Neutral Citation Number: [2021] EWHC 234 (Admin)

Case No: CO/2230/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2021

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

JS

Claimant

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -
- -

RAZA HUSAIN QC and ELEANOR MITCHELL (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
JULIA SMYTH (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 2 February 2021
- -

Approved Judgment

Mr Justice Chamberlain:

Introduction

1 This is a renewed application for judicial review, permission having been refused on the papers by Farbey J on 15 December 2020. The decision challenged is the "ongoing decision" reflected in paragraphs 352A to 352F of the Immigration Rules and in a policy document entitled *Family reunion: for refugees and those with humanitarian protection* (version 4.0), published on 9 January 2020. Together, these provide a route for an adult refugee in the UK seeking reunion with a child or partner abroad, but no equivalent route for a child refugee in the UK seeking reunion with a parent or sibling abroad.

2 The effect of the challenged policy is that, whereas family reunion is routinely permitted in the first kind of case, applicants in the second kind of case face the more difficult task of showing why, exceptionally, their application should be granted outside the Immigration Rules, normally on the basis that this is required by Article 8 of the European Convention on Human Rights ("the Convention").

3 The Secretary of State acknowledges that the situations are treated differently and avers that this is so for good reason. The main reason advanced is that providing a route for children in the UK to bring in their parents and siblings would risk encouraging families to send children ahead to act as an "anchor" for their own applications to enter, thereby subjecting the children to danger. The Claimant responds that there is no reliable evidence that the opening of a route to family reunion for child refugees in the UK would have that effect.

4 There are at least two other cases currently before the Administrative Court which raise the same points.

The chronology up to issue of the claim

5 The claimant, JS, was born on 21 March 2002. He is a national of Afghanistan. He arrived in the UK on 6 April 2016 as an unaccompanied minor and claimed asylum. His claim was refused by the Secretary of State on 6 October 2016. His appeal was dismissed by the First-tier Tribunal on 6 March 2017. On 26 June 2017, he submitted a fresh claim pursuant to paragraph 353 of the Immigration Rules. This was refused by the Secretary of State on 15 February 2018 without an in-country right of appeal. A claim for judicial review of that decision failed. JS made a further fresh claim on 27 June 2019. This was refused on 9 August 2019, this time with an in-country right of appeal. That was heard in the FTT on 24 October 2019 and allowed on 18 November 2019. JS was granted asylum on 24 December 2019, but the grant was not communicated until 9 January 2020.

6 By this time, JS's mother and two younger brothers had also fled Afghanistan and were living in Iran without status. On 16 January 2020, JS instructed his current solicitors, Duncan Lewis, to assist with an application for family reunion so that his mother and brothers could join him in the UK. On 19 March 2020, they wrote to the Secretary of State asking how entry clearance applications should be made, explaining that JS's family were unable to submit an application via the visa application centre ("VAC") in

Iran, because it had been closed due to the COVID-19 pandemic since 3 March 2020. On the following day, 20 March 2020, Duncan Lewis sent by post to the Secretary of State an application for entry clearance on behalf of his mother and brothers. They say they did this because of the closure of the VAC in Iran, local restrictions which made travel to other countries impossible and the lack of any Home Office guidance about alternative methods of application. It was also necessary to submit the application urgently because JS would turn 18 on the following day.

7 At the same time as submitting this application, Duncan Lewis also sent a letter under the Pre-Action Protocol giving notice of an intended challenge to the Secretary of State's policy of denying refugee children a route to family reunion under the Immigration Rules when such a route is available to adults.

8 The Secretary of State responded to the letter before claim on 16 April 2020 saying that the application for family reunion was invalid as it should have been made online and that the grounds for challenging the policy therefore fell away.

9 Duncan Lewis sent a further pre-action letter on 1 May 2020 taking issue with the Secretary of State's position on the family reunion application. After some further correspondence, the Government Legal Department responded substantively on 21 May 2020, thanking Duncan Lewis for bringing to the Secretary of State's attention the practical problems with submitting family reunion applications in Iran during the pandemic, offering a justification for the challenged policy and noting that, where a family reunion application does not meet the requirements of the Immigration Rules, caseworkers must consider whether there are exceptional circumstances or compassionate factors which may warrant a grant of leave outside the Rules.

10 Duncan Lewis responded by return, on 21 May 2020, asking for urgent confirmation that JS's application for a family reunion would be considered under Article 8 of the Convention. There was no reply to that letter. The claim for judicial review was filed on 20 June 2020. It challenged the policy of not permitting family reunion applications from children save in exceptional cases. The challenge was on two grounds; first, breach of s. 55 of the Borders, Citizenship and Immigration Act 2009; and second, incompatibility with Article 14 read with Article 8 of the Convention.

The post-issue chronology

11 In the Secretary of State's Summary Grounds of Defence dated 10 August 2020, it was noted that JS was an adult when the claim was issued, though the Statement of Facts and Grounds had not made this clear, and that there was no valid application for family reunion at the time when the claim was made.

12 In response, JS applied to amend the Statement of Facts and Grounds. There were two material changes: first, to add a third ground – irrationality; and second, to add to the relief sought a mandatory order that the Secretary of State consider and determine the application made on 20 March 2020.

13 On 4 September 2020, Cavanagh J granted permission for these amendments and permitted the Secretary of State to make consequential amendments to her Summary Grounds of Defence. In the Amended Summary Grounds of Defence of 11 September

2020, it was noted that there was no pleaded ground challenging the Secretary of State's decision to treat the 20 March 2020 application as invalid.

14 That prompted an application by JS on 15 September 2020 to re-amend the Statement of Facts and Grounds and a Reply to the Secretary of State's Summary Grounds which JS had filed. The application to re-amend came before Farbey J. She directed that it be considered at a hearing together with the question whether JS or his lawyers had breached the duty of candour by failing to make clear that in the Statement of Facts and Grounds that JS was an adult at the time when the claim was issued. The hearing took place on 20 October 2020.

15 On 28 October 2020 Farbey J gave a judgment: [2020] EWHC 3053 (Admin). She summarised her conclusions as follows at [7]:

> "i. By a fine margin, in the particular circumstances of this case, a failure to mention the claimant's date of birth or age in the SFG falls below the standards that the court would expect of the claimant's lawyers but will not be treated as a breach of the duty of candour.
>
> ii. The claimant's application to re-amend his grounds of claim is refused.
>
> iii. The claimant's application to amend his Reply is refused.
>
> iv. The claim will proceed in the Administrative Court.
>
> v. The claim will proceed alone to a permission decision on the papers. Two other similar cases in which the claimant's lawyers are instructed will be stayed pending the outcome of this claim."

16 JS appealed to the Court of Appeal against the refusal to permit re-amendment of the Statement of Facts and Grounds and indicated his intention to apply for a stay of the proceedings pending the outcome of that hearing. The matter came back before Farbey J on the papers. On 15 December 2020, she noted that no application had been made for a stay and refused permission to apply for judicial review on the basis that the substantive grounds were not arguable. She added that she had "serious reservations" about JS's standing to bring the claim but did not include that among her reasons for refusing permission.

17 On 23 December 2020, JS renewed the application for permission and at the same time formally applied for a stay of the proceedings pending determination of the appeal against the refusal of permission to amend. The oral permission hearing before me today was listed on 29 December 2020. The stay application came before Murray J, who on 11 January 2021 ordered that it be considered at the start of today's hearing. He made clear in his order that one matter to be considered today would be "whether (on the basis of the legal position currently obtaining) the Claimant has standing to bring the claim". Depending on that, the judge hearing the claim might then give further directions including as to stay of the claim and/or relisting of the renewed application for permission or, if appropriate, might proceed directly to consider permission.

18 Mr Raza Husain QC, for JS, indicated at the hearing that, whilst JS maintains that the original application of 20 March 2020 should have been treated as valid, a further application for family reunion was made by JS's mother in December 2020. This was done online and then at the VAC in Tehran, which by this time had reopened. After the hearing before me, copies of the documents relating to that application were filed.

Standing

19 Section 31(3) of the Senior Courts Act 1981 provides as follows:

> "no application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with the rules of court; and the courts shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates".

20 Mr Husain submits that, irrespective of the outcome in the Court of Appeal, JS has a sufficient interest to pursue the claim. He points out that applications made by persons who were children at the date of the application are considered under the provisions applicable to children. (This much is common ground.) Mr Husain relies on *R v Somerset County Council ex p. Dixon* [1998] Env LR 111, at 117-8, where Sedley J articulated three propositions about the test for standing at the permission stage:

> "(a) The threshold at the point of the application for leave is set only at the height necessary to prevent abuse.
>
> (b) To have 'no interest whatsoever' is not the same as having no pecuniary or special personal interest. It is to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody.
>
> (c) Beyond this, the question of standing has no materiality at the leave stage."

21 Mr Husain points out that the test for standing is "liberal and inclusive": *R (O) v Secretary of State for International Development* [2014] EWHC 2371 (QB), [12] (Warby J). He notes that the test for whether a claimant has a sufficient interest is context-sensitive, a key consideration being what will serve best the purposes of judicial review in the relevant context: *AXA General Insurance Ltd v Lord Advocate* [2012] 1 AC 868, [170] (Lord Reed). He made the point that a person adversely affected by provisions in the Immigration Rules had always been assumed to have standing to challenge those provisions without having first to apply for consideration outside the Rules. He gave *MM (Lebanon) v Secretary of State for the Home Department* [2017] 1 WLR 771 as an example.

22 As matters currently stand, there is no extant challenge to the Secretary of State's decision to treat the 20 March 2020 application as invalid. Mr Husain accepts that, as a consequence, success in challenging the Secretary of State's policy will not *directly* assist JS. His case is that success in the challenge will be of *indirect* benefit to JS because "historic injustice" is a material factor in deciding whether Article 8 of the Convention requires an application for family reunion outside the immigration rules to

be granted. Mr Husain cites *Patel v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17 and *R (Gurung) v Secretary of State for the Home Department* [2013] 1 WLR 2546 as authority for this proposition. He cites *AP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 89 as establishing that where historic injustice is established it will often be a factor of considerable or even decisive weight.

23 As to how such historic injustice could be made out on the facts of this case, Mr Husain says this at para. 30.3 of his skeleton argument:

> "If the Secretary of State's position on family reunion for refugee children were found to be in breach of s. 55, to violate article 14 ECHR, or to be irrational, this would give rise to just the kind of historic injustice to which the authorities refer. Apart from anything else, absent that unlawful position, the claimant might well have made a straightforward and successful application for family reunion shortly after he was granted refugee status."

24 Mr Husain argues that a decision-maker faced with a resubmitted application for family reunion outside the Immigration Rules would be required to take account of this historic injustice in deciding whether a refusal would breach Article 8, so success in this claim would be of practical benefit to JS.

25 In order to understand the potential significance of a "historic injustice", it is necessary to consider the authorities on which Mr Husain relies. In *Patel*, the "historic injustice" relevant to the entry clearance application was that, for more than three decades, the appellants' mothers had been wrongfully denied the right to settle in the UK. This was first because of the Commonwealth Immigration Act 1968, which the European Commission on Human Rights declared to be racially discriminatory in the *East African Asians* case in 1973, and because of a special quota voucher scheme which applied only to heads of household, which was defined in a manner that discriminated directly against women. It was in that context that Sedley J said at [15]:

> "If… [the appellants] come within the protection of art. 8(1), the balance of factors determining proportionality for the purposes of art. 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for [the historic injustice] the family would or might have settled here long ago".

26 In *Gurung*, the Court of Appeal was faced with a different historic injustice against those who had been veterans of the Gurkha Brigade in the British Army. Lord Dyson noted at [38] that the fact of a historic injustice was only one factor to be considered, but went on at [42] to say that it was a "strong reason" for holding that it was now proportionate to permit someone who was now an adult child to join his family in the UK.

27 In *AP (India)*, Elias LJ (with whom the other members of the Court of Appeal agreed) considered *Patel* and *Gurung* and a decision of the Upper Tribunal, *R (Ghising) v Secretary of State for the Home Department* [2013] UKUT 567 (IAC), and made clear at [19] that there must be "a causal connection between the historic injustice and the appellant's circumstances". At [37], Elias LJ added this:

> "…the courts should not in this context be unduly rigorous in the application of the causation test, given that its significance is to redress this historic injustice. I think there would be manifest unfairness to conclude that the absence of express evidence on the causation point should defeat the claim."

28 Despite the attractive written and oral arguments of Mr Husain, this aspect of his case has three fundamental and insuperable difficulties.

29 First, the policy which JS seeks to challenge is one which applies to and is said to discriminate against children. But JS is not a child and (obviously) will never again be one. This would not matter if he had made a valid application for family reunion when he was still a child, because – as Mr Husain has explained – the Secretary of State treats the date of application as determinative. But the Secretary of State does not accept that the application made on 20 March 2020 was valid; and the consequence of Farbey J's refusal of permission to re-amend is that there is – as matters now stand – no valid application before the Secretary of State made when JS was a child. By the time of the later application, in December 2020, he was an adult. Hence Mr Husain's sensible concession that, as matters stand, the success of this claim cannot assist him directly. The consequence of this is that JS is in a different position from that of the claimants in *MM (Lebanon).* They were challenging provisions in the Immigration Rules which governed their position at the time when they filed their claims and would continue to do so in the future. JS, by contrast, is challenging a policy which does not and can never again apply to him.

30 Second, in this case, JS was not recognised as a refugee until 24 December 2019. It was only at that point that any question of family reunion could have arisen, even in principle. He first instructed his solicitors, Duncan Lewis, on 16 January 2020, just over two months before his 18th birthday. On the authorities, it would be necessary to show that the lack of a valid application by the time he turned 18 was causally connected to the absence of a route to family reunion under Immigration Rules. But even if the Immigration Rules provided a route to entry clearance for the parents and siblings of a child refugee, some conditions would presumably still have to be satisfied. The requirements for leave to enter or remain as the child of a refugee are set out in paragraph 352D of the Immigration Rules. A person who makes an application under that paragraph still has to provide evidence that they meet those requirements. Had an equivalent route been available to JS, some equivalent requirements would presumably have been imposed. It would undoubtedly have taken some time for Duncan Lewis to obtain and collate the necessary information and for JS's mother to make the application in person at the VAC in Iran. Even bearing in mind the need not to be unduly rigorous with respect to causation, there is no proper basis for concluding that the application would have been made online and/or at the VAC by 3 March 2020, rather than by the route actually used (resulting, in the Secretary of State's view, in an invalid application).

31 Third, the circumstances of the present case are very far removed from those of *Patel*, *Gurung* and *AP (India).* In those cases, the historic injustice was already established at the time of the application and was of long standing. It is one thing to say that an established historic injustice can be relevant to a later application for entry clearance. It is another to say that the possibility of establishing such an injustice, and the further

possibility that it might be relevant to a future application, is sufficient to confer standing to challenge a policy which cannot ever apply directly to the claimant.

32 I have borne in mind the observations of Sedley J in *Dixon* (citing other high authority) about the low threshold for standing at the permission stage. The term "busybody" has a long lineage in this area of the law, dating back to Lord Fraser's speech in *R v Inland Revenue Commissioners ex p. National Association of Self-Employed and Small Businesses Ltd* [1982] AC 617, 646 and 653. It had been used in private law contexts before that. I do not, however, find the term very illuminating: a busybody is a person who involves himself in matters that are not his business. But what counts as "not his business" will vary from one context to another and will depend on what the speaker considers to be the proper scope of person's legitimate interest. To say of a claimant that he is not a busybody thus expresses a conclusion on the statutory question, but does not assist in arriving at that conclusion.

33 In my judgment, it is preferable to focus on the words of the statute. Section 31(3) of the 1981 Act expressly applies at the permission stage. It is not to be treated as a dead letter. It requires the court to be satisfied that the applicant has a "sufficient interest" in the matter to which the application relates. It is true that the requirement for a "sufficient interest" has been applied liberally, particularly in cases where non-governmental organisations and others representing the public interest have challenged decisions by which they cannot claim to be personally affected, generally in the absence of other better placed actual or potential challengers: see eg *R (McCourt) v Parole Board* [2020] EWHC 2320 (Admin), [31]-[32]. There are important reasons for this, as Lord Reed's judgment in *Axa* shows. But the present claimant is not an NGO and does not claim to represent any interest other than his own. Moreover, it is not and could not be said that there are no challengers directly affected by the policy who could realistically be expected to litigate. To start with, there are at least two other challenges to the same policy in which the claimant is represented by JS's legal team. These claims were stayed behind this one by Farbey J.

34 Mr Husain submits that, if the challenge has to be advanced in these other cases, rather than this one, the result will be further delay. That may be so. But, in a case such as the present, where the claimant does not purport to represent any interests but his own, s. 31(3) of the 1981 Act requires the court to focus on the relief sought and to consider, in light of the claimant's position at the point in time when permission considered, whether that relief is capable of conferring a benefit (not necessarily a pecuniary one) on him. In the light of Farbey J's decision refusing permission to re-amend, the answer to that question is currently "No". It follows that, as matters presently stand, JS in my judgment lacks standing to challenge the Secretary of State's policy. As the Secretary of State sensibly accepts, that may well change if his appeal against the refusal of his application for permission to re-amend succeeds. In that event, success in the challenge to the Secretary of State's policy may benefit him directly by altering the basis on which the family reunion application of 20 March 2020 falls to be determined.

35 This means that, as things currently stand, s. 31(3) of the 1981 Act precludes the grant of permission to apply for judicial review.

36 Ms Smyth pointed out that ground 2 relies on Convention rights, so standing on that ground is governed by the "victim" test in s. 7(1) of the Human Rights Act 1998 and

Article 34 of the Convention. But this is an even more stringent test. Mr Husain sensibly did not suggest that JS could be a "victim" for these purposes if he did not have a "sufficient interest" for the purposes of s. 31(3) of the 1981 Act. For the reasons I have given, I conclude that JS is not currently a "victim" of the Convention breach alleged under ground 2.

Disposal and stay

37 In the event that I am against JS on the question of standing, neither side invites me to refuse permission here and now. JS contends that the appropriate course is to stay the proceedings pending a decision from the Court of Appeal. The Secretary of State, for her part, is neutral on the question of a stay. In my judgment, given my conclusion on standing, the arguability of the grounds of challenge is better considered if and when the appeal against Farbey J's ruling succeeds. I shall therefore direct that the proceedings are stayed pending the final determination of JS's appeal against Farbey J's ruling. The renewed application for permission to apply for judicial review will have to be relisted for oral hearing if that appeal succeeds. If it does not, permission to apply for judicial review will be refused.