Case No: CO/10088/2005

Neutral Citation Number: [2007] EWHC 51 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 26th January 2007

Before :

MR JUSTICE COLLINS

- -

Between :

R(S)	Claimant
- and -	
Secretary of State for the Home Department	Defendant

(Transcript of the Handed Down Judgment of
WordWave International Ltd
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190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Manjit Gill, Q.C. & Mr Basharat Ali (Solicitor Advocate) (instructed by Aman Solicitors Advocates) for the Claimant
Mr Robert Jay, Q.C. & Ms Nicola Greaney (instructed by The Treasury Solicitor) for the Defendant

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Judgment
As Approved by the Court

Mr Justice COLLINS :

1. The claimant, who was born on 10 August 1979, is a citizen of Afghanistan. As a result of persecution by the Taliban, who were then in control of Afghanistan, he fled the country and entered the United Kingdom by means of a false passport on 16 September 1999. He went to solicitors and, following advice from them, attended the Home Office to claim asylum on 17 September. On 14 October he submitted a self-completed questionnaire in accordance with normal practice. Nothing was heard from the Home Office and so on 16 November 2000 his then solicitors wrote expressing their concern at the delay and pointing out that "many other Afghan nationals have received a decision within a shorter period of time". The solicitors further requested a Statement of Evidence form (SEF). In the absence of any reply, they wrote again on 16 February 2001. This resulted in the provision of an SEF which was duly completed and submitted to the Home Office on 11 March 2001.

2. Nothing happened. On 3 May 2001 the solicitors wrote again asking as a matter of urgency for an indication when a full interview would take place. There was no reply. On 3 August 2001 a further letter was sent asking for an interview and threatening the making of a formal complaint. Again there was no response. New solicitors wrote again on 8 January 2002. At last, an answer was received, albeit an entirely unsatisfactory one. On 25 January 2002, the Home Office, after apologising for not having responded to any of the previous letters, stated:-

> "Unfortunately a sharp increase in applications for asylum received in 2001 has meant applications received prior to 2001 have been put on hold for the time being. [S] applied in September 1999 and I regret to say his claim is therefore unable to be considered at present. We are however fully aware that he needs to be interviewed before any decision can be made and we will invite him to attend the Home Office when it is convenient to do so."

3. In the absence of any further communication, the solicitors wrote again on 16 September 2002, 23 October 2002, 23 January 2003 and 10 March 2003. True to form, the Home Office did not deign to reply to any of these letters, despite being told of the

claimant's concern and distress at the delay. However, after 4 months on 7 July 2003 the Home Office wrote saying:-

> "I can advise you that your client's Home Office file is currently in a queue awaiting the booking of a substantive asylum interview. Unfortunately, I am not able to advise you at this time when the interview is likely to take place. I can assure you, however, that you will be informed of the date, time and location of the interview, once we are in a position to confirm your interview."

For some reason, a further letter containing the same information was sent and signed by the same caseworker on 25 July 2003. No doubt this, coupled with the indefensible failures even to acknowledge letters, reflected the poor state of affairs in the Immigration and Nationality Directorate (IND).

4. The claimant was at last interviewed on 12 March 2004 and on 16 March his claim was refused. By then, the Taliban had been removed and circumstances in Afghanistan had changed and so it was not altogether surprising that it was decided that he would not, if returned, be at real risk of persecution. The refusal letter did not in terms consider Articles 3 or 8 of the European Convention on Human Rights, although an Article 3 claim would fail if there was no real risk of persecution. No Article 8 claim based on a breach of any right which had accrued during the 4 ½ years delay in dealing with the claimant's case seems to have been made. Certainly none was considered in the refusal letter.

5. The claimant appealed against the decision to remove him as an illegal entrant. The adjudicator, in a determination of 11 June 2004, decided that the claimant did have a well founded fear of persecution when he left Afghanistan, but that, since the Taliban had been ousted, there was, despite his claim that he was still at risk from members of some parties in power because of his support for an organisation known as Harakat-e-Islami, now no risk of persecution. The adjudicator accepted that the claimant had been targeted by the Taliban because he was a Hazara and a Shi'a Muslim. However, he did not find the claimant to have been entirely truthful in that he had produced two documents purporting to be arrest warrants. This was an attempt to gild the lily.

6. The claimant raised an Article 8 claim in his appeal. It was based on the establishment of a private life and the assertion that he was a highly valued member of the staff where he worked. A letter was produced from his employer to that effect. But no further details were given by the claimant and the adjudicator decided that there would be no breach and in any event return would be proportionate. The claimant did not apparently refer to his association with and plans to marry a British citizen. That association had, on the evidence produced before me, commenced in 2002. The lady in question was and remains married and there were concerns that she would suffer if her family or her husband discovered what was happening. She says that in October 2005 she finally decided that come what may she was going to seek a divorce to end her unhappy marriage and she and the claimant would then marry. He says that she and he agreed that she would allow him to get the right to live in the U.K. on his own merits and then she would divorce her husband and marry him. Since his cousin, who had come to this country at the same time as he, had been granted four years exceptional leave to remain

(ELR), he saw no reason why he should not be treated similarly. I can well understand why he held this view.

7. The claimant's solicitors sought permission to appeal to the Immigration Appeal tribunal. This was refused on 12 November 2004. Prior to that, on 11 October 2004 the claimant through his solicitors applied for discretionary leave to remain in the U.K. based on his integration, his Article 8 right to private life and fear of persecution in Afghanistan. There were enclosed a number of letters showing his good work record and achievements in this country. Yet again, the Home Office failed to respond and in June 2005 the solicitors wrote to the local MP asking for his help. A further letter to the Home Office on 18 August 2005 was again seemingly ignored so that a chasing letter was sent on 11 October 2005. On 3 November 2005, the Home Office refused the application (having delayed for over 12 months). It was accepted that the claimant "may have established a private life" but the view was taken that it was vital to maintain effective immigration control so that removal was proportionate. It might reasonably be thought that to delay for 4 ½ years before making a decision on an asylum claim and then to delay for a further 12 months before deciding a subsequent application could not be regarded as maintaining effective immigration control.

8. The letter went on to certify in accordance with s.96(1) of the Nationality, Immigration and Asylum Act 2002 that the application to which the present decision related relied on a matter which could have been raised on the appeal to the adjudicator and so, in the absence of any satisfactory reason for the matter not having been raised in that appeal, there was no right of appeal. The letter also stated, having asserted that there would be no breach of Article 8,:-

> "Further to this there is no reason why your client cannot return to Afghanistan in order to apply for the correct entry clearance/work permit, given your client's keenness to work and set up his own business in the UK."

I shall return to this in due course.

9. In 14 November 2005 the claimant was detained for the purpose of removal. He managed to contact the solicitors who now represent him and, following representations by them, removal was deferred. By letter of 25 November, they submitted a statement from the lady whom the claimant intends to marry together with material confirming the relationship. The letter included the following:-

"Our client's girlfriend is a British citizen of Pakistani extraction and we would ask you to deal with this matter with the utmost of confidence because of the prevalence of the despicable practice known as 'honour killing' within, amongst others, the Pakistani community.

10. On 2 December 2005 the Home Office refused the application. The letter stated that the claim was "essentially based on the same factors as his previous claim". This was not the case inasmuch as reliance was placed on the relationship with the lady he said he

intended to marry. In dealing with that, the letter stated:-

> "Full consideration has been given to Mr [S's] asserted relationship with a British citizen, proof of his girlfriend's nationality has not been provided. However, your client has knowingly entered into a relationship in the full knowledge that he did not have the right to remain here. It is considered that the persistence of their relationship within the UK would, from the outset, be precarious. In any case, your client has not provided evidence to support his assertion that he has established family life with his girlfriend, on his own admission they do not live together. I should add that even if family life in the UK does exist and removal would interfere with such family life, your client does not have the right to ignore legitimate immigration controls or to choose where he wishes to enjoy his private life. This office has considered your claim but has concluded that the result of Mr [S's] removal would be wholly proportionate. Following your client's removal, it will be open to him to make an application for entry clearance, which, if successful will allow him to return to the UK lawfully as a spouse/fiancé of a person settled here."

On 7 December 2005, this claim was lodged and so removal has been deferred.

11. On the findings of the adjudicator, which should be accepted by the defendant and which I should apply, the claimant was to be regarded as a refugee so long as the Taliban were in control in Afghanistan. That means that had the application been determined prior to 15 November 2001 (the date after which the defendant did not normally grant asylum to those fearing persecution by the Taliban) he should have been granted indefinite leave to remain (ILR). Although the Refugee Convention does not require that asylum be granted for any longer than a real risk of persecution continues it was then and has until the enactment of s.83A of the 2002 Act by s.1 of the 2006 Act (which so far as I am aware is not yet in force) been the policy of the defendant to grant ILR. However, it seems likely that the defendant would have refused the application since the credibility of the claimant was not accepted. Accordingly, it would have been necessary for an appeal to have been heard and determined in the claimant's favour by 15 November 2001 if ILR were to be granted.

12. Asylum seekers from Afghanistan had from January 1995 normally been granted ELR for 4 years if their claim for asylum was refused. This was because the impossibility of returning anyone compulsorily in safety was recognised. This policy continued until 18 April 2002, when the 4 years was reduced to 1 year. From 11 July 2002, each case was considered on its merits and there was no longer any policy not to remove. In addition, those who had been granted 4 years ELR would, if they applied, normally be granted ILR when the 4 years expired unless they had committed offences or otherwise shown that they were of bad character. It is accepted that the claimant had done nothing wrong and so would, if his claim had been dealt with before 18 April 2002, now have been granted ILR. This means the he would now be irremovable if his claim had been dealt with within 2 ½ years of his arrival.

13. Permission was refused by Davis J on the papers. He was not informed in the Acknowledgement of Service of the policy that 4 years ELR would result in ILR. That

failure was regrettable, since it was clearly relevant to the arguability of the claim. Permission was in due course granted by Burton J following an oral hearing on 31 March 2006. He was not persuaded by the defendant's argument that the claim was out of time and Mr Jay Q.C. has rightly not relied on delay since he has accepted that he could not establish a detriment to good administration or prejudice to anyone.

14. Mr Gill, Q.C. submits that the failure to deal with the claimant's application within 2 ½ years deprived him of an entitlement to ILR and it would be unfair and an abuse of power to deny it to him now. He had a legitimate expectation that his application would be dealt with within a reasonable time and that he would be treated no differently from others who arrived and made claims at the same time as he. Further, he submitted that the failures made it disproportionate to remove the claimant whose rights to private life had accrued under Article 8. Finally, he submitted that the decision to certify under s.96 of the 2002 Act was wrong since there were good reasons why the points about delayed decision making and the denial of the benefit of the policies which should have applied were not raised before the adjudicator.

15. In July 1998, the government issued a White Paper entitled "Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum". That title has a hollow ring in the light of subsequent events. In Paragraph 8.7, in a chapter headed 'Asylum Procedures', this was said:-

> "The key to restoring effectiveness to our asylum system and to tackling abuse is swifter determination of applications and appeals. The Government inherited backlogs of over 50,000 cases awaiting decision and over 20,000 queuing for an appeal hearing. Some undecided cases date back to 1990 and appeals can take 15 months to list in London. Delays of this order send a clear message to abusive applicants that the system cannot cope and is ripe for exploitation, while those in genuine need of protection are condemned to a cruel limbo of worry and uncertainty over their future."

Then in 8.9, there was this:-

> "Delivering faster decisions is crucial to the success of the overall strategy. The Government is aiming to ensure that by April 2001 most initial decisions will be made within 2 months of receipt and that most appeals to adjudicators will be heard within a further 4 months. Both those targets reflect average process times and the Government expects that many cases will be dealt with more quickly. But achieving these targets will depend on a number of factors, including the successful implementation of Casework Programme, the number of asylum applications outstanding which will be affected by changing international circumstances and the extent to which applicants and their advisors unnecessarily delay resolution of an application or an appeal. The Government will therefore keep these targets under review … A faster system with more certain removal at the end of the process will significantly deter abuse."

Finally, with reference to dealing with the backlog which had been inherited, it was said that measures would be adopted which were both firm and fair. It was recognised that the consequences of very long delays, which were not the fault of the applicant, could not fairly be ignored in terms of his or her ties in this country. Paragraph 8.28 concluded:-

> "The Government will therefore adopt an approach in which the effects of long delays in reaching a decision will be taken into account and weighed with other considerations, but only in due proportion and in appropriate cases."

Chapter 8 concluded with this sentence (Paragraph 8.32):-

"Above all the approach will look to the future, enabling resources to be kept focused on ensuring the delivery of an asylum system which is both swift and fair."

16. The aims and expectations were not met. However, the policy was not sufficiently positive to give an individual who suffered from delay any particular expectation. The excuse for the failure to deal with applications swiftly has been the large numbers, which exceeded 70,000 for each year between 1999 and 2002. The average ages of cases dealt with were, according to statistics put before me by Dr McLean of the Asylum Policy Unit in IND, 35 months in 1999, 18 months in 2000, 13 months in 2001 and 7 months in 2002. In the subsequent 3 years they were about 12 months. It is to be noted that these statistics do not show how long it would on average have taken for an application made in a particular year to be dealt with but it is evident that 4 years is excessive.

17. On 1 January 2001 what is called a Public Service Agreement (PSA) target was introduced requiring that 60% of applications lodged on or after 1 January 2001 should be decided within 60 days. A PSA is an agreement between the Treasury and a Government department which calculates spending priorities. During 2001, only 40% was achieved and so any case which could not be decided within 60 days would be set aside and put on hold. There were what Dr McLean describes as supplementary targets for older cases, but these were subordinate to the objective of meeting the PSA target. Thus the old cases were shelved while the PSA targets were sought to be achieved. It is difficult to see how this could be said to be fair since it clearly worked to the detriment of such as the claimant (and there were no doubt many in his position) whose application had not been dealt with by 1 January 2001. There is a suspicion that those such as the claimant were sacrificed so that it could be said that the Government was meeting a target of dealing with at least 60% of applications within 2 months. And it seemed particularly unfair to him when he saw his cousin and others who had entered at the same time as him with similar claims being granted ELR and subsequently ILR.

18. When the claimant arrived in the U.K., he was a refugee. Nevertheless, the U.K. was entitled to consider whether he fulfilled the necessary criteria and inevitably some time would have to elapse before that decision was reached. If it was adverse, further time would elapse while an appeal was brought. Each decision maker would have to consider whether at the time of the decision he was a refugee or entitled to protection

under the European Convention on Human Rights. The Conventions do not give protection to those who do not require it and the Government's policy to grant an unnecessary ILR to refugees does not mean that those who are subsequently found to have been refugees on arrival but not when the decision on their applications was reached must nonetheless be granted ILR. That would be contrary to the principle in *Ravichandran v Secretary of State for the Home Department* [1996] Imm. AR 97 which has now been given statutory force.

19. There can be no doubt that the law requires public authorities to be held to their promises whether they relate to procedure or to substance. A failure to do so will be regarded as an abuse because unfair or, as Laws LJ has defined it in *Abdi v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at Paragraph 68, it is a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. He went on:-

> "… there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the ECHR. Accordingly, a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

20. Laws LJ goes on in paragraphs 69 and 70 to set out various relevant factors that bear on proportionality and to identify what lay behind some of the relevant cases, including *A-G of Hong Kong v Ng Yuen Shin* [1983] 2AC 629, *R v Department of Education and Science ex p. Begbie* [2000] 1 W.L.R. 1113, *R v North East Devon Health Authority ex p. Coughlan* [2001] Q.B. 213.

21. It is unnecessary to go into further detail since there was in my judgment no unambiguous promise that applications would be dealt with in any particular timescale. The White Paper was careful not to make any unequivocal promises and it would be rare for aims expressed by politicians or government to constitute promises capable of being regarded as legitimate expectations. While it may be said with some force that there ought to have been a recognition that asylum claims were likely to remain at a high level and that insufficient resources were put in place to deal with those claims, it would be difficult if not impossible for a judge to decide that what was done was unjustifiable having regard to all the competing claims on the public purse.

22. It is not however of crucial importance to determine whether there was a promise. There is a wider principle that there must be fair treatment of any individual by a public authority and the court can give redress if unfairness in any given set of circumstances can be said to have amounted to an abuse of power. It was this that led the Court of

Appeal in *R(Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744 to decide that Mr Rashid was entitled to be regarded as a refugee and to ILR. This was because the Secretary of State had failed to apply a policy or a practice which was in force when the refusal of asylum was made. No explanation was given for that failure and the Court inferred that it resulted from, as Dyson LJ put it at paragraph 53, "flagrant and prolonged incompetence". An explanation was given to me in R*(A), (H) and (AH) v Secretary of State for the Home Department* 2006 EWHC 526 (Admin). I took the view that, far from excusing what had happened, the explanation confirmed that there had been flagrant and prolonged incompetence. This led me to decide that the claimants must be granted what they should have been granted if the policy in question had been applied. I recognised that, having regard to the *Ravichandran* principle, such relief would only rarely be granted. The correct approach was indicated by Dyson LJ in Paragraph 50 of *Rashid*. He was basing his decision on legitimate expectation, which was relevant in that case but which I regard as unnecessary. However, the principle in relation to fairness is the same. He said this:-

> "The nature of the decision will, therefore, always be relevant to the question whether the frustration of an expectation is an abuse of power. The court will not only have regard to whether wide-ranging issues of policy are involved, but also whether holding the public body to its promise or policy has only limited temporal effect and whether the decision has implications for a large class of persons. The degree of unfairness is also material. That is why in *R v Inland Revenue Commissioners ex p. Unilever Plc* [1996] STC 681, Simon Brown LJ referred to 'conspicuous unfairness' amounting to an abuse of power. The more extreme the unfairness, the more likely it is to be characterised as an abuse of power. If the frustration of a legitimate expectation is made in bad faith, then it is very likely to be regarded as an abuse of power and, therefore, unlawful."

23. The question therefore is whether the delay in the circumstances amounted to conspicuous unfairness so as to constitute an abuse of power. It is not suggested that there was bad faith in that the defendant, knowing that the situation in Afghanistan was fluid, deliberately refrained from deciding applications such as this until the impossibility of removal disappeared. The relevant periods of delay are just over 2 years before 15 November 2001 for the grant of asylum and almost 2 ½ years for the grant of 4 years ELR. The reasons for the delay are a material factor because, if those reasons demonstrated that this claimant was being treated unfairly, they might help to show an abuse of power. I am not impressed with the approach which was adopted because it put those who had made applications before January 2001 and whose applications had not been determined by then in a worse position. However, I am not in a position to say that that was so obviously and conspicuously unfair as to amount to an abuse of power. Indeed, it is difficult to see that delay by itself could, unless it was extreme and arose for wholly bad reasons in an individual case, enable a court to say that the decision made after the delay was unlawful if it deprived the person affected of some advantage he would have enjoyed if the decision had been made timeously. Nor do I accept that the decision of the A.I.T. in *MM (Delay – reasonable period – Akaeke-Strbac)* [2005] UKIAT 00163 that in effect it would be unreasonable for the Home Office to delay for more than 12 months in reaching a decision is of universal application. Delays of over 12 months may need an explanation, but that explanation may properly amount to no more than that the pressure of numbers made a greater delay inevitable. In addition, any particular circumstances of an individual case must be

taken into account. I note, incidentally, in this context that the evidence before me in *R(A), (H) and (AH) v Secretary of State for the Home Department* showed that by January 2000 the backlog of undecided asylum applications had exceeded 120,000 (see paragraph 20). There was also evidence that there had been a reorganisation in IND to try to deal with the volume of applications more efficiently (see paragraph 21).

24. The case that perhaps comes closest to supporting Mr Gill's contentions is *R(Mugisha) v Secretary of State for the Home Department* [2006] INLR 335, a decision of Calvert Smith J. That was a case in which a similar policy of granting 4 years ELR was applied to those seeking asylum from Rwanda. Mr Mugisha claimed asylum in June 2000. In June 2001 his claim was rejected because he had failed to attend for interview and so the Secretary of State based his refusal on what had been put forward by the claimant in writing. He did not believe his story. The refusal was not served until April 2002 whereupon the claimant appealed. The claimant's solicitors pointed out that as the claimant was Rwandan, the decision that he should be removed was contrary to the practice to grant 4 years ELR because return to Rwanda was not possible. A crucial document, namely an identity card which was in the possession of the Home Office, was not produced to the adjudicator before whom the appeal was heard. The Secretary of State was not represented and the adjudicator was influenced by the supposed unreliability of the identity card in judging the claimant's credibility. He thought he was not a Rwandan but was trying to misuse Rwandan nationality to achieve residence in the U.K.

25. The adjudicator was misled about the existence of the 4 years ELR policy since he thought it had been withdrawn before the adverse decision in 28 August 2002. The I.A.T., who heard an appeal against the adjudicator's determination, were also misled as to the terms of policy, believing that it was not a fixed policy but only a general practice which the Secretary of State did not need to follow in the exercise of his discretion in an individual case. By the time the appeal was heard in April 2004, the Secretary of State accepted that the claimant was Rwandan, but by then he could not benefit from the policy. In all the circumstances, it is not at all surprising that Calvert Smith J decided that there had been conspicuous unfairness. The case was one in which the *Rashid* approach was applied. It was not a case in which delay by itself was relied on. It was the failure for any good reason to apply a policy in force when the relevant decision was made and the subsequent failures to provide proper information to the appellate authorities that led to the adverse decision.

26. I am not therefore persuaded that the claimant is now entitled to ILR. While I have no doubt that with good reason he feels that he has been treated unfairly, that is not sufficient in the circumstances of this case in the light of the principles laid down by the Court of Appeal to entitle him to be put in the position he would have been in if his application had been dealt with before the change of policy.

27. But that is not the end of this case. The claimant has relied on the full 4 ½ years delay to found an argument that to return him would breach his rights under Article 8. There have been a number of decisions of the Court of Appeal which consider the effect of delay in relation to claims under Article 8 and in particular whether it would be disproportionate to remove an individual who, because of the lapse of time, had established a private or a family life in the U.K. while awaiting the Secretary of State's

decision. The latest of these is *HB & Others v Secretary of State for the Home Department* [2006] EWCA Civ 1713 in which judgment was delivered on 14 December 2006. When I reserved judgment, I was informed that this judgment was expected and I said that either side could, if they wished, put before me any submissions in writing before the end of term. Neither did so. At paragraph 24, Buxton LJ, who gave the only reasoned judgment, helpfully summarised the law in relation to delay. He said this:-

> "I draw the following conclusions from the authorities, binding on us, discussed above.
>
> i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within Article 8(1). That however is a question of fact, and to be treated as such.
>
> ii) The application to an Article 8 case of immigration policy will usually suffice without more to meet the requirements of Article 8(2) [*Razgar*]. Cases where the demands of immigration policy are not conclusive will be truly exceptional [Huang].
>
> iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in *Shala* and *Akaeke*); and persons who have no such right.
>
> iv) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [*Akaeke*], to enforce those procedural rules [*Shala; Akaeke*]
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> v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under Article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under Article 8(2), but it must have very substantial effects if it is to influence the outcome [*Strbac* at p25]
>
> vi) The mere fact that delay has caused an applicant who now has no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR does not in itself affect the determination of a subsequent Article 8 claim [*Strbac*, at p32]
>
> vii) And further, it is not clear that the court in *Strbac* thought that the failure to obtain ELR on asylum grounds because of failure to make a timely decision could ever be relevant to a decision on the substance, as opposed to the procedure, of a subsequent Article 8 claim. Certainly, there is no reason in logic why that fact alone should affect the Article 8 claim. On this dilemma,

see further p6 above.

viii) Arguments based on the breakdown of immigration control or of failure to apply the system properly are likely only to be of relevance if the system in question is that which the Secretary of State seeks to rely on in the present proceedings: for instance, where a procedural rule of the system is sought to be enforced against the applicant [*Akaeke*]. The same arguments do not follow where appeal is made in Article 8 proceedings to earlier failures in operating the asylum system.

ix) Decisions on proportionality made by Tribunals should not, in the absence of errors of principle, be interfered with by an appellate court [*Akaeke*]."

28. I should refer briefly to the cases which are referred to in this summary. The first is *Shala v Secretary of State for the Home Department* [2003] INLR 349. In *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848 that case was said to be a decision on its own facts which established no particular, free standing principle. Nevertheless, its facts are of some interest in the context of the instant case. Mr Shala, an ethnic Albanian, came to this country in June 1997 from Kosovo. At that time and until mid 1999 there was a policy to grant at least ELR because of the persecution by the Serb authorities of ethnic Albanians. In October 1998, he met and began to cohabit with a woman who was a Czech national and an asylum seeker who was granted refugee status in May 2000. It was not until July 2001 that Mr Shala's claim was determined. The question before the court was whether to require him to go to Kosovo and apply from there for leave to enter as the spouse of someone settled here was disproportionate.

29. The court decided that it was disproportionate. If he had had his claim dealt with reasonably efficiently, he would have been able to apply for leave to remain on the basis of marriage from within the country. Keene LJ at paragraph 15 on page 355 made the point that the appellant had a legitimate claim to enter at the time when on any reasonable basis his claim should have been determined. This was because he was then fleeing persecution. Schiemann LJ put it thus at paragraphs 24 to 26 on p.357:-

"[24]. The present case, however, is distinguishable from the mass of cases because the applicant came here at a time and in circumstances where his failure to apply for a visa was accepted by the Home Office as wholly explicable and where he applied for permission on the day he arrived from Kosovo, which was in the middle of a dreadful civil war. He could not have done more. In short he was, at the time that he came, a meritorious applicant for permission to remain here, at any rate for a while. It was not until more than 4 years later that the Home Office, after chivvying by his solicitors, got round to arranging an interview to test the genuiness of his asylum application. Automatically to apply to a person in his position a policy designed to discourage both meritorious and unmeritorious applicants from jumping the queue is a wrong approach to the difficult problem of deciding whether the interference with a person's rights under Article 8 is necessary in a democratic society.

> [25]. As I understand it, had his application been dealt with in the appropriate timescale as it ought to have been, then his application for permission to stay would in all probability have been granted. The fact that it was not was not his fault. Had that been granted, a further application to remain with his wife would also in all probability have been granted. It was during this period that the family relationship was established. These factors should have been considered by the decision-taker as well as the interests of his wife and the two boys who have now found a father.
>
> [26]. The difficulties in a case such as the present arise from the fact that the relevant procedures were designed to take a few months and yet have in practice, through no fault of the applicant, taken the Home Office several years. In such circumstances one must be careful before one allows policies designed for procedures operating in different conditions to become automatically determinative of the fate of a family."

30. In *Strbac v Secretary of State for the Home Department,* a Serb from Croatia, came to the U.K. on 28 January 1999 and claimed asylum. His claim was decided adversely within about 10 months but for some reason the decision was not served on him until a year or so later. In paragraph 25, Laws LJ, who gave the only reasoned judgment, said:-

> "It is of course right that substantial delay in the determination of an application may, at least if it proves to be substantial and to have brought consequences in its wake beyond the bare passage of time, be a factor which the decision-maker is obliged to consider. But as a proposition that does no more, with respect, than identify an actual or potential relevant factor. (And it is a factor which, I apprehend, must have very substantial effects if it is to drive a decision in an applicant's favour: see *Anufrijeva v Secretary of State for the Home Department* [2003] EWCA Civ. 1406 Paragraphs 46-47). This is a far cry from [counsel for the appellant's] very different endeavour, which was to glean from Shala a distinct principle: a principle which, with some qualifications, came close to a rule to the effect that an applicant whose claim to enter or remain (a) is decided after the expiry of a reasonable time and (b) would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, should, if he has meantime established a family life here, be treated as if it had been so decided …"

Mr Strbac had come with his wife and family from Croatia and so there was no reason why the whole family should not return together to Croatia. Thus he had not been deprived of any procedural advantage. Even if the claim, had it been decided earlier, would certainly have met with success, the principle remains the same. That in itself would not suffice to establish the exceptional circumstances which an applicant would need to establish to justify being allowed to remain.

31. In *Akaeke v Secretary of State for the Home Department* [2005] INLR 575 the delay by the Home Office was described as a public disgrace. The claimant had arrived in the U.K. no later than November 1994. Her asylum claim was rejected in December 1995.

In February 1996 she married a British citizen. Her claim to be allowed to stay on the basis of that marriage was refused in September 1996 as were various other attempts to persuade the Secretary of State to allow her to remain. Eventually, in February 1999 she made a further claim to remain on the basis of her marriage and sought to rely on Article 8 of the European Convention on Human Rights, although the Human Rights Act 1998 was not then in force. There then followed a delay of over 3 years in dealing with that claim.

32. Mrs Akaeke had clearly been able to stay in this country unlawfully over 10 years. However, it was accepted that the marriage was genuine and subsisting and so the only issue was whether she should return to Nigeria and make an application to enter on the basis of her marriage from there. *Akaeke* does not decide that culpable delay by itself will mean that it will be disproportionate to return a person who has established a private or family life here. The claimant succeeded because of the added factor of the need to apply from abroad. Since this was the only reason for removal, the delay could and in the circumstances did render it disproportionate to require that that procedural step be taken.

33. It follows in my judgment that if this claim were based on the delay alone it must fail. But there is an added factor here. The refusal letter of 3 November 2005 stated:-

> "Further to this there is no reason why your client cannot return to Afghanistan in order to apply for the correct entry clearance/work permit, given your client's keenness to work and set up his own business in the U.K."

I have already set out the relevant paragraph of the refusal letter of 5 December 2005 following the "asserted relationship" with the lady he intends to marry. The last sentence refers to the possibility of applying for an entry clearance.

34. This claim thus falls fairly and squarely within the principle referred to in paragraph 24iii) and viii) of Buxton LJ's judgment in *HB and Others*. There is, however, an additional and, it seems to me, a determinative factor in the circumstances of this case. There is no possibility of obtaining an entry clearance in Afghanistan. The British Embassy there has no facilities for issuing such clearances. The best that it can offer is to apply via the High Commission in New Delhi or possibly Islamabad or the embassy in Dubai. This must have been known to the Secretary of State in November and December 2005. There are thus very serious and possibly insurmountable obstacles to obtaining an entry clearance following return to Afghanistan. This coupled with the excessive delay in dealing with the claimant's application renders the decision to remove unlawful. It does not mean that the claimant is now entitled to ILR. But it does mean that he should be allowed to apply for the necessary leave based on his proposed marriage and his plans to set up business or to work here while remaining in the U.K.

35. In addition, I am satisfied that the certification under s.96(1) was wrong. The defendant rejected the asserted relationship on the facts. However, those facts have not been properly investigated and there are arguably valid reasons why the relationship was not put forward to the adjudicator. If the claim is to be refused, there should be a right of

appeal.

36. I have no doubt that this claimant has not been treated fairly and that there has been a failure to deal with his claim efficiently. A delay of 4 ½ years is on any view excessive. People cannot be expected to put their lives on hold, particularly if they are young. The claimant was when he arrived in genuine need of protection and he has been condemned to a cruel limbo of worry and uncertainty over his future. He has now been here for over 7 years and on any view has established himself as a good worker and, it seems, a model citizen. He has seen his cousin and others granted ILR which has been denied to him because his claim was not dealt with earlier.

37. I can only deal with errors of law. But, should a refusal be maintained, an immigration judge can consider the facts and exercise his discretion accordingly. I would be surprised if the Secretary of State in the circumstances of this case maintains his refusal and even more surprised if a refusal is upheld on appeal.

38. The removal directions will be quashed. In addition, the decision to certify under s.96(1) will be quashed. The defendant must reconsider the claim in the light of this judgment.