Neutral Citation Number: [2008] EWHC 3130 (Admin)

Case No: CO/6530/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand. London, WC2A 2LL

Date: 18 December 2008

Before

MR JUSTICE MUNBY

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Between:

R (ANN MWANGI)	**Claimant**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Mr Ranjiv Khubber (instructed by Turpin and Miller) for the Claimant **Mr Sarabjit Singh** (instructed by the Treasury Solicitor) for the Defendant
Hearing date: 10 October 2008

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Judgment

Mr Justice Munby:

1. This is an application for judicial review challenging a decision of the Secretary of State for the Home Department notified by a letter dated 1 May 2007 refusing to grant the claimant the discretionary benefit of a policy ("the Policy") embodied in a document dated 21 June 2006 (but taking effect from 12 June 2006) entitled 'One-off exercise to allow qualifying asylum seeking families to stay in the UK' and sometimes referred to as the 'Family ILR policy'.

2. In my judgment the application for judicial review fails and must be dismissed. 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, truth be told, never could, bring herself within the Policy. But I cannot help thinking, nonetheless, that there are circumstances here that might merit a compassionate reconsideration of her plea to be allowed to remain in this country.

<u>The Policy</u>

3. It is convenient at this point to set out the parts of the Policy which are relevant for present purposes:

> "Introduction
>
> This note sets out the criteria for granting indefinite leave to enter or remain (ILR) outside the Immigration Rules as a result of the concession announced by the Home Secretary on 24 October 2003 to allow certain families seeking asylum in the UK to stay (the "concession" henceforth). It updates and replaces the note "One-off exercise to allow families who have been in the UK for three years or more to stay" with effect from 12 June 2006. All applications considered after that date will be considered in accordance with this note. New applications from persons who have previously applied unsuccessfully under the previous notice will be considered under this revised policy.
>
> Basic criteria of the concession
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> The basic criteria for deciding whether or not a family will qualify for the exercise are:
>
> - The applicant applied for asylum before 2 October 2000; and
>
> - The applicant had at least one dependant aged under 18 (other

than a spouse or civil partner) in the UK on 2 October 2000 or 24 October 2003.

Application for asylum

The initial claim for asylum must have been made before 2 October 2000.

Families will be eligible for the concession where the asylum claim (i) has not yet been decided, (ii) has been refused and is subject to an 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 or (v) has been decided in their favour and limited leave as a refugee has been granted.

Families will not be eligible if after refusal of the initial claim the applicant has been removed or has made a voluntary departure.

Dependants for the purpose of qualifying for the concession

For the purpose of determining whether the basic criteria of the concession are met, a dependant is a child of the applicant, or child of the applicant's spouse or civil partner, who was financially and emotionally dependent on the applicant on the relevant date (i.e. 2 October 2000 or 24 October 2003).

Granting leave in line to dependants

All dependants of the applicant who meet the basic criteria for the concession should be granted ILR.

For this purpose a dependant is the spouse, civil partner or child of the main applicant, or child of the spouse or civil partner, who formed part of the family unit in the UK on 24 October 2003."

The Policy is subject to the following exclusions:

"The concession will not apply to a family where the principal applicant or any of the dependants (using the definition of a dependant as above in "granting leave in line to dependants"):

- have a criminal conviction for a recordable offence;
- have been subject of an anti-social behaviour order or sex offender order;

- have made (or attempted to make) an application for asylum in the UK in more than one identity;
- should have their asylum claim considered by another country (i.e. they are the subject of a possible third country removal, but see also section on third country cases below);
- present a risk to security;
- fall within the scope of Article 1F of the Refugee Convention; or
- whose presence in the UK is otherwise not conducive to the public good."

4. The Policy concludes with this important provision which lies at the heart of the present case:

> "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.
>
> Discretion should not be exercised without referral to a senior officer and **Ministers must always be consulted before discretion is exercised in a case involving a criminal conviction for a recordable offence."**

5. The background to, justification for and rationale behind the Policy have been considered in a number of cases to which I was referred. It is enough for me simply to refer without further elaboration to *AL (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1619, *R (Rudi and Ibrahimi)* v *Secretary of State for the Home Department* [2007] EWHC 60 (Admin), [2007] EWCA Civ 1326 and *R (de Franco) v Secretary of State for the Home Department* [2007] EWHC 407 (Admin). The first two cases ultimately went to the House of Lords: [2008] UKHL 42.

6. More importantly, I should emphasis that there is in the present case no challenge of any kind to the legality of the Policy.

<u>The factual background: the claimant's aunt</u>

7. The claimant's aunt, Jane Wanjiku Nyoike, arrived in this country and claimed asylum at Heathrow on 15 October 1995. Her claim was rejected by the Secretary of State but was allowed on appeal by an Adjudicator on 24 July 2000.

8. On 13 December 2000 the Secretary of State wrote to the aunt. She accepts that she received the letter. In material part the letter said:

> "You have applied for asylum in the United Kingdom. Your application has been carefully considered, and a decision has now been taken to grant you 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 your application is recorded as having been determined is 13th December 2000."

The letter continued:

> "The implications of this decision for your immigration status within the United Kingdom are being considered separately within the Immigration and Nationality Directorate. When that process is complete, you will receive a further letter from your port of entry.
>
> ... You will **not** be eligible to apply for Home Office Travel Documents until you receive the official confirmation of your immigration status."

9. On 29 January 2001 the Immigration Officer at Heathrow wrote to the aunt the letter foreshadowed by the earlier letter dated 13 December 2000. The letter is stamped "Given indefinite leave to enter the United Kingdom."

10. The aunt's case, and derivatively the claimant's case, is that she never received the letter. Thus, on 22 November 2001 an advice centre was writing on behalf of the aunt to the Secretary of State and on 16 December 2003 her solicitors were writing, on each occasion to the effect that she had heard nothing further since receiving the letter dated 13 December 2000. A chasing letter was sent by her solicitors on 3 February 2004 and, on 5 March 2004, a letter threatening proceedings for judicial review. On 29 April 2004 the Secretary of State responded with a letter similar (though making no reference) to the earlier letter dated 29 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."

The factual background: the claimant

11. The claimant was born in Kenya on 10 November 1987. She has had a saddening life. She is an orphan. Her mother, who was HIV positive, drowned herself in January 1999, at the age of 36, when the Claimant was only just 11 years old. Her younger sister, then aged 4, died in April 2000 of malaria. Her father subsequently died the same year of HIV-AIDS. She was then looked after by her mother's family but, she says, was ill-treated by them and ran away to live on the streets. From there she was rescued, she says, in 2002 by an American who worked with street children and who was able to locate her aunt and arrange for her to travel to this country. She arrived on 4 October 2002 and went to live with the aunt. She has been with her ever since.

12. The claimant's factual case is set out in the aunt's statutory declaration dated 9 October 2002 referred to in paragraph [14] below, in the claimant's statement dated 11 March 2004 also referred to in paragraph [14] below and in witness statements by the claimant dated 23 July 2007 and by her aunt dated 15 October 2007. I need not set them out. They show that the aunt is her father's sister and that she had provided financial assistance for her and for her parents and sister in Kenya while they were alive and then until she ran away. The Secretary of State, whilst asserting that the claimant has never provided proper proof of their blood relationship, accepts for present purposes that they are indeed niece and aunt.

13. It is not challenged that, since the claimant's arrival in this country in October 2002, she has lived with and been looked after in every way - materially, financially and emotionally - by her aunt. The claimant is, of course, well aware of her history and knows that her aunt is, indeed, her aunt and not her mother, but, making allowance for that crucial reality, the fact is that the aunt has been *in loco parentis* for the last six years and that the claimant *sees* her, understandably in the circumstances, as being, psychologically and emotionally, her mother. She says - and her statement sets out in plain and simple terms why this is so - that "I see Jane as my mother and I know that she *sees* me as her daughter." Her aunt says that "Ann has always been financially and emotionally dependant upon me since she arrived in the UK ... I see no difference in mine and Ann's relationship to that of any mother and daughter." A letter dated 26 April 2005 from a family worker with a NGO for refugees and asylum seekers in the city where the claimant and her aunt live refers to the "parental care" given by the aunt as having "undoubtedly been to a high standard, with Ann's needs both emotionally and physically being met at all levels."

The application to the Secretary of State

14. On 9 October 2002 the aunt swore a statutory declaration in support of the claimant's application for indefinite leave to remain in the United Kingdom. That application was acknowledged by the Secretary of State on 6 December 2002. On 17 March 2004 the claimant's solicitors wrote to the Secretary of

State enclosing further information in support of the application, including a statement by the claimant dated 11 March 2004.

15. That application, as will be appreciated, pre-dated the original announcement of the Policy on 24 October 2003. On 17 December 2004 (by which time, as will be appreciated, the original application had been outstanding for over two years) the claimant's solicitors made an application under the Policy as it then stood on behalf of both the aunt and (as her dependant) the claimant. The same documentation as had been submitted in support of the previous application was re-submitted.

16. In the continuing absence of any response to the claimant's original application, the claimant's solicitors wrote on 10 March 2005 threatening an application for judicial review. The Secretary of State's response in a letter dated 30 March 2005 was to request information. That information was supplied by the claimant's solicitors under cover of a letter dated 27 April 2005, which, in the absence of any response, was followed up by a 'chaser' on 29 June 2005. An acknowledgment dated 5 July 2005 apologised for the delay but said that the Secretary of State was awaiting verification of certain documents, following which (it was said) the case would be treated as a "priority". Further silence on the part of the Secretary of State prompted a further chaser on 21 February 2006 and when that, too, went unanswered, the claimant's solicitors wrote on 16 March 2006 to the claimant's Member of Parliament, inviting him to approach the relevant Home Office Minister.

17. Eventually, on 30 June 2006, the Secretary of State wrote giving his decision in relation to the original claim made by the claimant on 9 October 2002. Her application was rejected, the Secretary of State deciding that her removal would not breach Article 8. There has been no appeal against that decision. But it is to be noted that the letter did *not* deal with the later application which had been made under the Policy as long ago as 17 December 2004.

18. Following receipt of the decision letter dated 30 June 2006, the claimant's solicitors in a letter dated 25 July 2006 again enlisted the assistance of her Member of Parliament. They told him that "Our client does not wish to pursue an appeal due to the high threshold required to be successful in an article 8 case", but they went on to complain that the Home Office had still not made any decision regarding the other pending application and invited him again to take the matter up with the relevant Minister. The response from the Home Office, in a letter to the claimant's Member of Parliament from the Director General of the Immigration and Nationality Directorate dated 21 August 2006, was to the effect that they were "aware" of the claimant's potential eligibility under the terms of the Policy and "we will reach a decision as soon as possible." Continuing silence prompted the claimant's solicitors to write again to her Member of Parliament on 20 October 2006. This eventually

extracted from the Home Office a letter to the claimant's Member of Parliament dated 5 February 2007 which said that the information given in the letter of 21 August 2006 was "not correct", that the Home Office had no record of the claimant having applied under the Policy, that the aunt had been found to be ineligible for consideration under the Policy on 28 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 the claimant might decide to return voluntarily to Kenya, failing which it threatened enforced removal.

19. This surprising letter prompted a response from the claimant's solicitors, who wrote to the Home Office on 12 April 2007 re-asserting the claimant's application under the Policy, stating that the claimant and her aunt had never received the 28 October 2005 decision and again threatening an application for judicial review.

20. The Home Office responded on 1 May 2007 with the letter setting out the decision rejecting the claimant's application under the Policy which is the subject of the present challenge.

21. It is a depressing commentary on the efficiency of its decision-making processes that it took the Home Office from 9 October 2002 until 30 June 2006 to determine the claimant's initial application and from 17 December 2004 until 1 May 2007 to determine the application which is now under challenge. 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.

The Secretary of State's decision

22. The decision letter dated 1 May 2007 is short. In the circumstances I think I should set it out 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."

23. "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 had to wait so unconscionably long for a decision from the Secretary of State.

The proceedings

24. The application for judicial review was filed on 31 July 2007. The Secretary of State filed an acknowledgement of service and summary grounds of defence on 12 September 2007. The claimant responded on 17 October 2007 with a reply to the defendant's summary grounds. Permission was refused on the papers on 6 November 2007 by Mr Kenneth Parker QC (sitting as a Deputy High Court Judge). Notice of renewal was lodged on 12 November 2007. Permission was granted by Owen J on 11 April 2008. Detailed grounds of defence, settled by counsel, were served on 9 July 2008.

25. The matter came on for hearing before me on 10 October 2008. The claimant was represented by Mr Ranjiv Khubber of counsel, whose skeleton argument was dated 25 September 2008. The Secretary of State was represented by Mr Sarabjit Singh who, appropriately in the circumstances, had not prepared a skeleton argument but relied upon the detailed grounds of defence which he, in fact, had settled. I am grateful to both Mr Khubber and Mr Singh for their submissions.

26. At the end of the hearing I reserved judgment, which I now hand down. I am sorry and apologise for the fact that it has taken as long as it has.

The grounds of challenge

27. On behalf of the claimant, Mr Khubber takes three points. First, he submits that the Secretary of State erred in holding that the claimant's aunt was not within the Policy. (He accepts, as he has to, that the claimant herself was not within the class of "dependants" as defined by the Policy, though stressing that the relationship between her and her aunt is "akin to that of parent and child".) Secondly, he mounts a 'reasons' challenge to the Secretary of State's decision. He says that the reasoning in the decision letter of 1 May 2007 is so brief and jejune that (a) it simply cannot be said that the Secretary of State adequately engaged with the application or gave it the anxious scrutiny to which all such applications are entitled and in any event that (b) it fails adequately to set out why the Secretary of State decided as he did. Finally, he

challenges the decision on grounds of irrationality, unreasonableness and disproportionality.

28. Those are the only grounds of challenge. There is no free-standing claim under Article 8. That, as I have already remarked, was abandoned for the reasons set out by the claimant's solicitors in their letter dated 25 July 2006. Nor is it said that the Secretary of State has misunderstood or misdirected himself in law.

The grounds of challenge: the first challenge

29. Central to his argument on this point is the distinction which Mr Khubber seeks to draw between the Secretary of State's acceptance of someone as a refugee and the granting by the Secretary of State to that person of what Mr Khubber referred to as "refugee status". In the present case, he says, the aunt was accepted by the Secretary of State as being a refugee by the letter dated 13 December 2000, but, the letter dated 29 January 2001 never having reached her, she was not granted refugee status until the letter dated 29 April 2004 was received by her. So, he submits, as at 24 October 2003, the crucial date, he says, in terms of the application of the Policy, the aunt did not have refugee status, for, he says, it is clear from the wording of the crucial paragraph of the Policy defining eligibility that what he calls both aspects -acceptance as a refugee and the grant of refugee status - had to have been satisfied as at 24 October 2003.

30. "The essential point that the claimant makes", he says, "is that the material time for consideration of her aunt's status was 24 October 2003. At this time she had not been given her status as a refugee. As a result the claimant's aunt had satisfied the requirement of this criterion within the Policy."

31. I have to say with great respect to Mr Khubber that I cannot accept any of this. Given that the Secretary of State did not seek to challenge the decision of the Adjudicator on 24 July 2000, the aunt was entitled to protection as a refugee, and was entitled, as a matter of both international and domestic law, to the full protection of the Geneva Convention from that moment on. From that moment on she had, both in international and in domestic law, the status of a refugee. The only question for the Secretary of State was what form of immigration status as defined in our domestic law he was going to grant the aunt, always acknowledging, as indeed his letter dated 13 December 2000 did, that any such status had to be compatible with the Geneva Convention and with her status as an acknowledged refugee entitled to the protection of the Convention.

32. The Secretary of State's decision in that respect was communicated to the aunt in the letter of 13 December 2000, which she accepts she received. The material part of that letter was, as we have seen, in the following terms:

> "a decision has now been taken to grant you indefinite leave to enter in the United Kingdom as a refugee ... The date on which your application is recorded as having been determined is 13th December 2000."

The Secretary of State has never sought to resile from that decision. Indeed, how could she if not to invite immediate challenge on obvious public law grounds?

33. The simple fact, therefore, is that on 24 July 2000 this country recognised the aunt's status as a refugee and on 13 December 2000 the Secretary of State decided, compatibly with that status, to give the aunt indefinite leave to remain. No doubt the bureaucratic procedures involved another step - the formal issue of the appropriate documentation, eventually perfected by the letter of 29 April 2004 - but the die was cast on 13 December 2000.

34. It is convenient at this point to repeat the wording of the crucial paragraph of the Policy defining eligibility. "Families will be eligible for the concession", it states,

> "where the asylum claim (i) has not yet been decided, (ii) has been refused and is subject to an 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 or (v) has been decided in their favour and limited leave as a refugee has been granted."

35. It is quite clear, in my judgment, that the aunt cannot bring herself within any of the limbs of this test. Her asylum claim *had* been decided - on 24 July 2000 - and favourably to her, so she cannot bring herself within paragraphs (i), (ii), (iii) or (iv). And on 13 December 2000 she had been granted *indefinite* leave to remain, so she cannot bring herself within paragraph (v). That is the end of the case on this point. It is as short and simple as this.

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 the 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 Policy or with the justification for or rationale behind the Policy.

38. Moreover, there is the unanswerable point made by Mr Singh, that the Policy is and always was incapable of benefiting the aunt who, to repeat, had

already obtained, long before the Policy was ever introduced, the indefinite leave to remain which is, after all, the very thing - and the only thing - that the Policy grants.

The grounds of challenge: the second challenge

39. The second ground of challenge, as I have said, is that the reasoning in the decision letter of 1 May 2007 is so brief and jejune that (a) it simply cannot be said that the Secretary of State adequately engaged with the application or gave it the anxious scrutiny to which all such applications are entitled and in any event that (b) it fails adequately to set out why the Secretary of State decided as he did. All that is said, to repeat, is this:

> "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."

This is just generic reasoning, says Mr Khubber. Where, he asks rhetorically, is there any engagement in the decision letter with all the specific matters raised by the claimant in her application and supporting documentation? This almost formulaic response, he submits, is simply not adequate in this case given all the data that the Secretary of State had to consider and given the anxious scrutiny required of him.

40. I do not agree with Mr Khubber. 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. Nor is there any room for doubt as to the reason why the Secretary of State decided as he did: the letter makes clear that it was because, on the evidence, there were no exceptional or compassionate grounds sufficient to justify departure from the Policy.

41. I do not read the letter as disputing any of the factual matters put before the Secretary of State by the claimant in support of her application. I read the letter as saying, in effect, 'accepting everything you say as to your circumstances, I do not accept them as showing that there are exceptional circumstances justifying departure from the Policy'. That, although hardly elaborate, is sufficient in my judgment as a statement of the reason for the Secretary of State's decision. His obligation, after all, is to give reasons; he is under no obligation to give further reasons explaining or justifying his reasons. And, when all is said and done, the reason why the Secretary of State decided as he did in this case can be very shortly stated and does not admit of that much elaboration.

42. In my judgment the second ground of challenge fails.

The grounds of challenge: the third challenge

43. The final challenge is on grounds of irrationality, unreasonableness and disproportionality.

44. Mr Khubber submits that the Secretary of State's exercise of what he calls "the residual discretion" was flawed, essentially because:

> i) Although the claimant is not a "dependant" within the letter of the Policy, she and her aunt have always been a 'family unit' of the kind which, he says, is at the heart of the Policy.
>
> ii) The Secretary of State failed to give adequate consideration or to attach sufficient weight (a) to the fact that there was, here, a family unit - a family - of the kind recognised by the Policy and protected by Article 8 and (b) to what Mr Khubber says was the exceptional nature of the circumstances as I have set them out in paragraphs [11]-[13] above, not least the high degree of financial and emotional dependency between the claimant and the aunt.
>
> iii) In particular, there were what Mr Khubber calls "clearly compassionate aspects" to the case: the fact that the claimant is an orphan, the fact that she was only 14 years old when she arrived in the United Kingdom, the fact that she has now lived here and with the aunt for over six years, during all which time there have never been any issues or concerns about the quality of the aunt's care for her, and the fact that she has at all times been emotionally and financially dependent upon the aunt.
>
> iv) Moreover, there has also been considerable delay by the Secretary of State in resolving the claimant's applications.
>
> v) Assessed in the light of all these exceptional and compassionate circumstances the Secretary of State's decision was neither a proportionate response to those circumstances nor, indeed, rational.

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.

48. 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?

49. During the course of submissions there was debate as to whether in this particular context - and in this type of case context is of course everything - the appropriate degree of scrutiny by the court is *Wednesbury* irrationality (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), or super-*Wednesbury* review (see *R v Ministry of Defence ex p Smith* [1996] QB 517) or *Daly* review (see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532). Both Mr Khubber and Mr Singh suggested, albeit for very different reasons, that it did not really matter; Mr Khubber asserting that the *Daly* standard was appropriate, but that even if it was not the decision had to be quashed, whilst Mr Singh asserted that, whatever standard of scrutiny was appropriate, the decision survived unscathed.

50. I agree with Mr Singh. Assuming, though I emphasise without deciding, that the Secretary of State's decision falls to be reviewed by reference to the most stringent standard, I am quite satisfied that it meets the challenge.

51. Accordingly, this ground of challenge also fails.

Conclusion

52. For these reasons this application for judicial review fails and must be dismissed.

53. In refusing permission on the papers, Mr Kenneth Parker QC said this:

> "(1) The claimant's aunt was granted refugee status on 13/12/00 or, at the latest 29/1/01. Whether or not the aunt received the relevant letters, the application for asylum has been granted within the terms of the Family ILR Policy.
>
> (2) The claimant was not a 'dependant' within the Terms of the Policy. Although the decision of 1 May 2007 does not refer to this fact, the claimant accepts that it is the case. The Policy does not extend to those who may arguably have a relationship similar to those specified in the Policy.
>
> (3) The letter of 30/6/06 from the SSHD considered and rejected the claimant's arguments relating to personal circumstances and article 8 rights. There is no proper arguable basis for challenging the rationality of the SSHD's rejection of these arguments."

I can well understand why Owen J subsequently gave permission. But I have to say that the opportunity I have had of listening to fuller and more sustained argument than Owen J had the opportunity of considering during a comparatively brief hearing has led me to the clear conclusion that Mr Parker QC was not merely right but right for the precise reasons which he gave - reasons with which I fully agree and which epitomise exactly my own reasons for dismissing this application.

54. There are two other matters I should add. The first relates to Article 8. In the course of his submissions, Mr Khubber referred me to the recent decisions of the House of Lords in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2008] 3 WLR 166, *Chikwamba* v *Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420, and *EB (Kosovo)* v *Secretary of State for the Home Department* [2008] UKHL 41, [2008] 3 WLR 178. In my judgment they did not assist him. There is, to repeat, no free-standing Article 8 claim before me and, putting it plainly, no amount of reference to Article 8 or to the Article 8 jurisprudence can overcome the essential, and in my judgment insuperable, flaws in the claimant's case based, as it is, exclusively upon the Secretary of State's decision on 1 May 2007 rejecting her application under the Policy. What the impact of those authorities

might be were the claimant even now to mount some free-standing claim based on Article 8 is not a matter which is before me and not something on which it would be proper for me to express any view, one way or the other.

55. The other matter is this. I understand that the claimant's solicitors requested that the substantive hearing should be before a nominated judge of the Administrative Court who is also a judge assigned to the Family Division. There will be cases in the Administrative Court where such a direction is appropriate - and that, after all, is one of the reasons why a number of judges who are assigned to the Family Division have been nominated to sit in the Administrative Court. But this was not, I think, such a case. No such direction had been given by Owen J. And the mere fact that a claim for judicial review is, as here, based on an explicitly "family" immigration policy is no sufficient reason for putting the case before a nominated judge who is assigned to the Family Division, any more than a listing before such a judge is to be justified simply because an application for judicial review is based on a claim to Article 8 protection for "family life." Some such cases may appropriately be directed to be heard by such a judge, but not all such cases will justify such a direction. This, in my judgment, did not. I make these comments not in any way to criticise the claimant's solicitors, who acted completely properly and merely with a view to assisting the court, but to indicate for the assistance of the professions the court's likely approach to such matters.

<u>Permission to appeal</u>

56. Following receipt of the judgment in draft, Mr Khubber sought permission to appeal, submitting helpful written submissions and indicating that he was content that I deal with his application on paper. For my part I am content to do so.

57. I do not understand Mr Khubber to be seeking permission to appeal in relation to the first ground of challenge. He identifies three grounds of appeal: the first relating to the second ground of challenge and the other two relating to the third ground of challenge:

> i) The first ground of appeal is that the decision under challenge was clearly inadequate. Mr Khubber submits that no amount of contextual interpretation can save it from the "stringent" standard of review or even the traditional standard.
>
> ii) The second ground of appeal is that the judgment has failed to address the important issue of the relationship between the scope of the Policy and Article 8. Mr Khubber submits that because the claimant has a viable Article 8 claim (particularly in the light of the new case law referred to at paragraph [54] above) the strength of that claim was relevant to the discretion under the Policy.

iii) The third ground of appeal is that the case raises important issues of law and practice concerning the scope and application of a residual discretion under a discretionary policy which should be further considered by the Court of Appeal. In particular, it is said that (a) this case appears to be one of the first that has had to consider the application of the discretion under the Policy, the previous case law on the Policy not having considered this aspect; (b) the previous challenges failed primarily because they did not engage the target group of the Policy - a family unit - whilst, it is said, this case clearly does; and (c) there are still a number of similar cases concerning, for example, a family unit that does not fall within the definition in the Policy, so a review of this judgment by the Court of Appeal will be of help to others who fall within this class and more generally in relation to the exercise of the discretion.

58. I do not, with respect to Mr Khubber, accept that any of these grounds of appeal would have a real prospect of success. Nor, insofar as the third ground of appeal is said to raise broader questions, do I think that mere is any other compelling reason why the appeal should be heard.

59. So far as concerns the first ground of appeal there is nothing to add. So far as concerns the second ground of appeal I should add this. I dealt with the argument in paragraph [54] and rejected it. My rejection of it was based upon what I referred to as the insuperable flaws in the claimant's case, namely (to make explicit what I had thought was implicit) the matters earlier rehearsed in paragraphs [46]-[48]. The point, in my judgment, was a short one, not admitting of elaboration. As I observed in paragraph [48], the Policy never had anything to do with people in the situation in which the claimant and the aunt found themselves; and if that was so, how could reference to Article 8 assist when there was no free-standing Article 8 claim before me? The second ground of appeal does not seem to me to grapple with this fundamental difficulty.

60. So far as concerns the third ground of appeal I should add this. There may well be issues arising in relation to the residual discretion under the Policy on which the guidance of the Court of Appeal would be of assistance. But this case does not raise such issues - I repeat the points made in paragraphs [46]-[48] - nor is it an appropriate vehicle for exploring such issues.

61. Accordingly I refuse the claimant permission to appeal.