. I prefer to read the letter literally. The Home Office said it had no evidence. That was plainly and simply wrong. Having taken such an eternity to arrive at a decision the least the Home Office could do was demonstrate that it had made some effort to correct its appalling mismanagement of this case and I am not inclined to be forgiving about their failures. In my judgment they must go away and do the job properly. If the answer is as Hallett and Wilson L.JJ. conclude it will be, well so be it. I, for one, will be most interested to learn whether we do have to send this young woman back to Kenya.

65. For my part, however, I would allow the appeal and quash the decision of 1st May 2007 and invite the Home Secretary to reconsider the matter fully and conscientiously.