R (on the application of Al-Anizy) v Secretary of State for the Home Department (undocumented Bidoons – Home Office policy) [2017] UKUT 00197 (IAC)

# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

The Queen on the application of Mohamed Al-Anizy

**Applicant**

v

Secretary of State for the Home Department

**Respondent**

**Application for judicial review: substantive decision**

**Before The Honourable Mr Justice McCloskey, President**

Having considered all documents lodged

**Decision: this application for judicial review is disposed of in the terms of the Order in [30] hereof.**

1) *The Home Office family reunification policy embraces a series of flexible possibilities for proof of identity.*

2) *In any case where withdrawal or a consent order is proposed judicial scrutiny and adjudication are required.*

**McCLOSKEY J**

## Introduction

(1) The Applicant is the father member of a family unit, the other members being his spouse and their four dependent children. All of them are Kuwaiti Bidoons. The distinguishing feature of the Applicant is that he is a recognised refugee in the United Kingdom with current leave until 21 May 2020. The oldest child resides with him, as a dependant. The target of this judicial review challenge is the failure/refusal of the Respondent, the Secretary of State for the Home Department (the "Secretary of State"), to determine the application of the Applicant's spouse and their twin infant boys for family reunification in the United Kingdom.

(2) By Order of Upper Tribunal Judge Bruce dated 06 March 2017, permission to apply for judicial review was granted, in tandem with expedition. It is appropriate to note the terms in which urgent consideration was requested in the Judicial Review Claim Form:

> "*The Applicant's wife and two youngest children are living in dire and severely over-crowded conditions in Iraq. They are asylum seekers registered with UNCHR who had to flee Kuwait. They survive on charity. The youngest child …….. has to attend hospital every month for treatment in relation to her inflamed lungs ……*
>
> *The Applicant's daughter in the UK ……., is severely affected by the separation from her mother. She is distressed, cannot concentrate, is struggling in school and has regular support from her GP and Social Services in respect of her mental health …..*
>
> *The effect of prolonged separation is having a damaging impact on all parties, but in particular the four children, all aged between 3 and 10 years.*"

### The Broader Factual Matrix

(3) I distil the following from the statement of supporting facts and grounds. I shall highlight *infra* whether there is any material contentious factual issue requiring particular consideration.

(4) All six members of the family were born in Kuwait. The four children are now aged 10, 8, 4 and 3 years respectively. Some few years ago the Applicant began attending demonstrations in support of equal rights for Bidoons in Kuwait. This gave rise to several episodes of detention and mistreatment entailing a head injury causing epilepsy. In time, a warrant for the Applicant's arrest based on his attendances at demonstrations and alleged distribution of anti-state leaflets was issued. This precipitated his flight from Kuwait.

(5) On 31 October 2014 the Applicant arrived in the United Kingdom and claimed asylum. On 09 November 2014 the oldest two children did likewise. All three were granted refugee status in 2015.

(6) Meanwhile, the authorities in Kuwait continued to pursue the Applicant resulting in the application of adverse attention to his spouse and their two younger children, all of whom fled to Iraq. There they live destitute and in chronically over-crowded conditions and are registered with UNHCR as asylum applicants.

(7) The succeeding milestones in the narrative are susceptible to the following tabulation:

(i) Aided by the Red Cross the Applicant submitted on line applications for family reunion, giving rise to an appointment at the Visa Application Centre ("VAC") in Basra on 28 August 2016.

(ii) The VAC staff demanded the production of passports as a pre-requisite to considering the applications.

(iii) On 13 August 2016 Ms Mead of the Red Cross, transmitted the details of the application to the VAC Entry Clearance Manager at the Amman, without response.

(iv) Between September and November 2016 the Red Cross engaged in a formal complaint process with UKVI in an attempt to stimulate progress.

(v) With the assistance of the Red Cross the Applicant completed new on line visa applications and booked an appointment at the Baghdad VAC on 06 December 2016. An accompanying letter from the Red Cross explained that, being Kuwaiti Bidoons, the family members concerned did not possess identity documents or travel documents, drawing attention to the supporting passage in the Home Office Country Information and Guidance Publication "Kuwait: Bidoons" (the "CIG") of July 2016.

(vi) The application included a substantial quantity of documentary evidence such as the asylum determination, biometric residence permits, the marriage contract, the asylum interviews of the Applicant and the aforementioned CIG.

(vii) At the scheduled appointment on 06 December 2016 in Baghdad a repetition of (ii) occurred.

(viii) Acting on a suggestion made by the VAC official on the last mentioned occasion the Applicant travelled to Jordan in December 2016 where he engaged with the British Embassy in Amman. Promises of further enquiries came to nothing.

(ix) In January and February 2017 the Applicant's solicitors engaged in formal correspondence with the Home Office, to no avail. Ultimately, pre-action protocol letters dated 18 February 2017 went unanswered.

The Respondent's Position

(8) The Applicant's solicitors received a reply to their initial letter addressed to the Home Office which can only be described as quite hopeless. While, by the terms of the reply, the author claimed to have investigated the issues raised with the Amman Entry Clearance Manager, the thrust of the reply was that no one was able to say why the Amman VAC had refused to consider the applications registered with them.

(9) Following several further solicitor's letters, the UKVI Head of International Visa Operations eventually responded, by letter dated 09 March 2017 which contains the following passage of note:

> "*Unfortunately, as no applications have actually been submitted we do not have available records to confirm exactly what has previously occurred ….*
>
> *Our use of the previously referred to policy and its implementation has been through the Home Office Council. We have also previously had applications for JR in relation to similar cases. At the current time the policy has not been highlighted as being unreasonable by the Courts.*"

Pausing, at this juncture UKVI was not disputing the assertion that on two previous occasions, appointments at the Basra VAC and the Baghdad VAC had resulted in a refusal to even consider the family reunification applications on the ground that the Applicants did not present suitable identification. The UKVI position remained the vague one stated in its letter dated 08 February 2017:

> "*… It may be that* [the Applicants] *were refused because they had not shown that they were normally resident in Iraq. As individuals claiming to be from Kuwait, they would need to show documentation showing that they normally reside in Iraq. Without this, they would be refused.*"

In passing, and not to be lightly dismissed, by this stage the Applicant had expended some £2,000 in securing the two aforementioned VAC appointments. His solicitors pointed out that he was in receipt of Employment Support Allowance and unable to work.

The UKVI Policy

(10) The less than illuminating and unparticularised reference to UKVI "policy" in

the second of the Respondent's aforementioned letters invites a little forensic excavation. In their letters the Applicant's solicitors quoted the following extract from the UKVI Family Reunion Guidance, published in July 2016.

> "*Applicants must submit all original documents that they are able to provide to establish their identity and to support their claim to be related to the sponsor. This* ***could be***
>
> *A passport*
>
> *National Identity Cards*
>
> *Other official documents, including* ***for example*** *school ID cards or letters,* ***UNHCR attestations*** *or identity cards. …*
>
> *Where original documents are not available to submit with an application …. the onus will be on the applicant to provide a reasonable alternative and explanation of their absence ….*"
>
> [Emphasis added.]

(11) The thrust and intention of the policy emerged from considering its terms as a whole. I begin with the opening sentence under the heading "About this Guidance":

> "*This guidance tells you about our refugee family reunion policy, which allows a spouse or partner and children under the age of 18 of those granted refugee status or humanitarian protection in the UK to reunite with them here, providing they formed part of the family unit before the sponsor fled their country of origin or habitual residence. It must be used by caseworkers considering whether to grant entry clearance or leave to enter or remain for the purpose of family reunion in accordance with paragraphs 352A to 352FJ of Part 11 of the Immigration Rules*"

The paragraph entitled "Purpose of Instruction" is revealing, for two reasons. First, the policy operates as, *inter alia*, an instruction to case workers. Second, this passage reiterates that case workers "*must*" consider family reunion applications in accordance with the policy. Third, it applies as fully to entry clearance officers abroad as to United Kingdom case workers.

(12) The "Background" paragraph makes clear that the potential beneficiaries of the policy are "*immediate family members*" and incorporates the Immigration Rules definition of "*a spouse or partner and children under the age of 18, who formed part of the family unit before their refugee sponsor fled their country of origin or former habitual residence to claim asylum in the UK*".

The "Policy Intention" is expressed in these terms:

*"The policy objective is to deliver a fair and effective family reunion process, which supports the principle of family unity by:*

- *acknowledging the speed and manner in which families may become separated by conflict and persecution, recognising the stress this may cause and providing a means for immediate family members to reunite in the UK;*
- *allowing a spouse or partner and children under the age of 18 of those granted refugee status or humanitarian protection, to reunite with them in the UK, providing they formed part of the family unit before their sponsor fled their country of origin;*
- *ensuring applications are properly considered in a timely and sensitive manner on an individual, objective and impartial basis, acknowledging the vulnerable situation that applicants (particularly women and children) may find themselves in and where possible, expediting claims without unnecessary delay;*
- *preventing abuse of the process by carefully reviewing applications where fraudulent documents are submitted or there is evidence that the sponsor obtained leave by deception, and refusing such applications where appropriate;*
- *preventing those who would otherwise be excluded from the Refugee Convention obtaining leave under the family reunion Rules by subjecting them to the same security checks as asylum seekers."*

(13) The section relating to <u>children</u> is noteworthy:

*"Although section 55* [of the Borders, Citizenship and Immigration Act 2009] *only applies to children in the UK, the statutory guidance, Every Child Matters - Change for Children provides guidance on the extent to which the spirit of the duty should be applied to children overseas. Caseworkers considering overseas applications must adhere to the spirit of the Section 55 duty and make enquiries when they suspect that a child may be in need of protection, or where there are safeguarding or welfare needs that require attention."*

It continues:

"*Caseworkers must carefully consider all of the information and evidence provided as to how a family member in the UK who is a child will be affected by a decision and this must be addressed when assessing whether an applicant meets the requirements of the rules. The decision notice or letter must demonstrate that all relevant information and evidence provided about the best interests of a child in the UK have been considered. Caseworkers must carefully assess the quality of any evidence provided. Original documentary evidence from official or independent sources must be given more weight in the decision-making process than unsubstantiated statements about a child's best interests.*

*Where it is relevant to a decision, caseworkers dealing with overseas applications must make it clear in their decision letter that the child's welfare has been considered in the spirit of section 55 without stating that it is a duty to do so."*

(14) The guidance continues:

> "*Where an applicant does not meet the requirements of the rules for entry clearance or leave to remain, caseworkers must, in every case, consider the family exceptional circumstances guidance or consider whether there are any compassionate factors which may warrant a grant of leave outside the Immigration Rules.*"

Notably, in the same section, there is an express instruction to give effect to the "*key principles to take into account*" by recourse to:

- *Section 55 Children's Duty Guidance*
- *Every Child Matters – Change for Children*
- *United Nations Convention on the Rights of the Child*
- *Victims of human trafficking – guidance for frontline staff (where appropriate)*

(15) The policy contains (at pages 10 – 24) an impressively detailed section entitled "Family Reunion Application Process". This includes the following noteworthy features:

(a) Family reunion applications are normally, though not invariably, to be made from outside the United Kingdom and using the on-line application process.

(b) All such applications must be "*carefully considered*".

(c) This policy guidance and paragraphs 352A to 352FJ of the Immigration Rules (the "Rules") will be applied to every such application.

(d) Success <u>outside</u> the Rules, is specifically contemplated, case workers being enjoined to consider "*the family exceptional circumstances guidance or whether there are any compassionate factors ….*".

(e) Decisions will be made on the basis of the information provided in the application form, the supporting evidence, the results of checks or enquiries and, in some cases, interviews either by telephone or in person.

(f) "*Security **and identity** checks must be completed on the applicant and their sponsor before considering the application*". [My emphasis.]

This is followed by a discrete "Proof of Identity" section which, in the context of these proceedings, it is appropriate to reproduce:

> "*In all cases, caseworkers must be satisfied that the applicant is who they claim to be. All applicants in-country and overseas are required to give their biometrics.*

*For applicants over 5 years of age, this will be a scan of their fingerprints and a digital photograph. Applicants who are under 5 are not required to provide their fingerprints, but must still provide a photograph. Caseworkers must refer to the Operating Mandate for details of the business as usual biometric checks to be carried out.*

*Applicants must submit all original documents that they are able to provide to establish their identity and to support their claim to be related to the sponsor, this could be:*

- *a passport*
- *national identity cards*
- *other official documents, including, for example, school ID cards or letters, UNHCR attestations or identity cards*

*Where original documents are not available to submit with an application, such as a passport or marriage certificate, because they have been lost or they could not be issued due to there being no authority to issue in the country the sponsor and their family have left, the onus will be on the applicant to provide a reasonable alternative and explanation of their absence, including any attempts to obtain them, and to satisfactorily demonstrate they are related as claimed to their sponsor. The Evidence section of this guidance provides further information."*

(16) The policy guidance also contains a detailed "Evidence" section (pages 21 – 31) which begins with the following general rule:

"*Although there is no requirement in the Immigration Rules for specified evidence to support a family reunion application, the onus is on the applicant and their sponsor to provide sufficient evidence to prove their relationship and satisfy the caseworker that they are related as claimed. The caseworker must consider whether, on the 'balance of probabilities', there is sufficient information to accept that the sponsor and applicant are related as claimed and that the relationship is genuine and subsisting."*

The immediately succeeding passage is of some moment:

"*Caseworkers must be mindful of the difficulties that people may face in providing documentary evidence of their relationship or the fact that it is subsisting. Those fleeing conflict zones or dangerous situations may not have time to collect supporting documents and may not realise they would be required."*

The next paragraph contains an acknowledgement that "*genuine documentation*" may not be readily available, supplemented by an inexhaustive list of reasons why this may be so. Notably, in this context, there is specific reference to CIG:

"*In addition to individual accounts given by the applicant, Country Information and Guidance (CIG) will give some insight into challenges that they may face in acquiring documents or providing credible documentation and providing*

*evidence that their relationship started before their sponsor left to support their application."*

This is followed by:

> "*Where original documents are not available to submit with any application, such as a passport or marriage certificate, the onus is on the applicant to provide a reasonable alternative or an explanation of their absence and to satisfactorily demonstrate that are related to, or in a relationship as, claimed to their sponsor. Applicants and sponsors may not understand the importance or the need to write a statement relating to lack of evidence. See Requesting further evidence."*

(17) The remainder of this section contains the following general statements of note:

(a) The civil standard of proof applies: "*It is for the applicant and their sponsor to provide sufficient evidence to show they are related or in a relationship as claimed and satisfy this burden.*"

(b) "*Case workers may request further information about the application. Requests for further evidence or documents should be sensible and realistic, bearing in mind the situation which has prompted the refugee to leave their country of origin or habitual residence.*"

(c) "*If the case worker considers that an explanation about the lack of documents or further evidence is required to support the claimed relationship, enquiries should be made through either the applicant's representative, by post or by arranging a telephone call to the sponsor or applicant (where appropriate). If the case worker is still not satisfied with the evidence they may, if they think necessary, arrange an interview with the sponsor in the UK and/or with the applicant overseas.*"

(d) This discrete theme is repeated in a separate passage (page 24):

> "*Caseworkers may defer the application and make further enquiries to the Refugee Resettlement Programmes Unit (RRPU) for evidence that the relationship is as claimed. Caseworkers should include the sponsor's name, date of birth, Home Office reference number (if known) and specify which programme the sponsor has arrived in the UK under (Syrian VPR Programme, Gateway Protection Programme or Mandate Refugee Programme) when contacting RRPU.*
>
> *Providing the caseworker is satisfied that the evidence submitted shows that the dependant is who they claim to be, that the relationship with the sponsor exists, is genuine, they intend to live together in the UK and that the requirements of the Immigration Rules have been met, the caseworker may grant leave – but not refugee status – in line with the sponsor."*

(e) There are <u>no</u> prescribed requirements concerning the documentary evidence to be provided to establish an applicant's relationship with the sponsor concerned. This is particularly clear from page 23 of the policy

guidance.

(f) Finally, it is specifically contemplated that an Applicant may provide DNA evidence "…. *to prove their relationship and satisfy the case worker that they are related as claimed*".

Consideration and Conclusions

(18) In her permission order (*supra*) Upper Tribunal Judge Bruce considered all of the Applicant's legal grounds of challenge to be arguable. These are, in summary, a failure to apply the Secretary of State's published policy, irrationality, breach of all of the family member's rights under Article 8 ECHR and vis-à-vis the two children in the United Kingdom, breach of the duties owed under section 55 of the 2009 Act.

(19) The Secretary of State's policy guidance, summarised above, occupies centre stage in these proceedings. It is the instrument upon which attention must be focused in the exercise of identifying the applicable legal principles. Its elastic, non-prescriptive terms and open textured content and structure reflect emphatically the essential characteristics of every policy instrument. This is the first element of the legal perspective. Second, this policy guidance is a paradigm illustration of a policy which falls to be viewed through the analysis of Lord Clyde in R (Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, at [143]:

> "*The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable.* ***What is crucial is that the policy must not fetter the exercise of the discretion.*** *The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision-makers.*"
>
> [Emphasis added]

(20) I would add that it is long established that this type of publication is not to be construed by adopting the approach applicable to a statute, deed or contract. See, for example R v Secretary of State for the Home Department, ex parte Ozminnos [1994] Imm AR 287 at 292. The construction of every document is, of course, a question of law and, therefore, ultimately a matter for the court: In Re McFarland [2004] UKHL 17 at [24].

(21) The Applicant's challenge also engages the "Lumba" principle, namely public authorities should normally give full effect to their published policies. See Lumba v SSHD [2012] 1 AC 245, per Lord Dyson JSC at [26]:

> *"….. a decision maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt …."*

It is generally held that this principle has its roots in another hallowed principle, namely the equal implementation of laws, in tandem with non-discrimination and the avoidance of arbitrariness.

(22) In this context I also draw attention to what was stated by this Tribunal in R (SM) v Secretary of State for the Home Department (Unaccompanied Minors – Article 17 Dublin Regulation – Remedies) [2017] UKUT 124 (IAC) at [48] – [49]:

> *"[48] It is convenient at this juncture to express our view - obiter of course - on the effect of a failure of this species in the context of a human rights challenge. In human rights cases, the question for the court or tribunal concerned is whether the decision of the public authority under challenge infringes the human right engaged. Where statutory appeals are concerned, the judicial authority must confront, and answer, this question. However, where the challenge is pursued via the medium of judicial review, as in this case, some calibration is required. All of this was addressed in extenso in the decision of this Tribunal in R (SA) v Secretary of State for the Home Department [2015] UKUT 536 (IAC), at [17] - [30], considered in the recent decision of the Court of Appeal in R (Caroopen and Myrie) v Secretary of State for the Home Department [2016] EWCA Civ 1307.*
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> *[49] Bearing in mind that we did not receive full argument on this issue, we confine ourselves to two propositions, recognising that these might require reconsideration with the benefit of more extensive argument. The first is that Government policy statements may, in principle, sound on the issue of legitimate aim. The second is that a failure by the decision maker to take into account a relevant Government policy statement may illuminate the judicial assessment of whether the impugned decision is a proportionate means of furthering the legitimate aim in play."*

(23) The context being one of public law, I consider that it matters not whether the target of the Applicant's challenge is properly characterised as a failure on the part of the Secretary of State to consider, examine and determine the three outstanding family reunification claims or a positive decision to this effect. There are elements of both characterisations. Common to each is the indelible fact that the applications have not been examined and determined. The question to be decided is whether this involves a public law misdemeanour within the compass of the Applicant's grounds of challenge.

(24) The irresistible answer to this question must be in the affirmative. First, by her published policy the Secretary of State was specifically enjoined to consider the applications and, in doing so, to examine the proof of identity and family relationships provided, together with the explanations given for the absence of documents such as a passport or a national identity card. The approach of the Secretary of State's officials conspicuously fails to give effect to this policy requirement. That is not of course the end of the matter since policies do not generate absolute rules and their non-observance may, in principle, be capable of legitimate justification. No justification of any kind is proffered on behalf of the Secretary of State and none is identifiable in the evidential matrix.

(25) Second, I consider that the Secretary of State's failure to examine the family reunification applications on their merits and determine them accordingly infringes the rights of all six family members under Article 8(1) ECHR. Third, given that it is manifestly in the best interests of the children concerned that the family unit be recomposed in the United Kingdom, there has been a clear breach of section 55(1) of the 2009 Act (vis-à-vis the two older children) and the Secretary of State's policy which, in substance, applies section 55 without material qualification to children outside the United Kingdom such as the third and fourth children of this family.

(26) To summarise, figuratively the Secretary of State does not have a leg upon which to stand either factually or legally. Thus this application must succeed.

Remedy

(27) In the exercise of my discretion, having regard to the egregious nature of the public law misdemeanours established, the extensive delay on the part of the Secretary of State, the factor of protracted family fragmentation, the involvement of four directly affected children of tender years and the lamentable history generally, I would have granted the following remedies:

(a) an order quashing the refusals on behalf of the Secretary of State to examine each of the three outstanding family reunification applications on their facts and merits; and

(b) a mandatory order requiring the Secretary of State to determine these applications on their facts and merits within 21 days maximum.

(28) However, at the eleventh hour, the Tribunal was requested by the parties to approve a draft Consent Order, the material portions whereof are the following:

> "*UPON THE RESPONDENT agreeing to accept for consideration the Applicant's wife and children's family reunion applications, to be submitted in person at the Visa Application Centre in Basra, Iraq;*

*AND UPON THE RESPONDENT agreeing to use her best endeavours to issue a decision as soon as possible, and no later than the current published visa processing guidelines, absent special circumstances;*

*BY CONSENT, it is ordered that:-*

*1 . The hearing listed for 26 April 2016 be vacated;*

2. *The Applicant do have leave to withdraw the above-numbered claim for judicial review.*"

This draft was not, of course, binding on the Tribunal. There are two fundamental reasons for this. First, in judicial review proceedings it is not open to the parties to dictate the outcome. Rather, the twofold question of whether a remedy should be granted and, if so, in what terms, lies within the discretion of the court or tribunal. Second, the withdrawal of any case before the Upper Tribunal requires the approval of the Tribunal, per Rule 17 of the Tribunals (Upper Tribunal) Rules of Procedure 2008, while Rule 39 designates the Tribunal the arbiter of every proposed consent order. Thus the Tribunal has the duty of adjudicating on the issues of withdrawal and the terms of any withdrawal.

(29) In the event, taking into account the factor of consent, the clear theme of expedition in the parties' agreed draft order and the possibility that certain evidence having a bearing on the content might not be before the Tribunal, I was persuaded, marginally, to approve this draft. However, what I have said at [27] above conveys a clear message to the Secretary of State and will be of significance in certain future eventualities, including the issue of further proceedings. Should this family find themselves driven to the latter course, the Tribunal will process their case with a high degree of expedition (weeks, not months) and will exercise its discretion in the matters of remedy and costs appropriately.

**Order**

(30) The Order of the Tribunal encompasses the following elements:

(a) See the passage in quotation marks at [28] above.

(b) The Secretary of State will pay the Applicant's reasonable costs, to be assessed in default of agreement.

(c) There shall be detailed assessment of the Applicant's costs to reflect his publicly funded status in accordance with the Civil Legal Aid (Costs) Regulations 2013.

(d) Liberty to apply.

(e) Permission to appeal to the Court of Appeal is refused.

**THE HON. MR JUSTICE MCCLOSKEY**
**PRESIDENT OF THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**25 April 2017**

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