IN THE UPPER TRIBUNAL

R (on the application of Vidales) v Secretary of State for the Home Department) IJR [2015] UKUT 00166(IAC)

Field House
London

8 January 2015

BEFORE

UPPER TRIBUNAL JUDGE ESHUN

Between

MELANIE SALINAS VIDALES

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr J Collins, Kilic & Kilic Solicitors, appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Treasury Solicitor, appeared on behalf of the Respondent.

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JUDGMENT

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JUDGE ESHUN: This judicial review concerns challenges brought by Miss Vidales, a national of Chile born on 25 March 2001, against the decisions of the respondent, Secretary of State for the Home Department, on 19 April 2013, 13 May 2014, 8 August 2014 and 14 August 2014 refusing the applicant leave to remain in the UK. The last two decisions postdate the grant of permission. There was no dispute between the parties that

the last two decisions formed part of the respondent's decision making process and were irrelevant in deciding whether relief should be granted to the applicant.

2. Permission to bring judicial review proceedings was granted on 24 July 2014 by Upper Tribunal Judge Peter Lane on the sole issue whether the Secretary of State is obliged to issue a decision to remove the applicant from the UK under Section 10 of the Immigration and Asylum Act 1999.

The Facts

3. The applicant, who is now 13 years old, was born in the United Kingdom to a mother who is from Colombia and a father who is from Chile. The applicant is a citizen of Chile by virtue of her father’s nationality. At the time of her birth the applicant's mother was in the United Kingdom having made an application to remain in the UK on asylum and refugee grounds. On 12 December 2001 the applicant left the UK with her mother in 2004, and resided in Colombia with her mother and grandmother until 2010. Her grandmother then came to the United Kingdom and the applicant and her mother rejoined her father in Chile.

4. On 7 April 2012 the applicant entered the UK on a valid visit visa and was granted leave to enter for two months, until 7 June 2012 to visit her grandmother who was dying. On 13 June 2012 the applicant made an out of time application for leave to remain in the UK with her aunt, Maria Fernandez Vidales Iruita on Article 8 family life grounds. The application was accompanied by a statement from Maria Iruita dated 6 June 2012. In the statement it was said that the applicant’s mother, who is the sister of Maria Iruita, got involved with bad people and started taking drugs. Their mother, the

applicant's grandmother, begged them to try and keep Melanie here with them in the UK. They mentioned the possibility to the applicant's mother and she was happy about it and told them she would do all the necessary paperwork. It was claimed that the applicant's father who is in Chile has a debilitating condition which prevents him from looking after the applicant. The aunt believed that the applicant would be destitute if she returned to Colombia as her mother is not there to look after her. It is my understanding that the respondent intends to remove the applicant to Chile where her mother is residing.

5. In the respondent's decision of 19 April 2013, it was stated as follows:

> “You were aged 11 at the time you submitted the application and entered the UK on 7 April 2012.
>
> You have failed to demonstrate that you have had twenty years’ residence in the United Kingdom as required by Rule 276ADE(iii).
>
> You have failed to demonstrate that you meet the requirements of Rule 276ADE(iv) as you are aged under 18 but have not lived continuously in the UK for at least seven years.
>
> You have failed to demonstrate that you meet the requirements of Rule 276ADE(v) as you were not aged between 18 and 25 and had lived more than half your life in the United Kingdom.
>
> You do not meet the requirements of Rule 276ADE(vi) as you have failed to demonstrate that you have no ties to your own country. We are aware that your parents live in your

own country, and signed an authorisation allowing you to visit the UK for a short period and to return later.

Therefore your claim is refused under paragraph 276B(e)with reference to 276ADE of HC 395 (as amended).

An application was made on your behalf on 13 June 2012. However, your leave to remain expired on 4 April 2003 [sic]. You therefore did not have leave to remain at the time of your application.

Your application for leave to remain in the United Kingdom has been refused and you no longer have any known basis of stay here. There is no right of appeal against this refusal."

6. On 22 May 2013 the applicant's solicitors submitted to the respondent a Pre-action Protocol letter giving the background to the application. It was submitted that the respondent's decision that the applicant failed to satisfy the Immigration Rules paragraph 276ADE was flawed and not in accordance with the law in that the respondent confined her consideration of the claimant's application under Article 8 to a consideration of whether Appendix FM has been met. It was argued on the applicant's behalf that Article 8 is broader than the provisions of Appendix FM and that her rights under Article 8 would be disproportionately breached by Rule .

7. It was further argued that the respondent erred in failing to take into consideration the best interests of the applicant in contravention of Section 55 of the Borders, Citizenship and Immigration Act 2009. The applicant argued that as a minor, her best interests are a primary consideration in the

determination of any application she makes, and no consideration appears to have been giving to these.

8. It was further argued that the respondent ought to have considered whether or not to set removal directions so that the refusal of her Article 8 claim would have attracted a right of appeal.

9. In a letter dated 13 May 2014 the respondent stated that further to the judicial review claim of 16 July 2013, it had been agreed to reconsider the applicant's applications for further leave to remain in the UK. The respondent stated that she had reconsider the applicant's application under Article 8 taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009 and the Immigration Rules put in place on 9 July 2012. The respondent maintained her original decision. the respondent referred to the fact that leave to remain was granted to the applicant after an interview and checks having taken place due to her arriving unaccompanied and without the required leave to enter. After telephone conversations with her mother in Colombia and her sponsor in the United Kingdom, the applicant was given leave to enter for a period of two months in order for her to visit her dying grandmother. During the conversations that took place the applicant's sponsor stated that the visit was not permanent as the applicant had to start school in her home country and that the visit was in order to see her grandmother whilst she still could. The applicant immediately applied for further leave to remain just before her leave to remain expired. Therefore the applicant has been resident in the United Kingdom from date of entry for two years.

10. The respondent was therefore satisfied that the applicant did not meet the requirements of paragraph 276ADE. The respondent

was also satisfied that the applicant had lived a large proportion of her life in Colombia and that she has close family in her homeland. The applicant had failed to demonstrate that she has no ties (including social, cultural or family) with Colombia and therefore did not meet the requirements of paragraph 276ADE(iv)(vi).

11. The respondent then considered whether to grant the applicant leave to remain outside the Rules and under Section 55. the respondent considered the claims made by the applicant's aunt about the applicant's father and mother, all of which the respondent said had been unsubstantiated. The respondent considered that the applicant was in the care of her mother prior to her arrival in the UK. There appeared to be no concerns regarding the applicant and her grandmother came to the United Kingdom without her. The immigration service contacted the applicant's mother upon her arrival and it was also confirmed that she would be returned to Colombia to continue her schooling. It had been claimed that the applicant's sponsor was sending money to help provide for the applicant. The respondent considered that there was no reason why this arrangement could not continue on her return to her home country. As to the allegation that the applicant's father suffers from a debilitating illness that prevents him from caring for his child, the respondent stated that no evidence of this had be provided to prove this assertion. Therefore this cannot be considered as a proven fact. The respondent stated that all the representations had been considered. However there are no exceptional circumstances or insurmountable obstacles to the applicant's family life being continued overseas. Relationships between the applicant and her parents can be commenced and their family life can continue in Colombia.

12. The respondent noted that whilst the applicant's return to her homeland may involve a degree of disruption to her private life, this was considered to be proportionate to the claim of maintaining effective immigration control and was in accordance with the respondent's Section 55 duties. It was decided therefore that a grant of leave outside the Rules was not appropriate.

13. The respondent pointed out that recent changes to the Immigration Rules governed the way in which entry clearance applications are treated where the applicant has previously breached the UK's immigration laws. The respondent gave various periods where the applicant will be refused entry clearance in most categories if they returned home voluntarily at their own expense following the breach. The respondent finally stated that it is in the applicant's best interests to make her own arrangements to leave the UK as soon as possible.

14. Following the grant of permission the respondent issued two further letters maintaining the original decision.

15. In the letter dated 8 August 2014 the respondent relied on Daley-Murdock v SSHD [2011] EWCA Civ 161 in which the Court of Appeal confirmed that there is no obligation on the Secretary of State to make a removal decision at the same time as refusing leave to remain and that there are sound reasons as to why this is not done as a matter of course.

16. The respondent stated as follows:

> "The Secretary of State will only make a removal decision where there is a request to do so, and where:

- The refused application for leave to remain included a dependent child under 18 who has been in the UK for three years or more; or

- The applicant has a dependent child under the age of 18 who is a British citizen; or

- The application is being supported by UKBI or has been provided evidence of being supported by a local authority; or

- There are other exceptional and compelling reasons to make a removal decision."

17. The respondent stated that the applicant's case does not include a dependent child who has been in the UK for three years or more, or is under 19 years old and a British citizen. There is no evidence to show that the applicant is being supported by the UKBI or by a local authority. Furthermore, there is no evidence of exceptional and compelling reasons to make a removal decision. Therefore the Secretary of State has decided not to make a removal decision on the applicant's case at the present time.

18. In the final letter dated 14 August 2014 the respondent referred to the Pre-action Protocol letter and the judicial review claim suggesting that the respondent should issue a removal decision attracting a right of appeal to the First-tier Tribunal. The respondent stated that the sole ground which the applicant pursued at the permission hearing, and in respect of which permission to apply for judicial review was granted, concerns making a removal decision. It was said this letter was supplemental and should be read in conjunction with

the original decision of 19 April 2013 and the subsequent decision of 13 May 2014.

19. The Secretary of State issued this letter in accordance with her published policy guidance “Request for Removal Decisions”. The letter referred to the original refusal letter which stated that there was no right of appeal against a decision of refusal of leave to remain where the person had no remaining leave at the time the application was submitted. In accordance with the published guidance, the respondent has carefully reviewed her decisions of 19 April 2013 and 13 May 2014 in the light of all available information. The Secretary of State was satisfied that those decisions, for the reasons already given, were correctly made and are maintained.

20. The respondent again went through her removals policy, considered whether or not there are exceptional and compelling reasons to make a removal decision and considered the best interests of the applicant. The respondent again considered that it is in the applicant's best interests to leave the UK voluntarily as opposed to being formally removed as an ovestayer, given that her application for leave to remain has been refused and she has no basis to reside in this country.

21. Mr Collins relied on his skeleton argument which he said sets out that there is a discretion for the respondent in any case in which discretion should be exercised rationally. In this case it was not exercised rationally.

22. He accepted that the applicant is not British and is not a dependent child. He submitted that if the respondent's position is that because the applicant has not resided here for three years she would have no removal decision but would be granted such a decision if she were a dependent child is

nonsensical. In his skeleton argument he argued that the respondent has erred in not adequately or properly considering whether on the facts this is a case where a removal decision should be made even if on a strict reading of the four examples provided, the applicant does not come within any of the four examples' scenarios. Further and in the alternative, he argued that the respondent has conspicuously failed to take into account the need to promote the welfare and best interests of the applicant. It is difficult to concede that the welfare of the applicant is served by leaving her in limbo for a further and indefinite period of time. The applicant should be granted certainty.

23. Mr Collins submitted that she accepts what the Court of Appeal said in Daley-Murdock. He relied on what Sullivan LJ said at paragraph 11 as follows:

> "Mr Blundell accepted that the need to achieve timely decisions where children were involved would be a relevant factor when deciding whether, in any particular case, it would be unfair or irrational not to make a removal decision at the same time as the refusal of leave. However, he submitted, correctly in my view, that each case would be fact sensitive. There might well be cases where it would not be in the child's best interests to make a removal decision rather than, e.g. waiting to see if the family left voluntarily after the end of the school term or year, or after the chid had fully recovered from hospital treatment. In my judgement it is not possible to spell out .. either Section 55 or the Guidance issued there under a general obligation to make a simultaneous removal decision in every case were children are refused leave to remain."

24. Mr Collins argued that in this it is clear that the applicant, who is 13 years old, will not be leaving the UK voluntarily, it being asserted that she would face destitution if returned to Colombia and that there is no one to look after her in Chile. He argued that on any rational view of the facts as well as a rational reading of Daley-Murdock, a removal decision should have been made in the instant case.

25. Mr Collins submitted that the Supreme Court in Patel and Others [2013] UKSC 72 did not disapprove what the Court of Appeal said in Daley-Murdock or the decision by Mitting J in Khan [2012] EWHC 707 (Admin). Mr Collins relied on paragraph 13 of Khan where Mitting J held:

> "Mr Zain Malik, however, goes on to submit that the situation, viewed as of today, involves an unlawful failure on the part of the Secretary of State to take the decision under Section 10. Seventeen months have gone by since the original decision. So, he submits, the time has now arrived at which it would no longer be reasonable for the Secretary of State to decline to make a decision under Section 10. A concession was made to Beatson J in Ferguson v Wilkie and Secretary of State for Justice (misnamed Secretary of State for the Home Department) [2010] EWHC 3756 (Admin)at paragraph 19, which Beatson J noted:
>
> > '... the defendant now accepts that she is under a public law duty to make a decision about enforcement in a reasonable time after making a decision on an application for leave.'
>
> That concession was made in the context of a case concerning two overstayers why had remained in the United Kingdom for many years without leave."

26. Mr Collins submitted that Mitting J accepted that the proposal has merit but declined to make the confession because firstly, there was simply no evidence from the applicant about the circumstances of himself and his sons, which now made it unsafe for the Secretary of State to refuse to make a decision under Section 10, against which he could have, he could have been arrested and which would permit his family circumstances to be considered by the First-tier Tribunal on their merits. Secondly, there was not a hint of this in the claim form.

27. Mr Collins argued that in this case evidence from the aunt was submitted with the applicant's application and later evidence was submitted from the applicant herself. The applicant asked for a removal decision in the Pre-action Protocol application. In Khan there was a delay of seventeen months between the decision and the hearing and in addition to which there was a three month delay by the Secretary of State in deciding the applicant's application which in total came to a delay of twenty months. In this case the delay between the first decision and the hearing is 21 months; in addition to which we have the ten months between the applicant's application for leave to remain and the respondent's decision which comes to a total of 31 months. Mr Collins submitted that on Khan principles the decision is unlawful.

28. Mr Collins then responded to the detailed grounds of defence submitted by Mr Malik. Mr Collins submitted that the applicant has no intention of leaving the UK when there is nowhere for her to go. In her consideration of Daley-Murdock, the respondent failed to consider the examples given at paragraph 11 where there might be instances where in respect of children the removal direction could be made. He submitted that because the respondent ignored the facts of this case,

the respondent's conduct is not entirely rational or lawful in light of paragraph 11 of Daley-Murdock.

29. With regard to the respondent's reliance on the Administrative Court's decision in Oboh and Patel [2014] EWHC 967 (Admin), Mr Collins said he was not challenging this decision. He said that Oboh was challenging the respondent's removal policy itself. What they are saying is that the welfare of the applicant was ignored by the respondent and that the respondent failed to act rationally. Mr Collins emphasised his submission that the applicant made her application in June 2012. She has nowhere to go. She will not leave voluntarily. They want a removal direction which will give rise to a right of appeal. This will enable her to live with her aunt and uncle if the appeal is allowed or removed if the appeal fails. The applicant requires certainty.

30. Mr Malik said that the starting point is the decision in Daley-Murdock, which he argued provides a complete answer to the applicant's submissions. He submitted that Daley-Murdock was an overstayer like the applicant. He submitted that the applicant is not challenging the refusal of leave by the respondent. She is saying that the respondent should have issued a removal decision as well. He submitted that the Court of Appeal in Daley-Murdock .. the policy and objects of the 2002 Act because of the list of appealable decisions in Section 82(2) make it clear that parliament did not intend that overstayers, unlike those who are lawfully in UK with leave, should have a right of appeal against a refusal of leave to remain. Consequently Mr Malik argued that if the Secretary of State makes a removal direction to an overstayer, she would be breaching the 2002 Act.

31. He referred to paragraph 9 of Daley-Murdock where the Court of Appeal considered the evidence of Mr Sainsbury that a substantial amount of people do leave voluntarily following refusal of their applications for leave to remain. The Court of Appeal, however, said that the evidence did not distinguish between those persons in the UK with leave who apply to vary their leave, and overstayers who apply for leave to remain. in the latter type of case it is not irrational for the Secretary of State to proceed on the basis that a significant proportionate of those who have been unlawfully living in the UK and have no right to remain here will leave voluntarily following the refusal of their applications, thus making a removal decision unnecessary. There are, therefore, sound reasons, on grounds of both principle and practice to distinguish between those lawfully in the UK and those who are overstayers, and not to impose an obligation on the Secretary of State to make a removal decision whenever she refused an overstayer’s application for leave.

32. Mr Malik then referred to the argument in paragraph 10 of Daley Murdock where it was said that where the overstayer's family includes children, the duty to have regard to the need to safeguard and protect the welfare of those children imposed by Section 55 of the 2009 Act when coupled with the Secretary of State's Guidance meant that there was a need for the two decisions, refusal of leave and removal, to be taken at the same time. Mr Malik said this argument was rejected by the Court of Appeal who held that it is not possible to spell out of either Section 55 or the guidance issued thereunder a general obligation to make a simultaneous removal decision in every case where children are refused leave to remain.

33. Mr Malik submitted that in this case the Secretary of State’s argument is that it would be in the best interests of the child to leave the UK rather than forcing her to leave.

34. Mr Malik also submitted that the Court of Appeal rejected an argument that the applicant having made a claim under Article 8 of the ECHR, had a right to have that claim determined in a way that was procedurally fair and that the necessary procedural safeguards included a right to appeal to an independent tribunal against the respondent's rejection of her claim. In any event this applicant has not advanced an argument that the refuels of leave to enter is unlawful. There is no obligation on the respondent to grant a removal decision. The applicant's claim under Daley-Murodck is without substance.

35. Mr Malik submitted that the decision in Patel endorses Daley-Murdock and goes a step further. The Court of Appeal held that the powers to issue removal directions under Section 10 of the 1999 Act and Section 47 of the 2006 Act are just that – powers. Neither Section can be read as imposing an obligation to make a direction in any particular case. He added that the Secretary of State’s powers of removal are defined by Section 10 of the 1999 Act and Section 47 of the 2006 Act. The former provides that the person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an Immigration Officer if ... (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave.

36. Mr Malik submitted that the use of the word “may” means that it is a discretionary power.

37. He submitted that Mr Collins' reliance on Khan is misconceived. Khan was decided on 8 March 2011, two years before Patel was decided by the Supreme Court. The tentative observations by Mitting J in Khan had been overtaken by Patel. In this instant case the respondent issued a decision on 13 May 2014. It is not a case where seventeen months passed before a decision was made. The concession which Mitting J referred to in Khan was based on illegal stay of many years. Furthermore, Mitting J's assertion that there is "some arguable merit" in the concession does not establish an obligation on the Secretary of State to issue a removal direction. That argument failed in Patel.

38. Mr Malik submitted that the removal policy was issued by the respondent following the Court of Appeal's decision in Patel. According to the removal policy the Secretary of State can make a removal direction where there are exceptional and compelling circumstances. It is not for the reviewing court to decide if an applicant's circumstances are compelling. They refer to Mr Collins' argument that the appellant says that she will not leave voluntarily and therefore the Secretary of State should issue a removal direction. Mr Malik submitted that this argument was rejected in Oboh. So the fact that the applicant has no intention to leave voluntarily is not a good reason to issue a removal direction.

39. Mr Malik relied on the Upper Tribunal's decision in Khairdin v SSHD [2014] UKUT 00566 (IAC). Mr Malik submitted that the Upper Tribunal referred to Nasseri [2009] UKHL 23 and R (Quila) v SSHD [2011] UKSC 45 where it was held that a judicial review court can rule for example whether there was a violation of Article 8 by the respondent's decision. Mr Malik submitted that the applicant has suffered no prejudice because of a failure to issue a removal direction. She wants to go to

the First-tier Tribunal and argue that the decision was incompatible with her Article 8 rights but this argument has not been pleaded.

40. Mr Malik submitted that the first reference to a request to be issued with a removal direction appeared in the Pre-action Protocol letter dated 22 May 2013. It was said in the letter that the applicant argues that the respondent ought to have considered whether or not to set removal directions so that the refusal of her Article 8 claim would have attracted a right of appeal. The letter did not say that the applicant falls within the removals policy as her case is exceptional.

41. The Pre-action Protocol was issued in the context of the respondent's letter dated 13 May 2014. The applicant did not challenge the context of the letter which also required her to leave voluntarily. Mr Malik said that it has been submitted that the applicant will not leave voluntarily but that is not something the applicant has said to the Secretary of State. In the respondent's refusal letter of 14 August 2014 the respondent said that she had taken into account everything that ws said by the applicant.

42. The respondent also took into account the statement from the applicant's aunt. The allegations made in that statement and the applicant's statement have not been accepted by the respondent. The respondent formed an entirely rational view on the evidence that there were no compelling circumstances in this case. He submitted that the submissions made by Mr Collins amounted to no more than a disagreement with the respondent's decision. The respondent has taken account of all the material submitted by the applicant. She has not taken into account any irrelevant material. On any view, the decision is within the range of responses open to the

respondent. The respondent has rationally declined to issue removal directions and there is no obligation on her to do so.

43. Mr Collins in response submitted that the applicant was not sent a criteria met or not met letter by the respondent. Mr Malik submitted that the relevant letter was the one dated 14 August 2014.

Decision

44. There is no obligation on the respondent to make an appealable removal decision in relation to an overstayer. This is made clear in the decision of the Court of Appeal in Daley-Murdock and approved by the Supreme Court in Patel. It has not been disputed that the applicant is an overstayer and made her application at a time when she had overstayed and had no leave to remain.

45. The request for the respondent to consider whether or not to set removal directions so that the refuel of her Article 8 claim would have attracted a right of appeal was contained in the Pre-action Protocol letter dated 22 May 2013. The letter proposed that the defendant withdraw her decision of 19 April 2013 and make a new decision in accordance with the law not later than three months from the date of the agreement to withdraw the decision currently challenged. Further, should the application be refused, removal directions will be set to enable the applicant to exercise a right of appeal. Following the Pre-action Protocol the respondent wrote a further letter the applicant via her solicitors dated 13 May 2014 containing the original decision. The letter made no reference to the request for the respondent to issue removal directions in this case.

46. Mr Collins argued that the gist of the two most recent decision letters dated 8 August 2014 and 14 August 2014 is to the effect that there are only four scenarios where a removal decision will be made and that the applicant does not come within any of those. He submitted that the respondent failed to take into account the best interests of the child. This factor appears in the guidance under the heading **"Accepting a request for a removal decision"**. The need to promote the welfare of children who are in the UK is a factor a caseworker *must* [my emphasis] consider when making a decision to accept a request. The other two factors are

> Any direct cost in supporting the applicant and dependants being met by the Home Office or a local authority (under Section 21 of the National Assistance Act 1948 or Section 17 of the Children Act 1989), and
>
> Exceptional, compelling and compassionate circumstances

47. Under the same heading the guidance states:

> "You can make a removal decision when requested in the following cases:
>
> - The refused application for leave to remain included a dependent child under 18 resident in the UK for three years or more
>
> - The applicant has a dependent child under the age of 18 who is a British citizen
>
> - The applicant is being supported by the Home Office or has provided evidence of being supported by a local

authority (under Section 21 of the National Assistance Act 1948 or Section 17 of the Children Act 1989), or

- There are other exceptional and compelling reasons to make a removal decision at this time."

48. The guidance then goes on to say that if one or more of the criteria outlined above are met, the caseworker must send the applicant the criteria met letter. Mr Malik submitted that the letter dated 14 August 2014 meets this requirement. Indeed, in this letter the respondent outlined her published guidance and the reference to the scenarios mentioned above that she can make a removal decision where requested to do so. There are the four scenarios. I find that the respondent did consider at page 2 of that letter the welfare of the applicant. The respondent stated as follows:

> "Your client's case does not include a dependent child who has been in the UK for three years or more, or is under 18 years and a British citizen. It is accepted that your client is under 18 but that alone does not bring her within the terms of the published guidance. There is no evidence to show that your client is being supported by UKBI or by a local authority. Furthermore, there is no credible evidence of exceptional and compelling reasons to make a removal decision at this time. In deciding whether or not there are exceptional and compelling reasons to make a removal decision at this time, the Secretary of State has regard to the need to promote the welfare of the children who in the UK, your client's statement dated 15 June 2013 and the statement of your client's aunt dated 6 June 2012. The Secretary of State has considered the best interests of your client as an integral part of her overall assessment. It is noted that the best interests of the children must be

a primary consideration, although not always the only primary consideration; and the children's best interests do not of themselves have the status of the paramount consideration. The assertions made in the statements, including the assertion that your client's mother and her stepfather have a troubling relationship and your client does not want to live with them, even if accepted, do not amount to an exceptional or compelling reason to make her removal decision at this time. The Secretary of State considers that it is in your client's best interests to leave the UK voluntarily as opposed to being formally removed as an overstayer, given that her application for leave to remain has been refused and she has no basis to reside in this country."

49. On this evidence I reject Mr Collin's argument that the respondent did not consider the welfare of the applicant.

50. Mr Collins's argument was that this a child who has nowhere to go. She is in limbo and she will be granted certainty.

51. I accept that the applicant is a child. There is a removal policy which takes into consideration the welfare of the child. This was fully considered by the respondent. The applicant is not in limbo. It is not only the grant of a removal decision that will be her certainty. The respondent did not accept the evidence put forward by the applicant and her aunt in relation to the circumstances of her mother and her stepfather. In any event, the respondent considered that even if they were to be believed, they do not amount to exceptional or compelling reasons to make a removal decision at this time. I find that the respondent's decision was within the range of reasonable responses open to her.

52. Mr Collins argued that the applicant does not wish to leave the UK voluntarily, as a result of which she should be granted a removal direction. The issue of a minority of applicants who refuse to leave the UK voluntarily was considered by the Administrative Court in Oboh [2014] EWHC 967 (Admin). It was argued in Oboh that because only a minority of applicants do not leave voluntarily, it follows that anyone who fails to leave voluntarily is in an exceptional category. Mr Justice Burnett rejected this argument as a nonsensical interpretation of the guidance.

53. Mr Collins argued that in light of the decision in Khan that the delay of 31 months between the original decision made by the respondent and the date of hearing is such that the decision made by the respondent is unlawful and therefore the time has come to issue a removal direction in this case.

54. I find that the circumstances of this applicant's case are different from the concession relied on in Khan. The applicants in the concession made to Beatson J was in the context of a case concerning two overstayers who had remained in the UK for many years without leave. This is very different from this applicant's case. The applicant had overstayed by a short period when she put the application in for leave to remain under Article 8 grounds. Her circumstances were known to the respondent and had not been accepted by the respondent. In any event, paragraph 11 of Khan which was relied on by Mr Collins was in respect of dependent children and their families. That is not the case here.

55. The decision I make is that the applicant's application for judicial review is dismissed.