UTIJR6

JR/3746/2017

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of VRB

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Jackson

Representation:

For the Applicant:	Ms H Foot of Counsel instructed by Coram Children's Legal Centre
For the Respondent:	Mr Z Malik of Counsel, instructed by the Government Legal Department

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Applicant or his mother. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

JUDGMENT

1. The Applicant, a citizen of Jamaica born on [redacted] 2000, has been granted permission to apply for Judicial Review of the decision of the Respondent dated 31 January 2017 refusing to grant him indefinite leave to remain in the United Kingdom.

2. The Applicant's immigration history is as follows. The Applicant arrived in the United Kingdom as a visitor with his mother on [redacted] 2001, when he was 15

months old. From 25 March 2002, to 29 April 2010, the Applicant's mother made four applications for leave to remain under different categories and/or on a different basis, all of which included the Applicant as her dependent. Three of these applications were unsuccessful, one, an application for an EEA Residence Card as the family member(s) of an EEA national exercising treaty rights was successful with cards issued for the period 2004-2009.

3. On 9 October 2012, the Applicant's mother applied for leave to remain including the Applicant as her dependent (along with the Applicant's brother) which was refused by the Respondent on 10 July 2013. That refusal was reconsidered by the Respondent on 7 May 2014, the refusal being maintained for both the Applicant and his mother, although his brother was granted leave to remain at that point. There was a further reconsideration of the refusal on 6 October 2014 by the Respondent, but the applications were again refused.

4. On 3 June 2015, the Applicant's appeal against the Respondent's refusal of his and his mother's application was allowed and the matter remitted to the Respondent to remake the decision taking into account the best interests of the Applicant as a child in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. The fresh decision by the Respondent was made on 23 October 2015 which again refused the applications for leave to remain. The Applicant and his mother appealed against that refusal and in the course of that appeal, substantial further information was submitted in relation to the Applicant's sexual orientation and past exploitation, with the initial appeal hearing being adjourned to allow the Respondent to consider the further material.

5. On 14 December 2016, one of the Respondent's caseworkers indicated that the Respondent accepted that the Applicant met the requirements set out in paragraph 276ADE(1)(iv) of the Immigration Rules and would therefore be granted leave to remain in accordance with those provisions. Further, it was indicated that the Applicant's mother was considered to be eligible for a grant of leave to remain as the parent of a child whom it was unreasonable to expect to leave the United Kingdom and also that in her own right she met the requirements set out in paragraph 276 ADE(1)(vi) of the Immigration Rules such that she would also be granted leave to remain.

6. On 15 December 2016, the Applicant's representatives wrote to the Respondent making a detailed request for exercise of the Respondent's discretion to grant the Applicant indefinite leave to remain rather than a period of limited leave to remain. This was on the basis that it would be appropriate and in the Applicant's best interests, to safeguard and promote his welfare and because of the exceptional compassionate circumstances of his case. The pertinent facts of his case, all of which were already known to the Respondent, were set out in summary in the letter as follows:

    - *[The Applicant] entered the United Kingdom in October 2000 [this date was corrected in subsequent correspondence to 2001] when he was 15 months old. He's lived in this country ever since then.*

- *[The Applicant's] father was imprisoned and then deported from the United Kingdom when [the Applicant] was still at primary school. He is now imprisoned again, in the USA, and [the Applicant] is unable to maintain a close relationship with him.*

- *At the age of 11 years old, [the Applicant] was raped by stranger when he was on his way home from a friend's house. [The Applicant] did not feel able to disclose this experience to anyone for almost 2 years.*

- *[The Applicant] is bisexual and this is causing both internal conflict and conflict within his family. He has also experienced bullying at school as a result of his sexuality. [The Applicant] has spent the past years anxiously thinking that he might be returned to Jamaica, where he is aware that he would very likely face violent abuse as a result of his sexuality …*

- *[The Applicant] has been the victim of Child Sexual Exploitation in the UK and was assessed by the Independent Social Worker Christine Brown to be at continued risk …*

- *[The Applicant] is of good character and has no criminal convictions. He is an ambitious 16-year-old who, despite a difficult background and traumatic experiences, is determined to move forward with his education, work and make a positive contribution to the community. He wishes to go to university and help other boys and young men who have experienced similar difficulties to himself.*

7. Detailed submissions were then made on the Applicant's behalf by reference to the Respondent's policies on discretionary leave and grants of leave to remain on a longer than standard basis; Article 8 of the European Convention on Human Rights; section 55 of the Borders, Citizenship and Immigration Act 2009 and the UN Convention on the Rights of the Child. I set out below two further paragraphs contained within the representations made on the Applicant's behalf which provide specific reasons based on his circumstances as to why grant of indefinite leave to remain would be appropriate in his case.

"We submit that [the Applicant] must be granted ILR in the United Kingdom in order to safeguard and promote his welfare, to protect him from further maltreatment and harm, and to prevent the impairment of his health or development. We further submit that it is only through the grant of indefinite leave to remain that [the Applicant] will be afforded, 'optimum life chances […] to enter adulthood successfully'. We refer once again to Christine Brown's report […]. We also remind you that, to date, [the Applicant's] family's immigration problems have been a great cause of stress and tension within his family as a whole. [The Applicant] is a child who has experienced traumatic conflict in his familial relationships due to his family's disapproval of his sexual orientation. These difficulties have been exacerbated by the family's overall situation, including their immigration problems. We submit that, in accordance with her section 55 duties, it is incumbent upon the SSHD to take all possible steps to assist [the Applicant] to establish and maintain healthy and supportive family relationships that will continue into his adult life. The grant of ILR to [the Applicant] would remove the anxiety and financial cost to his mother of having to make further immigration applications on his behalf, and would constitute a positive step that the SSHD could take to ensure [the Applicant's]

welfare and best interests are protected over the long term. We remind you once again that this matter must be considered from [the Applicant's] perspective and not that of his mother or anyone else.

[...]

A grant of ILR to [the Applicant] would not be detrimental to the SSHD or the British public, but it would make an overwhelming difference to this vulnerable young person. It would enable him to feel safe and accepted; to understand that his presence in the United Kingdom is permanent and feel that he has the same rights and entitlements as his peers. Importantly, in providing certainty and security it would assist [the Applicant] to achieve his goals of a university education, employment and a successful career thereafter. A grant of limited leave to remain will continue to cause significant anxiety to [the Applicant] who has already experienced abuse and rejection over a prolonged period of time. All of the evidence in this case shows that [the Applicant] is a vulnerable young person, who very much needs to feel a sense of acceptance, belonging and permanency. [...]"

8. The report of the Independent Social Worker, Christine Brown dated 1 December 2016 was available in full to the Respondent and set out in detail the Applicant's history, family situation, trauma and exploitation suffered by the Applicant and the multiple agencies involved in assisting the Applicant. His current circumstances and support were set out as well as his likely future needs and possible risks. Ms Brown reaches a clear and reasoned conclusion that it is in the Applicant's best interests to be granted indefinite leave to remain. In particular, Ms Brown states:

"At this stage in his life, a time of uncertainty and flux for most young people, [the Applicant] has the additional emotional burden of having been the victim of abuse. [The Applicant], as he does progress, now wants to be on parity with his friends and his associates, to be able to go to University and work to develop personal closer partner relationships. Even now, [the Applicant] is beginning to lose pace in this aspect of his life, as his friends and peers begin to find work, start to gain a sense of independence and, to begin to consider the next places of study, all aspects of the next stage of his life that currently eludes [the Applicant]. In order to provide [the Applicant] with the optimum life chances and to meet [the Applicant's] best interests socially, psychologically, and educationally, and to provide [the Applicant] with certainty and reassurance, [the Applicant] should be granted indefinite, rather than temporary, leave to remain in United Kingdom. [The Applicant] has spent his adolescence with the uncertainty of his immigration status, which for many young people that I encounter, in itself is a cause of anxiety and associated mental health issues aside from the complexity of [the Applicant's] past life."

9. The Respondent also had before her at that time a number of other letters and documents from the other agencies and organisations involved in supporting the Applicant (including from the Applicant's school, Child and Adolescent Mental Health Services, the Children's Society and social services), setting out their view of his history, current circumstances and needs.

10. On 31 January 2017, the Respondent issued the Applicant with a biometric

residence permit for a limited period of leave to remain and in a separate letter of the same date, refused to grant him indefinite leave to remain. The substance of that separate letter, headed 'Decision on Indefinite Leave to Remain' stated as follows:

"With regards to your claim the client should be granted indefinite leave to remain, our published policies state that:

"There may be particular compelling circumstances where someone may request either limited or indefinite LOTR. Any such case should be considered on its individual merits and in line with any relevant policy at the time. Caseworkers/immigration officers should always give full consideration to whether someone first qualifies under the provisions of the Immigration Rules, or the Humanitarian Protection and Discretionary Leave criteria for any relevant policy instruction.

It is not possible to give instances or examples of case-types that might be defined as 'particular compelling circumstances'. However, grants of such LOTR should be rare, and only the genuinely compassionate and circumstantial reasons or where it is deemed absolutely necessary to allow someone to enter/remain in the UK, when there is no other available option."

Your client has never previously applied or mentioned indefinite leave to remain on his previous applications. He has never raised any circumstances as to which he should be granted indefinite leave to remain. Your client applied and paid originally on a limited leave to remain application form and has therefore been granted the maximum period of leave possible. It is not accepted that your client will meet the rules for a grant under indefinite leave to remain as he's remained in the UK without any form of leave to remain for several years. To meet the rules for indefinite leave to remain an applicant is expected to serve a probationary period with leave to remain here in the UK.

We have taken into consideration the social workers report with regards to your client being granted indefinite leave to remain in the UK. However as explained above your client cannot meet indefinite leave to remain rules and it is not considered that granting indefinite leave to remain would be a solution to your client's situation."

11. The Applicant, following an exchange of pre-action correspondence, issued this application for Judicial Review on 24 April 2017, challenging the Respondent's decision of 31 January 2017 to refuse to grant him indefinite leave to remain on the following grounds:

(i) the Respondent unlawfully fettered her discretion to grant the Applicant indefinite leave to remain;
(ii) the decision is in breach of the Respondent's policy;
(iii) the decision fails to discharge the Respondent's duties under section 55 of the Borders, Citizenship and Immigration Act 2009 and the UN Convention on the Rights of the Child;
(iv) the decision fails to take into account material considerations in the Applicant's favour and/or takes into account immaterial considerations.

Legal and policy framework

12. By virtue of section 3(1)(b) of the Immigration Act 1971, the Secretary of State has a general discretion to grant a person leave to enter or remain either for a limited or for an indefinite period. Pursuant to section 3(2) of the same, she shall from time to time lay before Parliament statements of the rules as to the practice to be followed in the administration of the 1971 Act regulating entry into and stay in the United Kingdom of persons required to have leave, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances.

13. Paragraph 276ADE of the Immigration Rules sets out the requirements for a person to be granted leave to remain in the United Kingdom on the basis of private life. The following provisions of paragraph 276BE then set out the grant of leave to remain which would normally follow:

(1) Limited leave to remain on the grounds of private life in the UK may be granted for a period not exceeding 30 months provided that the Secretary of State is satisfied that the requirements in paragraph 276ADE(1) are met or, in respect of the requirements in paragraph 276ADE(1)(iv) and (v), were met in a previous application which led to a grant of limited leave to remain under this sub-paragraph. Such leave shall be given subject to a condition of no recourse to public funds unless the Secretary of State considers that the person should not be subject to such a condition.

(2) Where an applicant does not meet the requirements in paragraph 276ADE(1) but the Secretary of State grants leave to remain outside the rules on Article 8 grounds, the applicant will normally be granted leave for a period not exceeding 30 months subject to a condition of no recourse to public funds unless the Secretary of State considers that the person should not be subject to such a condition.

14. The Respondent's policy 'Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b - Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (August 2015)' provides guidance to caseworkers as to grants of leave to remain on the basis of private life and provides, so far as relevant to this claim, as follows:

Longer grants of leave

Settlement in the UK is a privilege, not an automatic entitlement. Unless there are truly exceptional reasons, the expectation is that applicants should serve a probationary period of limited leave before being eligible to apply for indefinite leave to remain (ILR) if they meet the requirements.

However, there may be rare cases in which a longer period of leave is considered appropriate, either because it is clearly in the best interests of the child (and any countervailing considerations do not outweigh those best interests), or because there are other particular exceptional compelling reasons to grant leave for a longer period (or ILR).

If the applicant specifically requests a longer period of leave than 30 months, or ILR, and provides reasons as to why they think a longer period of leave or ILR as appropriate in

their case, the decision-maker must consider this. See Section 11.3 of this guidance for information on how to make this decision if the applicant is a child or a parent.

In cases not involving children (as the main applicant or as dependents), there must be sufficient evidence to demonstrate individual circumstances are not just unusual but can be distinguished a high degree from other cases to the extent that it is necessary to deviate from the standard grant of 30 months' leave to remain.

In all cases the onus is on the applicant to provide evidence as to why they believe that a longer period of leave (or ILR) is necessary and justified on the basis of particular exceptional compelling reasons. Where the decision-maker considers that a longer period of leave may be justified the case must be referred to a senior caseworker for further consideration. If the decision maker decides that the case is not sufficiently exceptional or compelling, they should grant 30 months' leave outside the Rules, and explaining in the decision letter why this has been granted.

If the applicant does not make a request for a longer than standard period of leave, or if they make a request without providing any reasons for why a longer grant of leave is appropriate, the decision-maker should grant 30 months' leave outside the Rules.

15. Section 11.3 referred to above, includes, inter-alia, as follows:

There is discretion to grant a longer period of leave where appropriate. There may be cases where a longer period of leave outside the Rules is considered appropriate, either because it is clearly in the best interests of the child (and any countervailing considerations do not outweigh those best interests), or because there are other particular exceptional compelling reasons to grant limited leave for a longer period, or to grant ILR. The onus is on the applicant to establish that the child's best interests would not be met by grant of 30 months' leave to remain and that there are compelling reasons that require a different period to be granted. This means that the decision maker should only consider whether to grant a longer period of leave or ILR if (a) the applicant has specifically asked for this, and (b) they have provided their reasons for why they think a longer period of leave or ILR is appropriate.

...

Where a decision is taken to grant ILR to a child because it is considered to be in their best interests, this does not necessarily mean that the parent(s) or primary carer should be granted ILR in line. It will normally be appropriate to grant a period of limited leave of 30 months to the parent(s) or primary carer unless they can demonstrate exceptional compassionate circumstances in their own right that warrant a departure from this policy.

Discussion

16. The Applicant's claim relies on the Respondent having a general discretion to grant leave to remain outside of the Immigration Rules, including for a longer period than envisaged under the Immigration Rules or indefinitely by virtue of her general power under section 3(1)(b) of the Immigration Act 1971. Further, that the Respondent's own policy guidance set out above, specifically envisages this, particularly in the case of a child, albeit it is acknowledged that more is

required than the simple fact that an applicant is a child.

17. Ms Foot submits that there is a two-stage process in determining an application, first for the Respondent to determine whether to grant leave to remain and secondly, if so, to determine for what period and on what conditions leave to remain should be granted. In the second part of the decision (as in the first part), the Respondent is required to have regard to the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009 and the UN Convention on the Rights of the Child.

18. The Applicant's claim under the first two grounds of challenge is simply that the Respondent has only considered the request for indefinite leave to remain under the Immigration Rules and has refused to consider whether to exercise her discretion to grant indefinite leave to remain outside of the Immigration Rules. In so refusing to even consider the exercise of discretion (as opposed to refusing to exercise it for substantive reasons), the Respondent has closed her mind to the representations and evidence supporting the request and not considered it; nor has she expressly considered the best interests of the Applicant, nor provided any reasons for the grant of a limited period of leave to remain.

19. The Respondent's primary submission is that there is a complete answer to this claim, in short, because there is no obligation on the Respondent to even consider granting the Applicant indefinite leave to remain in the absence of a 'formal application for ILR'. Mr Malik, for the Respondent, in oral submissions stated that the whole claim turns on the 'formal application' point and appeared to accept that if that was not needed, there was merit in the Applicant's remaining grounds of challenge.

20. On the 'formal application' point, Mr Malik relied upon the Upper Tribunal decision in R (on the application of Patel) v Secretary of State for the Home Department (duration of leave - policy) IJR [2015] UKUT 00561 (IAC), in which Upper Tribunal Judge Eshun accepted his submission on behalf of the Respondent that there was no obligation on the Secretary of State to grant indefinite leave to remain or to consider granting the same in circumstances where no formal application for it had been made and that the Secretary of State could not be criticised for responding to the only application made. In the present case the application was not for indefinite leave to remain and the grant of a limited period of leave to remain was therefore appropriate and lawful.

21. Mr Malik sought to rely on Patel further by equating a 'formal application' with a 'valid application', a defined term under paragraph 34 the Immigration Rules with specific formalities, including use of a specified form for, in this case, indefinite leave to remain and payment of the appropriate fee. In the present case, the form used was for limited leave to remain and the fee paid was that required for that application (which is lower than it would be for an application for indefinite leave to remain).

22. There are however three significant difficulties with this submission. First, there was no argument before the Upper Tribunal in Patel as to what a 'formal

application' meant or what was required for one and specifically no suggestion that this was the same as a 'valid application' under the Immigration Rules. If what was meant in that case was a 'valid application' it could reasonably have been expected that that term, as a defined term in the Immigration Rules, would have specifically been used.

23. Secondly, the submission was further to the Court of Appeal's decision in R (Alladin and Wadhwa) v Secretary of State for the Home Department [2014] EWCA Civ 1334, the judgment in which was expressly adopted by Upper Tribunal Judge Eshun in Patel. At paragraph 70 however, Lord Justice Floyd only went so far as to state:

> *"As I have intimated, 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 UKBA in support of the application pointed to any disadvantage associated with the grant of DLR as opposed to ILR."*

24. Thirdly, Mr Malik's submission is contrary to the Respondent's own guidance set out above, which expressly requires a decision maker to consider the grant of indefinite leave to remain where a clear request has been made for this, supported by reasons why that would be appropriate. The same is also envisaged in a separate part of that same guidance at paragraph 61 which deals with the possibility of a grant of indefinite leave to remain to an applicant who does not meet the Immigration Rules for such and who has not made a valid application for this when it states:

> *"Where granting a non-standard period of limited leave to the applicant ... this leave will have to be granted outside the Immigration Rules as there is no provision within the Rules for granting a different period than 30 months. This also applies to ILR, where this is granted outside of a valid (charged) application or where the requirements of the Rules are not met'.*

25. The Applicant submitted further that the Respondent's approach on this point would also lead to absurd consequences, first, that a child applicant may only make a single valid application and would be forced to choose between applying for leave to remain under paragraph 276ADE of the Immigration Rules on the form specified for that purpose and applying for indefinitely leave to remain on a different form. Such a decision would be unreasonable to require a child applicant to make given the inherent risk of not being granted leave to remain under one route or the other. Secondly, the Applicant notes that a person who can afford the higher application fee could be considered for a grant of indefinite leave to remain whereas a child in poverty could not and there is no fee waiver option for such an application.

26. I would add to that a third practical difficulty which arises on the facts of the present case that at the time of the original application in 2012, the Applicant was a minor and dependent on his mother's application for leave to remain. His

mother has never requested a longer period of leave to remain, nor set out any circumstances pursuant to which she should be considered for such, nor has she sought to challenge the grant to her of a period of 30 months' leave to remain. A separate application on a different basis for the Applicant is not impossible but impractical in these circumstances. In addition, the circumstances on which the Applicant based his request for indefinite leave to remain did not exist at the time of the original application but are predominantly due to events that have occurred since and the Respondent's approach would allow no flexibility for such matters to ever be considered unless a whole new and separate paid for application is submitted.

27. For all of these reasons I reject the Respondent's submissions that a formal application, meaning valid application (in accordance with paragraph 34 of the Immigration Rules) for indefinite leave to remain is required before the Respondent is obliged whether to grant a longer period of leave or indefinite leave to remain. What is required, as set out by the Court of Appeal in Alladin and Wadhwa, and in the Respondent's own guidance set out above, is only that there should be a clear request to the Respondent for indefinite leave to remain, supported by reasons as to why that would be appropriate in the particular circumstances of the case. That is the extent of the requirements of a 'formal application'.

28. There is no doubt in this case that there was a clear request made to the Respondent on 15 December 2016 for indefinite leave to remain, supported by detailed reasons and relying on evidence previously submitted and available to the Respondent.

29. The statement to the contrary in the Respondent's decision letter dated 31 January 2017 that *"[the Applicant' has never raised any circumstances as to which he should be granted indefinite leave to remain"* is patently false. Where such a clear request supported with reasons was made, the Respondent was obliged, in accordance with her own policy, to consider whether to grant indefinite leave to remain. This could be either under the Immigration Rules, or more likely, outside of the Immigration Rules on a discretionary basis (as also specifically envisaged in the Respondent's own policy guidance).

30. It is clear from the wording of the Respondent's decision letter of 31 January 2017 that she considered an application for indefinite leave to remain was required and that in any event, the Applicant would not meet the requirements of the Immigration Rules for a grant of indefinite leave to remain because he had previously remained in the United Kingdom without lawful leave to remain (even if as a minor when he would have had no control over his status). Although there is reference to consideration of Ms Brown's report (but not any of the representations or other evidence relied upon), there is nothing within the letter to suggest that the Respondent considered the possibility of exercising discretion to grant the Applicant indefinite leave to remain outside of the Immigration Rules or that she had regard to the specific parts of her own policy set out above.

31. With her Summary Grounds of Defence, the Respondent disclosed GCID case

record sheets showing minute/case notes for the Applicant between 30 October 2015 and 25 January 2017. An entry on 14 December 2016 (partially redacted) sets out the caseworker's consideration of the material submitted by the Applicant as part of his appeal, views as to the requirements of the Immigration Rules being met for a grant of leave to remain and an initial view on indefinite leave to remain as follows:

> *"With regard to the request for indefinite leave to remain made via the social workers report, if being granted leave the applicants have a confirmed basis of remaining in the UK and will have status to be able to work etc. Their situation would no longer be precarious as it has been for a number of years. The applicants have not applied for indefinite leave to remain, and we expect people to serve a probationary period to show that they remain suitable to be in the UK."*

32. The above was prior to the formal written request with reasons submitted on the Applicant's behalf on 15 December 2016. On 17 January 2017, there was a referral to an HEO for 're-request for [the Applicant] to be granted ILR' and a recommendation to refuse the request. On 24 January 2017 there is a statement that 'with regards to ILR, the requirements are not met' and on 25 January 2017 a statement that the Applicant 'meets the private life rules, grant 30 months LTR'.

33. It is clear from the Respondent's notes that the consideration of the Applicant's request went no further than what is evident on the face of the decision letter on 31 January 2017, which was limited to consideration of the application made and whether the Applicant could meet the Immigration Rules for a grant of indefinite leave to remain.

34. In the alternative, in Mr Malik's skeleton argument, it was submitted on behalf of the Respondent that even if a formal or valid application had been made by the Applicant, she would have been obliged to refuse indefinite leave to remain under paragraph 276DH of the Immigration Rules (a mandatory refusal if the requirements for indefinite leave to remain on the grounds of private life in paragraph 276DE are not met). It was submitted that the Respondent's adherence to her own Immigration Rules, as a reflection of her policy, would not amount to an unlawful fettering of her discretion. However, in oral submissions, Mr Malik accepted that the Respondent also had a policy expressly contemplating the exercise of discretion to grant a longer or indefinite period of leave to remain in particular circumstances. The general principle relied upon by Mr Malik as to the Immigration rules setting out the way in which the Respondent will exercise her ultimate discretion can be distinguished in this case because of the additional separate provision specifically envisaging departure from the Immigration Rules in specific cases, which is permitted by the overall discretion contained in section 3(1)(b) of the Immigration Act 1971.

35. For these reasons, the Applicant's claim that the Respondent has fettered her discretion and failed to consider whether to grant the Applicant indefinite leave to remain outside of the Immigration Rules contrary to her own policy guidance succeeds. The Applicant had done more than enough in this case to oblige the Respondent to give consideration as to the exercise of discretion as to the period of leave to remain to be granted, which she failed to do.

36. Mr Malik submitted at the oral hearing, that if a formal or valid application beyond the letter submitted on behalf of the Applicant on 15 December 2016 was required, then the reasons given in the decision letter of 31 January 2017 would be adequate and no further detail considering the best interests of the child or reasons for granting anything less than indefinite leave to remain would be needed. However, Mr Malik also appeared to accept that if I found to the contrary, there was merit in the Applicant's remaining grounds of challenge and made no oral submissions in defence of those.

37. The Respondent's position as to the remaining grounds of challenge are only set out in her Summary Grounds of Defence, which at best make a bare assertion that the Respondent has discharged her obligation under section 55 of the Borders, Citizenship and Immigration Act 1971 by the grant of 30 months' leave to remain which can not be said to be "unduly harsh", irrational or Wednesbury unreasonable on the facts of this case. The Respondent has not at any point in this case suggested that section 55 has no application at the point of her consideration of what period of leave to grant.

38. In cases involving children, the Respondent's own policy guidance set out above makes clear reference to the best interests of the child and specifically that these may, absent any countervailing considerations outweighing those interests, make a longer period of leave to remain appropriate. Neither the Respondent's decision letter nor her GCID case notes reveal any substantive assessment of the Applicant's best interests either under section 55 or under the UN Convention on the Rights of the Child; nor any detailed consideration of the evidence from numerous professionals and organisations relied upon by the Applicant. The representations made on the Applicant's behalf on 15 December 2016 were solely on the basis of why his best interests, by reference to his particular circumstances and background, meant that he should be granted indefinite leave to remain. The Respondent has simply failed to consider the possibility and therefore closed her mind to that evidence and to making any assessment of the Applicant's best interests. It follows that Applicant's third and fourth grounds of challenge also succeed.

Order

1. The Applicant's application for Judicial Review of the Respondent's decision dated 31 January 2017 is granted on all grounds.

2. The Respondent's decision dated 31 January 2017 refusing his request for indefinite leave to remain is quashed.

3. The Respondent to reconsider the Applicant's request for indefinite leave to remain dated 15 December 2016 within two months of the date of sealing of this Order.

Permission to appeal to the Court of Appeal

The Respondent did not seek permission to appeal. I am however required to consider that in any event. I refuse permission to appeal to the Court of Appeal because there is no arguable error of law in my decision above.

Costs

1. The Respondent shall pay the Applicant's costs, to be assessed if not agreed.

2. There shall be a detailed assessment of the Applicant's publicly funded costs.

Signed: _____

Upper Tribunal Judge Jackson

Dated: **26th April 2018**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 15 MAY 2018

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3.