IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

R (on the application of Patel) v Secretary of State for the Home Department (duration of leave – policy) IJR [2015] UKUT 00561 (IAC)

Field House

Friday, 3 July 2015

BEFORE

UPPER TRIBUNAL JUDGE ESHUN

Between

THE QUEEN (on the application of)
AMITKUMAR PRAVINBHAI PATEL

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr R Sharma of Counsel, instructed Direct Access on behalf of the Applicant.

Mr Z Malik of Counsel, instructed by the Government Legal Department, on behalf of the Respondent

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APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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(1) The decision of the High Court in R (SM & Others) v Secretary of State for the Home Department [2013] EWHC 1144 (Admin) relating to the 2009 Discretionary Leave policy and instruction only applies to cases where the decision to grant leave to remain was made prior to 24 June 2013.

(2) There is no obligation on the Secretary of State to grant ILR or to consider granting ILR in circumstances where no formal application for ILR has been made.

(3) It is legitimate for the Secretary of State to grant leave to remain for 30 months on an application that is decided on or after 9 July 2012 irrespective of when the application was made unless it was made between 9 July 2012 and 6 September 2012: see para [56] of Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74.

JUDGE ESHUN: This judicial review concerns a challenge brought by the applicant, a citizen of India, born on 1 April 1977. He has two dependants, namely, his wife, Daxaben Amitkumar Patel, born on 1 September 1977 and their child, a son, V, born on 23 December 2007. They are also Indian nationals. The applicant challenges the decision of the respondent, Secretary of State for the Home Department, on 10 July 2013 to grant him and his dependants discretionary leave to remain in the United Kingdom for a period of 30 months after his appeal was allowed in the First-tier Tribunal outside the Immigration Rules.

2. Permission to bring judicial review proceedings was granted by Upper Tribunal Judge Gleeson at an oral hearing on 22 September 2014.

3. The applicant raised two grounds. The first ground contended that the Secretary of State acted inconsistently with her duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 (“the 2009 Act”) as elucidated in R (SM & Others) v Secretary of State for the Home Department [2013] EWHC 1144 (Admin); and secondly the Secretary of

State acted unlawfully in applying the provisions introduced by HC 194 and associated policies because the relevant implementation provision provides that they would not apply to applications made before 9 July 2012.

Facts

4. The applicant and his wife arrived in the United Kingdom with entry clearance as visitors on 30 June 2004. Their visit visas expired on 10 December 2004 but they continued to reside here unlawfully. Their child, V, was born in the United Kingdom.

5. On 20 June 2011 the applicant with his wife and child made an application for discretionary leave to remain in the United Kingdom relying on Article 8 of the ECHR. On 22 July 2011, their application was refused by the Secretary of State without a right of appeal. He did not leave the United Kingdom and on 9 December 2011, the Secretary of State issued an appealable decision to remove him under Section 10 of the Immigration and Asylum Act 1999.

6. On 22 December 2011 the applicant lodged an appeal to the First-tier Tribunal against the respondent's decision to remove him. On 13 February 2012 the appeal was heard by First-tier Tribunal Judge Warner and allowed on the ground that the respondent's decision was not in accordance with the law. The First-tier Tribunal found that the respondent had not given consideration to the best interests of the applicant's child, therefore failing to discharge her duty under Section 55 of the 2009 Act when making the decision under appeal. The matter was remitted to the respondent for a lawful decision to be made.

7. According to Mr Sharma, following Judge Warner's determination, further decisions were made by the respondent on 7 March 2012 which were flawed for the same reason as the decision allowed on appeal by First-tier Tribunal Judge Warner. On 30 October 2012 the respondent re-made her decision rectifying the errors and issued an appealable decision in respect of the applicant, his wife and child. The subsequent appeals were heard together by Judge Warner on 7 March 2013. In a decision promulgated on

13 March 2013, Judge Warner allowed the appeals on the ground that the removal of the applicant and his family members from the United Kingdom would be unlawful for being incompatible with Article 8.

8. The Secretary of State, having regard to the First-tier Tribunal's determination, granted the applicant, his wife and child limited leave to remain for 30 months on 10 July 2013. The grant of leave and conditions attached to them were communicated by the Secretary of State in her letter of 9 July 2013 and 10 July 2013.

9. Mr Sharma relied on his skeleton argument. He said the applicant's case raises two grounds. The first ground is the wholesale failure by the respondent to consider Section 55 at the second stage of the decision making, which was when the respondent was considering the length of leave to be granted to the applicant. The second ground is that the applicant ought to have been granted leave that was in place at the time he made his application on 20 December 2011 and not at the date of the decision under challenge, namely 10 July 2013.

10. In relation to the first ground Mr Sharma relied on SM, [57] where Mr Justice Holman held that the relevant 2009 Discretionary Leave policy and instruction document was unlawful because it effectively precluded case specific consideration of the welfare of the child concerned in making the discretionary decision whether to grant discretionary leave or ILR. Further, the policy and instruction failed to give proper effect to the statutory duty under Section 55.

11. Mr Sharma submitted that the issue is not whether ILR should have been granted but whether the respondent considered Section 55 in her decision to grant discretionary leave and whether she applied her discretion when considering how long the leave should be granted for.

12. Mr Sharma submitted that Mr Justice Holman noted that the overarching submission for the Claimants was that

> *"when making decisions concerning children officials must grasp the nettle at the outset and make a realistic appraisal whether 'it is clear from the*

outset that a child's future is going to be in the UK' and make decisions accordingly". [23].

Mr Sharma submitted that in the present case, the respondent is unable to establish that this question had been properly addressed. Given the decision of the First-tier Tribunal, it was undoubtedly clear that the applicant's child's future was in the United Kingdom.

13. Mr Sharma noted that the respondent made reference to R (Alladin and Wadhwa) v Secretary of State for the Home Department [2014] EWCA Civ 1334. He submitted that although the Court of Appeal found that there was a policy in place, it was unlawful for the same reason as in SM; neither applicant had demonstrated that the grant of indefinite leave to remain was more appropriate than following the policy itself.

14. Mr Sharma also made reference to Wadhwa in which the applicant was subject to a removal direction for a number of years. Eventually the Secretary of State decided to grant the applicant leave to remain. The Court of Appeal held that the applicant did not at any stage ask for ILR. Mr Sharma asked me nevertheless to find that the facts in Wadhwa are similar to the facts in this case. The distinct feature in the instant appeal is that Judge Warner found that "it is in the best interests of VP that he remain in the United Kingdom and continue to develop his established private life". He submitted that the best interest of the third applicant to remain in the UK has to be considered in line with the respondent's Section 55 duties at both stages, namely the grant of leave, and the length of leave. There is no evidence at all that the respondent applied her mind to her Section 55 duty in respect of her consideration of the length of leave.

15. Mr Sharma relied on R (NS and others) v Secretary of State for the Home Department [2014] EWHC 1971 (Admin) which held that there can be countervailing considerations which might outweigh the best interests of the child. Mr Sharma submitted that if this is what the Secretary of State was relying on, she has not told us. He submitted that this case can be distinguished from NS because the children in **NS** were British nationals.

The application for leave was made by their mother. Her argument was that the interests of her children should be reflected in the grant of leave to her. He argued that the applicant child in the instant case will be left in limbo because he will be subject to a precarious status when it had been held that his best interest is to remain in the UK. His status affects the family unit as a whole. Additionally it would be difficult for the child coming up to the end of his secondary education and how he will be treated for university fees.

16. Mr Sharma submitted in respect of the first argument that the respondent's failure to give consideration to Section 55 when considering the grant of leave and the length of leave was a flaw.

17. In respect of the second ground, Mr Sharma submitted that the respondent applied the wrong policy and in so doing applied the wrong Immigration Rules in respect of applications under Article 8. He further argued that there was a failure to consider the Respondent's delay in deciding the applications.

18. He relied on the chronology in the background to this claim. The application which gave rise to the current grant of leave was that made on 20 June 2011 well before the new Rules came into force on 9 July 2012. He submitted that prior to 9 July 2012, an applicant on success at an appeal was to be granted three years' leave to remain, extended for a further three years and after six years, was entitled to ILR. It was the six year route to settlement. The new Article 8 Rules were announced by way of a Statement of Changes (HC 194) which provided that:

> "…*If an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012*."

19. Mr Sharma submitted that from 9 July 2012 discretionary leave was put in line with paragraph 276, which was a ten year route to settlement of two and a half years' leave at a time. He submitted that the additional four

years for a minor is significant and amounts to a potential prejudice to the applicant.

20. Mr Sharma submitted that the transitional provisions gave reason to believe that the new Rules would not apply to an application for leave to remain made before 9 July 2012. He submitted that the Court of Appeal considered this particular point in Edgehill and Bhoyroo v Secretary of State for the Home Department [2014] EWCA Civ 402, Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 and Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 74.

21. Mr Sharma submitted that Singh assists the applicant's case because at [79] Lady Justice Arden said that she would not go as far as their Lordships in [40] of the decision and would not say that the distinction made by Mr Blundell is necessarily without foundation or that the reasoning of Jackson LJ necessarily goes so far as to decide that the Secretary of State can never rely on the new Rules in determining an application of the kind referred to or in the implementation provisions. She would urge circumspection about those parts of the old Rules which they have not expressly considered, and leave them open to argument in an appropriate case when they arise.

22. Mr Sharma relied on Chapter 8 Transitional Provisions of the Immigration Directorate Instruction on Family Migration issued in April 2015. He said this has to be read in conjunction with the discretionary leave provisions. He also relied on the Chapter 8 Transitional Provisions which were in force in January 2012. At paragraph 5.1 it states that an application submitted before 9 July 2012 and which was considered and refused against part 8 of the Immigration Rules and his subsequent appeal against the decision to refuse is successful, leave should be granted under the Rules of part 8 in force at the date of application. Mr Sharma submitted that this provision gives weight to the applicant's argument. Further support, he said, can be found in the April 2015 Immigration Directorate Instructions at paragraph 3.1.1, which states "a person who meets the following criteria will remain subject to the Immigration Rules in force as at 8 July 2012 until settlement

(the grant of indefinite leave to remain) even where the application is granted on or after 9 July 2012."

23. The next point made by Mr Sharma was in relation to the delay by the respondent in considering the applicant's application. He submitted that the respondent's further decision made on 7 December 2012 was flawed because it failed to take into account what First-tier Tribunal Judge Warner said in his earlier decision. There was correspondence between the applicant's solicitors and the respondent. The respondent withdrew her decision and it took the respondent two years to make a lawful decision. Mr Sharma submitted that but for the delay, the application would have been considered by the respondent long before 2012. The lack of explanation for the delay strengthens the applicant's application.

24. Mr Malik reminded the court that the respondent granted the applicant and members of his family leave to remain for 30 months.

25. He said the two issues identified in the grounds are firstly whether the Secretary of State is obliged to grant indefinite leave to remain, and secondly whether the Secretary of State is in any event obliged to grant leave to remain for three years. He submitted that there is no obligation on the Secretary of State and that the thirty months' leave granted was lawful and sustainable.

26. In respect of the law Mr Malik submitted the following:

    (1) The guidance given by the High Court in SM only applies to cases where a decision to grant indefinite leave to remain was made prior to 24 June 2013.

    (2) There is no obligation on the Secretary of State to grant ILR or to consider granting ILR in circumstances where no formal application for ILR has been made.

    (3) It is legitimate for the Secretary of State to grant leave to remain for 30 months on an application that is decided on or after 9 July 2012 irrespective of when the application is made.

(4) The general principle in Odelola v Secretary of State for the Home Department [2009] UKHL 25 that Immigration Rules apply when they say they take effect is good law and binding on Lower Courts and Tribunals.

27. Mr Malik asked me to endorse these four points.

28. With regard to the first issue, whether the respondent is obliged to grant ILR, Mr Malik said that Mr Sharma relies heavily on SM and the duty of the respondent in respect of Section 55. He said the respondent's duty was considered in Alladin and provides a complete answer to the applicant's case.

29. Mr Malik said the principal issue in Alladin and Wadhwa was whether the decisions of the Secretary of State to give limited (discretionary) leave to remain as opposed to indefinite leave to remain (ILR) were unlawful because they were made in breach of the Secretary of State's duty under Section 55 of the 2009 Act. Mr Malik submitted that the principal issue in Alladin is not different from the issue in the instant application.

30. Mr Malik said that Miss Alladin, along with her family members, had applied for ILR outside the Immigration Rules relying on Article 8 of the European Convention. ILR was refused but the Secretary of State granted the family three years' DL. Miss Alladin said that the grant of DL for three years was unlawful.

31. Mr Malik submitted that Mr Wadhwa made an application for discretionary leave to remain in the United Kingdom on exceptional circumstances outside the Immigration Rules. The application was refused because the Secretary of State was not satisfied that Mr Wadhwa had provided material evidence of satisfactory reasons in support of his application, and drew attention to the fact that such private and family life as he had developed in this country had been developed whilst he was here unlawfully. At [57] the Court of Appeal discussed the ambit of Section 55. At [70] it held that a striking feature of Mr Wadhwa's case is that at no stage did he make a clear request to the Secretary of State for the grant of ILR. In those circumstances it would be wrong to criticise the Secretary of

State for granting DL in the belief that she was acceding to the only application made. Consistently with the absence of any request for ILR, none of the material sent to the UKBA in support of the application pointed to any disadvantage associated with the grant of DL as opposed to ILR.

32. Relying on the decision in Mr Wadhwa's case, Mr Malik submitted that in the instant application the applicant did not apply for ILR, only discretionary leave and therefore he cannot criticise the Secretary of State for granting him DL.

33. Relying on paragraphs 29 and 30 of Alladin, Mr Malik submitted that the Secretary of State has to act fairly. At [29] of Alladin's case, Mr Gallagher, a civil servant with the Operational Policy and Rules Unit in the Home Office, made a witness statement in which he explained the approach to granting leave outside the Rules, namely discretionary leave, leave to remain and indefinite leave to remain. DL was mostly frequently granted where there were grounds for a claim based on human rights. In developing a system of DL the Secretary of State sought to manage progression to permanent settlement in a way that acknowledges the interests of the country as a whole. In particular, she was concerned to ensure that those who had ignored or could not meet the requirements of the Immigration Rules did not proceed immediately into the permanent residence category ahead of those who have to demonstrate their compliance, and without being able to review their circumstances later to determine whether the further grant of leave was still appropriate.

34. At **[30]** Mr Gallagher continued that DL on Article 8 grounds was normally granted for a period of 30 months, followed by a review to see whether a further period of DL was justified. It was only after a second period of DL that an application for ILR was considered. The Secretary of State considered that this struck a fair balance between the rights of those who could not be removed for human rights reasons and the wider interests of society as a whole. To grant immediate settlement on the basis of overstaying would be to trivialise the requirement to use the lawful routes into the UK and undermine the Secretary of State's ability to manage migration in a manner which the government considers to be in the

interests of society as a whole. Mr Malik submitted that Mr Gallagher's evidence was accepted as rational and endorsed by the Court of Appeal who said at [59] that there can be no doubt that the Secretary of State is entitled in principle to adopt a staged approach to settlement. Even where children are the applicants, it does not follow that the Secretary of State is bound, on a first application, to grant ILR. The considerations outlined in the evidence of Mr Gallagher amount to factors which are worthy of consideration, and deserve to be placed in the balance after the best interests and welfare of the children have been considered. It follows that an applicant who wishes to persuade the Secretary of State to grant her leave to remain for a longer period than that provided for by the state's settlement policy has to do more than point to the fact that she is a child.

35. Mr Malik also relied on [53] where the Court held that it is firmly established by decisions in the Court of Appeal that it is a matter for the Secretary of State to decide whether to exercise her discretion to grant leave to remain, and if so, for how long, relying on IT (Sierra Leone) v Secretary of State for the Home Department [2010] EWCA Civ 787 at [15] per Pill LJ.

36. Mr Malik submitted that this is the second reason why the Secretary of State is entitled to grant DL instead of ILR.

37. His third reason in support of the first argument relies on [11] of Alladin which stated that version 3 of the Home Office Policy on Discretionary Leave was amended on 24 June 2013. Version 3 is the current version. Mr Malik submitted that this version was amended to plug the lacuna identified in SM. This new policy applies in this particular case because the Secretary of State's decision was made after 24 June 2013. **SM** applies to decisions made before 24 June 2013.

38. Mr Malik submitted that the policy in force on 24 June 2013 was considered in NS at [38-41] At [42] the Admin Court concluded that the policy guidance was compliant with the duty under Section 55. He submitted there was therefore no reason for me to depart from NS. He

submitted that SM was decided under the old policy which was subsequently amended on 24 June 2013.

39. Mr Malik further submitted that the claimants in SM were minor children who argued that it was wrong to grant them DL and not ILR. The minor children had made applications for ILR and the Secretary of State had instead granted them DL for three years. In the instant case the application was made by the parents and the application was for DL and not ILR.

40. In respect of the two documents submitted by Mr Sharma, Mr Malik submitted that they support the respondent's case. Page 8 of the April 2015 document at 3.1.1 refers to an application made under part 8 of the Immigration Rules. It permits applications for entry clearance to join parents who are already in the UK. Mr Malik submitted that the applicant's application was for leave to remain outside the Immigration Rules, therefore paragraph 3.1.1 does not assist him.

41. He further submitted that the January 2012 document referred to at [22] at page 11, paragraph 5.1, also refers to an application that is considered and refused under part 8 of the Immigration Rules. Again he submitted that 5.1 does not apply because the application made by the applicant was not allowed under the Immigration Rules.

42. Mr Malik submitted that paragraph 5.2 is applicable. It refers to an application submitted before 9 July 2012 and following refusal at appeal it was considered and allowed on Article 8 family life grounds on or after 9 July 2012, and the Secretary of State is not contesting the determination, leave of 30 months' duration should be granted in accordance with Appendix FM and in accordance with paragraph 276BE. Mr Malik submitted that the grant of 30 months' discretionary leave to remain to the applicant was consistent with this policy. Consequently the first issue should be resolved in favour of the Secretary of State.

43. Mr Malik then made submissions in relation to the second issue i.e. whether the Secretary of State was obliged to grant discretionary leave for three years. Mr Malik submitted that the starting point is the policy in

force in January 2012. He submitted that the applicant's appeal was allowed under Article 8, paragraph 5.2 of the policy. Mr Malik referred to Mr Sharma's reliance on HC194 to argue that the applications were dealt with under the wrong policy. Mr Sharma had argued that HC194 provided:

> "*If an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012*."

Mr Sharma relied on HC194 because he said the application was made before 8 July 2012.

44. Mr Malik submitted that this provision triggered the decision in Edgehill where the Court of Appeal considered the ambit of the implementation provision. At **[21]** the Court of Appeal identified that the sole issue in Edgehill was whether it was lawful to reject an Article 8 application made before 9 July 2012 in reliance upon the applicant's failure to achieve twenty years' residence, as specified in the new Rules. The Court of Appeal at [33] answered that question in the negative. Mr Malik submitted that Edgehill provided artificial support to the applicant's argument. This was because of the Court of Appeal's decision in Haleemudeen, the facts of which he said were not different from Edgehill, as Haleemudeen had also made his application before 9 July 2012. The Court of Appeal rejected the argument that the new Rules should not be applied and held that the new Rules applied in that case.

45. Mr Malik submitted that the conflict was resolved in the Court of Appeal's decision in Singh. The Court of Appeal held that Haleemudeen was decided per incuriam because Edgehill was not cited to it nor was the policy. The Court of Appeal in Singh decided that Edgehill only obtained as regards decisions taken in the two month window between 9 July and 6 September 2012 but if a decision is made outside this window, the new Rules apply.

46. Mr Malik submitted that the decision under challenge in this case was made on 5 July 2013, after 6 September 2012, therefore Singh applied and

the Secretary of State was entitled to apply the new Immigration Rules and policy. Mr Malik submitted that Singh resolved an acute conflict which is binding and should be followed.

47. Mr Malik then noted Mr Sharma's argument that Odelola states that the Immigration Rules take effect when they say they apply. He submitted that Odelola made her application which was pending and during that period the Secretary of State changed the Immigration Rules and refused her application under the new Rules. The argument in Odelola was that the Secretary of State was wrong to apply the new Rules. The House of Lords ruled that the Rules take effect when they say they take effect.

48. Mr Malik submitted that R (Munir) v Secretary of State for the Home Department [2012] UKSC 32 considered Odelola. Lord Dyson endorsed the ratio in Odelola which is still good law and binding on lower Tribunals. Relying on Odelola he submitted that the Secretary of State relied on the Rules in force at the time of her decision.

49. Mr Malik relied on the Court of Appeal's decision in R (Rahman) v Secretary of State for the Home Department [2011] EWCA Civ 814. He said this was about the seven year concession policy which was withdrawn by the Secretary of State and therefore the applicant was not granted ILR. The applicant argued that it was unfair not to be granted ILR. The applicant argued that the withdrawal of the policy was unlawful because it was made without any prior notice, consultation or invitation to make representations. The Court of Appeal at [42] held that the concept of legitimate expectation is normally otiose in cases where there has been no representation, by words or conduct by the public authority in question to the claimant seeking to rely on it. It was said in the judgment that the Secretary of State was entitled to take the view that the policy was inimical to her immigration policy. A Minister is entitled to review, to change and to revoke his policy whenever he considers it to be in the public interest to do so. Thus he would reject any suggestion that the Secretary of State's decision to withdraw the policy was irrational. Nor did she fail to take into account the interests of the children of those seeking to remain here: their interests, as well as those of their parents, are

adequately addressed by the provisions of the European Convention on Human Rights, and in particular Article 8. Relying on this judgment Mr Malik submitted that the Secretary of State was entitled to grant 30 months' discretionary leave to the applicants after the policy came into force.

50. Mr Malik submitted that Mr Rahman had resided in the UK unlawfully. The Court of Appeal held at [45] that there was no unfairness in the refusal to apply the policy to those, such as Mr Rahman, who had been here for more than seven years, and who had not sought to regularise their immigration status before the withdrawal of the policy, and that any reliance on the expectation would not have been legitimate in the sense of giving rise to any right in public law. Mr Rahman entered the UK under leave he obtained by deception. He failed to seek to regularise his family's immigration status after the expiration of his leave. They were here unlawfully. His evasion or avoidance of Immigration Rules disqualified him from establishing any legitimate expectation.

51. Mr Malik also relied on TN (Afghanistan) and others v Secretary of State for the Home Department [2015] UKSC 40 which he said was a classic case of historic injustice. He submitted that the Supreme Court criticised the decision in Rashid [2005] EWCA 744. In R (Rashid) v Secretary of State for the Home Department [2015] UKSC 40 the Court of Appeal held that to hold the Secretary of State to an earlier policy which had been withdrawn by the final stage of the decision making process would infringe the principle established by R (Ravichandran) v Secretary of State for the Home Department [1995] EWCA CIV 16, but this consideration was outweighed by the conspicuous unfairness which there had been. In criticising the reasoning in Rashid, Carnwath LJ described the reasoning as "not altogether convincing", and that it appeared to turn "abuse of power" into a factor able to achieve remedial results not open to the courts in other instances of illegality. He also had doubts about the weight placed by the court on the department's conduct. He said the court's proper sphere is illegality, not maladministration.

52. Mr Malik submitted that the Supreme Court had difficulties with the application of the Rashid principle in DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305, KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014 and EU (Afghanistan) v Secretary of State for the Home Department [2013] EWCA Civ 32. The Supreme Court at [71] overruled Rashid. The Supreme Court held that in Rashid the sloppiness of procedures in the Home Office resulted in the appellant being unfairly denied refugee status when he applied for it; but refugee status is not bound to endure forever. By the time that his case reached the Court of Appeal the source of persecution in Iraq had been overthrown, and the effect of the court's decision was to give him a right which he did not need for his personal protection. Because the Rashid exception to Ravichandran lacks a satisfactory principle, it is also impossible to state its scope with any degree of clarity. The Supreme Court held that the Ravichandran principle applies on the hearing of asylum appeals without exception, and Rashid should no longer be followed. The question of whether the appellant qualifies for asylum status is not a question of discretion. It is one which must be decided on the evidence before the Tribunal or court, and there is no legal justification for abridging that question with the presumption that the appellant is credible arising from a failure of the respondent properly to discharge her obligation in relation to family tracing. Discretionary leave by definition involves a discretion, but it is a discretion which belongs to the respondent and not to the court.

53. Mr Malik submitted that the principle derived in Ravichandran is that a court should look at the facts as at the date of decision. The decision under challenge in this case is 10 July 2013. It cannot be said that the Secretary of State had no regard to Section 55 when the First-tier Tribunal's decision had already considered Section 55. The First-tier Tribunal said it would be in the best interests of the child to remain in the UK and continue to establish his private life. The applicant was entitled to make an application for indefinite leave to remain and had he done so the Secretary of State would have determined it in accordance with the Immigration Rules. He did not make an application for indefinite leave to

remain. He made an application for discretionary leave to remain. Therefore the second issue should also be resolved in favour of the Secretary of State.

54. Mr Malik asked me to endorse the four propositions of law which began his submissions.

Decision

55. I was greatly assisted in this case by the helpful analysis by both parties, in particular, Mr Malik, of the case law they relied on.

56. I was not persuaded that the respondent erred in the manner argued by Mr. Sharma. On the first issue, I find that the applicant got what he applied for, which was discretionary leave to remain.

57. I accept Mr Malik's submission that the Section 55 duty of the respondent was considered in Alladin and that provides a complete answer to the applicant's case. The issue in Alladin was not dissimilar to this case. Miss Alladin and her family members had applied for ILR outside the Immigration Rules relying on Article 8 of the European Convention on Human Rights. ILR was refused on 15 June 2011 but the Secretary of State granted the family three years' DLR until 14 June 2014. Miss Alladin argued that the grant of DLR was unlawful. There was also the Claimant Wadhwa who had made an application for discretionary leave to remain in the United Kingdom on exceptional circumstances outside the Immigration Rules. This was refused. Mr Wadhwa then made further submissions through his solicitors, drawing particular attention to Section 55 of the 2009 Act. He was on 11 April 2013 granted DLR for a period of thirty months.

58. There was a discussion by the Court of Appeal judges on the exercise of the duty under Section 55. Floyd LJ said there could be no doubt in his judgment that the Secretary of State is entitled in principle to adopt a staged approach to settlement. Even where children are the applicants, it does not follow that the Secretary of State is bound, on a first application, to grant ILR. He went on to say that an applicant who wishes to persuade

the Secretary of State to grant her leave for a period longer than that provided for by the staged settlement policy has to do more than point to the fact that she is a child. He went on to say that a striking feature of Mr Wadhwa's case is that at no stage did he make a clear request to the Secretary of State for the grant of ILR. In those circumstances it would be wrong to criticise the Secretary of State for granting DLR in the belief that she was acceding to the only application made. Consistently with the absence of any request for ILR, none of the material sent to the UKBA in support of the application pointed to any disadvantage associated with a grant of DLR as opposed to ILR.

59. I adopt those findings. The applicant made an application for DLR relying on Article 8 outside the Immigration Rules. Other than relying on the conclusion made by the First-tier Tribunal Judge, Mr Sharma did not point to any specific disadvantage to the applicant with a grant a grant of DLR as opposed to ILR. Consequently the Secretary of State cannot be criticised for granting the applicant DLR.

60. I also find that the respondent did not err in law in failing to grant ILR to the family. Given that they had lived in the UK in breach of the Immigration Rules, the grant of ILR would have put them in a more favourable situation than those who have lived here lawfully. The High Court in SM approved the staged approach to settlement. I also hold that it is a matter for the respondent to decide whether to exercise her discretion to grant leave to remain, and if so, how long. This is a principle that has been established firmly in law.

61. In SM the High Court held that the relevant 2009 discretionary leave policy and instruction document was unlawful. This was because it precluded case-specific consideration of the welfare of the child concerned in making the discretionary decision whether to grant DL or ILR and further the policy and instruction failed to give proper effect to the statutory duty under Section 55. For those reasons the claims for judicial review of the claimants were allowed and the Secretary of State was ordered to reconsider each claim with a fresh mind and properly applying Section 55.

62. Following the criticism in SM, the respondent issued a new policy on 24 June 2013. This policy was considered by the Court of Appeal in NS and held to be lawful.

63. At [18] of NS, it was held that the respondent is entitled to adopt a policy whereby those who do not have leave to remain in the UK may be granted discretionary leave to remain because of the particular circumstances of the individual or his family. The following was quoted[1]:

> "*8. I agree with those observations, it follows from the reasoning in that case that where the Secretary of State is adhering to published policy, in exercising a discretion to confer a benefit on someone to which they would not otherwise be entitled, there is no obligation to give reasons for not making an exception to that policy. One cannot draw any inference from the absence of such reasons in the decision letter, let alone the inference that the decision maker has failed to give consideration to whether the case is so exceptional as to warrant departure from policy and grant ILR*."

64. I find that this decision destroys Mr Sharma's argument that it cannot be discerned from the Secretary of State's decision that she exercised her discretion at the second stage when deciding the period of leave to grant to the applicant.

65. In any event, SM was decided under the old policy and that policy was amended on 24 June 2013. The decision in this case was made after SM and therefore the amended policy applied to the applicant.

66. The two documents relied on by Mr Sharma, that is chapter 8 of the 2015 policy guidance and the one dated January 2012 do not assist him. Both documents refer to part 8 which deals with permitted applications to join parents under the Immigration Rules. The application that was made in this case was for leave to remain outside of the Immigration Rules. The applicant's appeal was allowed by FtTJ Warner applying Article 8 outside the Immigration Rules. FtTJ Warner allowed the applicant's appeal on 13

[1] R (Omokayode) v Secretary of State for the Home Department [2014] EWHC 594 (Admin)

March 2013. By the time the respondent granted them leave on 9 July 2013, the policy dated 24 June 2013 was in force and I find that it was correctly applied to the applicant and his family.

67. In light of the above I find in favour of the respondent in respect of the first issue. I find that the grant of 30 months' DLR was consistent with the policy in force at the date of the respondent's decision.

68. I rely on [38-41] of NS, where Mr Justice Parker referred to the relevant policy in this case which is contained in the children's best interests guidance which was prepared following, and in response to, the judgment of Holman J in SM. He said that the guidance was issued in order to ensure that decisions taken under the family and private life provisions of the Immigration Rules, and decisions as to whether to grant leave outside the Immigration Rules are taken in accordance with the duty under Section 55. He went on to state at [39] that the guidance does recognise that even if a longer period of leave was in the best interests of the child involved, "countervailing considerations" might outweigh those best interests. The weighting of competing factors in that manner is not inconsistent with Section 55. The best interests of any child involved must be treated as a primary consideration; they are not required to be treated as the primary or the conclusive consideration. The duty under Section 55 furthermore does not mandate in every case that the decision should conform with the best interests of a child involved: the child's best interests may be outweighed by the importance of other policies affecting the decision (see ZH (Tanzania) v Secretary of State for the Home Department [2011] 2AC 166, at paragraphs 24-26).

69. Mr Justice Parker said at [40] that the guidance does place the initial onus on the applicant to raise the issue of the best interests of the child involved, given the context in which the applicant is seeking a period of leave that is substantially longer than that ordinarily provided by the applicant. The applicant should be in a position to explain what children are involved in the decision, and how in broad terms the interests of the children would be adversely affected if, for example, LTR rather than ILR were granted.

70. He went on to say at [41] that Holman J concluded that the discretionary leave Asylum Policy 1nstruction in that case was unlawful because it effectively precluded the case-specific consideration of the welfare of the children from the discretionary decision whether to grant immediate ILR or limited DL. By contrast, the children's best interests' guidance requires caseworkers to give case-specific consideration to the welfare of any child concerned when deciding whether to grant a longer period of LTR, or ILR to the child's parent. The flaw in the previous policy has been recognised and addressed in an appropriate manner. Parker J concluded that the policy guidance at issue in this case was compliant with the duty under Section 55.

71. In the light of NS**,** I find that Mr Sharma's argument that the respondent failed to exercise a discretion by not granting the applicant and his family ILR as opposed to DL is without merit.

72. The second ground argued by Mr Sharma was that the respondent applied the wrong policy; had she applied HC194, which was the policy in force prior to 9 June 2012, she would have granted the applicant three years' DLR which would have led to ILR after six years, as opposed to relying on the current policy which is a ten year route to indefinite leave to remain. Mr Sharma argued that the additional four years for a minor is significant and that a potential prejudice has been caused to the applicant. The potential prejudice was in respect of the confusion that might be caused to the applicant child in respect of university fees. I find that to be a very weak point. The applicant is 10 years old. There was no evidence of any immediate prejudice to him in the grant of 30 months' DLR. He continues to live in the UK and he continues to establish his family life in the UK.

73. In any event, the conflict caused by the transitional provisions which led to two different decisions in Edgehill and Haleemudeen was resolved by the Court of Appeal in Singh. At [56] of Singh the Court of Appeal held as follows:

> *"56. ...I can summarise my conclusion and the reasons for it as follows:*

(1) When HC 194 first came into force on 9 July 2012, the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That is because, as decided in Edgehill, 'the implementation provision' set out at paragraph 7 above displaces the usual Odelola principle.

(2) But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6 September 2012. As from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in Edgehill only obtained as regards decisions taken in the two-month window between 9 July and 6 September 2012.

(3) Neither of the decisions with which we are concerned in this case fell within that window. Accordingly the Secretary of State was entitled to apply the new Rules in reaching those decisions."

74. The decision under challenge in this case was made on 10 July 2013, after 6 September 2012. I find in light of Singh that the Secretary of State was entitled to apply the new Rules and the policy in force at the date she made her decision.

75. Mr Sharma relied on Odelola where it was held that Immigration Rules take effect when they say they apply. Lord Dyson endorsed the ratio in Odelola.

76. I find that in this case the Secretary of State was doing no more than that when she granted the applicant 30 months' DL in line with the policy prevailing at the time she made her decision. The applicant made his

application in December 2011, before the new Rules came into force on 9 July 2012. However, in light of Singh, the law as it was held to be in Edgehill only obtained as regards decisions taken in the two month window between 9 July and 6 September 2012. The Secretary of State decided to grant the applicant DL on 10 July 2013. It is the date of decision that is applicable and is in line with the Odelola principle. As in all Article 8 cases, it is the evidence at the date of decision that matters. When the applicant made his application in 2011 it was refused by the Secretary of State. His appeal against that decision was allowed only to the limited extent that it was returned to the Secretary of State to re-make the decision taking into account Section 55 of the 2009 Act.

77. A further decision was taken by the respondent again refusing the application which resulted in the appellant's appeal being granted. The judge's decision was promulgated on 11 March 2013 and the Secretary of State's implementation of the judge's decision was on 10 July 2013. In the light of this evidence the Secretary of State was entitled to apply the new Immigration Rules and the policy of granting 30 months' DL.

78. I reject Mr Sharma's argument that there has been a historic injustice in this case. There was no legitimate expectation that when he made his application for DL it would be granted by the Secretary of State and therefore the policy in force in 2011 would have been applicable.

79. In Munir the Supreme Court considered the Court of Appeal's judgment that the Secretary of State had acted lawfully in withdrawing DP5/96 and in determining the transitional arrangements that would apply. The Secretary of State was entitled to review her policy (such as that contained in DP5/96) and to change or revoke it whenever she considered it to be in the public interest to do so. They rejected the argument that the decision to withdraw the policy was irrational or unfair and held that the interests of the children were adequately addressed by Article 8 of the Convention. The Supreme Court noted that there was no challenge to this part of the Court of Appeal's reasoning and that it was plainly correct.

80. The Supreme Court at [34] and [35] held that the Secretary of State was entitled to determine Munir's application by reference to the new Rule.

81. In the January 2012 IDIs paragraph 5.2 applies to the applicant. I have already recited that particular paragraph earlier. This applies to the applicant who submitted his application before 9 July 2012 and following a refusal at appeal it was considered and allowed on Article 8 family life grounds after 9 July 2012. The respondent did not contest their determination and in line with paragraph 5.2 was granted DL for 30 months in accordance with Appendix FM and Article 8 private life grounds.

82. However it is looked at, the argument that the applicant's application was considered under the wrong policy has no merit whatsoever. The applicant had no vested right that he would be granted leave in line with a policy that had been revoked.

83. Following my consideration of the arguments and the evidence, I endorse the four points that were made by Mr Malik at the start of his submissions. They are:

    (1) The guidance given by the High Court in SM only applies to cases where the decision to grant leave to remain was made prior to 24 June 2013.

    (2) There is no obligation on the Secretary of State to grant ILR or to consider granting ILR in circumstances where no formal application for ILR has been made.

    (3) It is legitimate for the Secretary of State to grant leave to remain for 30 months on an application that is decided on or after 9 July 2012 irrespective of when the application was made.

    (4) The general principle in Odelola that Immigration Rules apply when they say the take effect is good law and binding on Lower Courts and Tribunals.

84. The applicant's application for judicial review is dismissed. ~~~~*0*~~~~