Neutral Citation Number: [2010] EWHC 3102 (Admin)

Case No: CO/15208/2009

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 29/11/2010

Before:

THE HONOURABLE MR JUSTICE BEATSON

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Between:

The Queen (on the application of K)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr Christopher Jacobs (instructed by **TRP Solicitors**) for the Claimant
Mr Robert Kellar (instructed by **The Treasury Solicitor**) for the Defendant

Hearing dates: 8 November 2010

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Judgment

The Honourable Mr Justice Beatson :

Introduction

1. The claimant is a citizen of Afghanistan, now aged 44 and a medically qualified doctor. He was removed from the United Kingdom to Afghanistan on 21 January 2006. He subsequently left Afghanistan and in April 2010 was in the Ukraine. The issues in his application for judicial review arise because of changes of policy by the Secretary of State for the Home Department during the consideration of his application for asylum. The effect of such changes of policy has been considered by the courts on a number of occasions.

2. In this case the first issue is whether or not a person outside the United Kingdom is potentially a beneficiary of a policy ("the *R (S)* policy") introduced by the Secretary of State on 4 September 2008 in the light of *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546. In that case the Court of Appeal held that a decision by the Secretary of State in 2002 to put certain asylum applications "on hold" to enable later applications to be dealt with within the government's target of 60 days was unlawful. The effect of putting the earlier applications "on-hold" was that the claimant's application was not decided until after the withdrawal of a policy to give applicants from Afghanistan exceptional leave to remain. The *R (S)* policy was formulated to address the position of those who were adversely affected by the delay in dealing with their asylum applications until after the exceptional leave to remain

policy had been withdrawn. Applicants within its scope are normally given indefinite leave to remain in the United Kingdom.

3. The second issue is whether an application by the claimant based on *R (S)*, made on 7 November 2008, was in time. It was submitted on behalf of the Secretary of State that the claimant delayed in making his application and that there is consequently no unfairness in the Secretary of State's refusal to grant him exceptional leave to enter the United Kingdom to enable his position to be considered in the light of the *R (S)* policy.

4. These proceedings were launched on 14 December 2009. At that time the defendant had not responded to or made a decision on the claimant's November 2008 application. Permission was refused on the papers by me on 11 March 2010. The grounds were amended on 15 March and 14 September 2010 in the light of the defendant's decision on 21 December 2009 refusing the application and her supplemental response dated 2 July 2010.

5. By 2 July 2010 permission had been granted. Wyn Williams J gave permission on 20 April 2010 at an oral hearing. He did so on the basis that the claimant would not rely on anything which occurred prior to the publication of the *R (S)* policy on 4 September 2008 except for the facts relating to his case which would engage that policy. Mr Jacobs, in paragraph 3 of his skeleton argument on behalf of the claimant, makes it clear that the claimant's case is not put on the basis that he is entitled to rely on any act or concession made by the Secretary of State before she published the *R (S)* policy.

6. The evidence on behalf of the claimant consists of his statement dated 3 December 1999, and a statement dated 16 April 2010 by Ms Bushra Ali, his solicitor. The evidence on behalf of the defendant consists of a statement by Mr Neil Forshaw, an Assistant Director at the UK Border Agency's (hereafter "UKBA") Case Resolution Directorate. He was involved in the discussions which led to the *R (S)* policy being implemented and, with colleagues, for the formulation of that policy.

7. Mr Forshaw's statement is dated 3 November 2010, two working days before the hearing, and four and a half months after the defendant's detailed grounds were served. An application to admit this very late evidence was not opposed. But I observe that it is unfortunately becoming all too common for the defendant in immigration judicial reviews to serve evidence at the very last minute. The court is aware of the pressures that face those who work in the UKBA and the immigration section of the Treasury Solicitor's Department as a result of their enormous case load. There is, however, a stark contrast between the expectations the defendant has for applications by claimants in cases such as these and what is now the commonplace practice by the defendant.

The factual and policy background

8. The material facts are conveniently summarised in the helpful skeleton arguments by Mr Jacobs and Mr Kellar. On 25 September 1999 the claimant arrived in the United Kingdom and applied for asylum. His claim to refugee status is that he and his family had been members of the Khalq Democratic Party/PDPA in Afghanistan, that he was

approached by the Taliban when they came to power in 1996 and asked to assist them because they were desperate for doctors, that his brother was publicly hanged by the Taliban in 1999, and that after his brother had been executed he refused to continue to provide medical assistance for the Taliban and fled from Afghanistan.

9. The number of applications for asylum, the backlog and the approach taken by the Secretary of State to the timing of the consideration of such applications meant that the claimant's application was not considered for over four years. Indeed, he was not interviewed in connection with his asylum claim until 27 May 2004. During that period the policies applicable to citizens of Afghanistan whose applications for asylum had been rejected changed.

10. Between 1995 and 15 November 2001 the Secretary of State's policy was normally to grant a credible applicant for asylum from Afghanistan indeifinite leave to remain. Thereafter, normally four years exceptional leave to remain was granted to applicants from Afghanistan who did not meet the criteria for recognition as a refugee under the Refugee Convention. What the Secretary of State's Operational Guidance Note dated February 2003 described as a "long-standing" practice, was altered on 18 April 2002. Between that date and 11 July 2002 unsuccessful Afghanistani applicants for asylum were given exceptional leave to remain for 12 months. Thereafter, if their applications for asylum were unsuccessful, they were not granted exceptional leave to remain for any period.

11. It is common ground that individuals granted four years exceptional leave to remain under the policy in place until 18 April 2002 would normally be granted indefinite leave to remain in the United Kingdom upon the expiry of the four year period. This was stated in the Secretary of State's Operational Guidance Note. The Operational Guidance Note also stated there may be specific cases in which it would not be appropriate to grant indefinite leave. On practice under the policy, see also *R (A, H & AH) v Secretary of State for the Home Department* [2006] EWHC 526 (Admin) at [12] *per* Collins J and *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 at [12] and [63] *per* Carnwath and Moore-Bick LJJ.

12. These changes in the defendant's policy about unsuccessful Afghan applicants for refugee status occurred between the time the claimant applied for asylum on 25 September 1999 and 27 May 2004 when he was interviewed in connection with his application and thus well before the defendant's decision on 5 October 2004 to refuse his application for asylum. The defendant's decision was served on the claimant on 26 November 2004. The reason for the delay in dealing with the claimant's application was that his was one of the large number affected by the defendant's decision in 2002 to put applications for asylum received prior to 2001 "on hold" in order to meet the government's target that new applications for asylum should be decided within 60 days. An account of that decision and the policy for dealing with the large backlog of asylum claims is given in the judgments of Carnwath and Moore-Bick LJJ in *R (S) v Secretary of State for the Home Department*.

13. In 2003 the claimant began working within the Health Service. He was employed by the West Midlands South Strategic Health Authority in a number of capacities, including as a project manager in medical staffing. After the refusal of his application for asylum he appealed to the Tribunal. Before that appeal was considered, on 2

December 2004, he was served with Form IS151B; that is notice by the defendant that a decision to remove him had been taken.

14. On 22 October 2004 Davis J's decision in *R (Rashid) v Secretary of State for the Home Department* [2004] EWHC 2465 (Admin) was handed down. That case concerned decisions of the Secretary of State refusing Rashid asylum and an adjudicator dismissing his appeal made respectively in December 2001 and June 2002. The decisions were made without reference to a policy in force at the time of the decisions not to return Iraqi Kurds. That policy would have assisted Rashid and meant that he was entitled to asylum. But the policy only became known to his advisers in 2003. The decision as to Rashid's position was subsequently reconsidered in January 2004 after the withdrawal of the policy. The decision to refuse him asylum was confirmed.

15. As to the decisions about Rashid made in 2001 and 2002, it is clear that in not taking account of the policy in force at that time, the Secretary of State and the adjudicator fell into public law error. But what of the Secretary of State's decision made in January 2004 after the policy had been withdrawn? Davis J held that notwithstanding the decision in *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex. p Ravichandran* [1996] Imm AR 97 that an asylum application must be determined in accordance with the circumstances obtaining at the date of the decision, it might be an abuse of power for the Secretary of State to fail to apply a policy or practice which was in force at the time of the application: see paragraphs 45 and 65 of his judgment.

16. Davis J concluded that there was an abuse of power in *Rashid*'s case for two reasons. The first was the unwarranted and unjustified failure on the part of the defendant to apply his policy to the claimant at the time of his original application when, had it been applied, he would have been granted refugee status. The second was the differentiation in treatment and consequent outcome accorded to two other applicants whose cases had been linked with his but who had been granted refugee status.

17. The appeal of the claimant in these proceedings was heard on 19 March 2005. In a determination promulgated on 29 March 2005 the adjudicator, Mr Mallinson, found ([39]) that, although the claimant had embellished the account he had originally given by stating he had been arrested and detained by the Taliban and that they had issued a fatwah against him, the core of his account was credible. The adjudicator, however, dismissed the claim because (see [47] and [51]) he considered that the claimant would not be at risk from the Taliban in Kabul and would not be considered to have aligned himself with the Taliban by the then administration in Afghanistan.

18. By the time his appeal was heard the claimant had left his employment in medical staffing to concentrate on obtaining his medical qualification and registration with the General Medical Council. This was acknowledged by the adjudicator. As to the claimant's Article 8 grounds, the adjudicator accepted that there had been "significant and unacceptable delay" by the defendant in his case and that no reason had been given for the delay. But he stated ([59] – [61]) that, although the delay was unsatisfactory, the claimant was not bound to succeed. He also stated that the delay and the benefit of the claimant qualifying and practising in the United Kingdom did not make removal a disproportionate interference with the claimant's private life.

Jumping ahead, by October 2005 the claimant had passed the necessary tests and obtained an offer of employment as a clinical assistant to a GP which would assist him in fulfilling the GMC's training requirements.

19. The claimant applied for reconsideration of the adjudicator's decision. On 22 April 2005 Mr Freeman, a Senior Immigration Judge, made no order for reconsideration. It appears that the grounds for reconsideration included the issue of delay and unfairness considered in *Rashid*'s case. As to that case, Mr Freeman stated that it was "a first instance decision not binding on the Tribunal, and not likely to be followed by it".

20. I pass over what might be thought to be a surprising approach for a tribunal judge to take to a decision of the Administrative Court. As to this, see *R (B) v Islington LBC* [2010] EWHC 2539 (Admin) *per* Cranston J at [29] referring to the "mutuality of respect constitutionally required of judicial institutions" and essential to our system of precedent which "demands" that the Upper Tribunal follow decisions of the Administrative Court unless the Tribunal is convinced that a previous decision is wrong. In fact, Davis J's decision in *Rashid*'s case was affirmed by the Court of Appeal two months later on 16 June 2005.

21. Dyson LJ stated that the *Ravichandran* principle would yield where there was conspicuous unfairness. His Lordship considered there was such unfairness in *Rashid*'s case. He referred to the two factors relied on by Davis J. He stated the unfairness resulted from "flagrant and prolonged incompetence" by the defendant in that case and the fact that the claimant was not treated in the same way as the two other applicants whose cases had been linked procedurally with his: see [2005] EWCA Civ 744 at [53].

22. In *R (S)* Carnwath LJ stated that although the result in *Rashid*'s case seemed just he did not find the reasoning altogether convincing because it appeared to transform "abuse of power" from a general concept underlying particular forms of public law illegality to a special and more extreme category of illegality: [2007] EWCA Civ 546 at [39] – [40]. Carnwath LJ also doubted the weight placed in *Rashid*'s case upon the defendant's conduct because the court's proper sphere is illegality not maladministration. His Lordship stated that if the decisions were unlawful it mattered little whether that was the result of bad faith, bad luck or sheer muddle and conversely, if the decisions were otherwise unimpeachable in law, he found it hard to see why even "flagrant" incompetence at an earlier stage should provide grounds for the court's (as opposed to the Ombudsman's) intervention: [2007] EWCA Civ 546 at [41].

23. Representations on behalf of the claimant were made *inter alia* by the Director of Development of the West Midlands South Strategic Health Authority. The representations did not lead to a revocation of the decision to remove and the claimant was administratively removed to Afghanistan on 21 January 2006.

The decision in R (S) and the R (S) policy

24. The Court of Appeal's decision in *R (S)*'s case was handed down on 19 June 2007. The decision was concerned with applications for asylum made on or before 1 January 2001. It was held that the decision to shelve such applications was unlawful

because it unlawfully fettered the Secretary of State's discretion. The court agreed with Collins J who, at first instance in January 2007, stated that the court was entitled to conclude on the balance of probabilities that the claimant in *R(S)* would have obtained exceptional leave to remain and in due course indefinite leave, and that his failure to do so was caused by the unlawful fetter on the Secretary of State's discretion. It ordered that the case be remitted to the Secretary of State to re-determine in the light of the judgment, with the expected consequence that the claimant in that case would be granted indefinite leave to remain.

25. As a result of the judgment in *R (S)*'s case the Secretary of State decided to adopt a policy to address other cases with similar facts. UKBA staff formulated a number of interim and draft policies during 2007. Mr Forshaw's statement sets out or summarises the contents of the various iterations of the draft policy and the published and unpublished policy.

26. The first document is interim guidance issued to UKBA staff on 3 September 2007. It has a heading "When to suspend removal action on the basis of the Court of Appeal's finding in the case of *R(S)*" and its language is couched in terms of suspending removal action and allocating the case for a consideration of a grant of leave.

27. In October 2007 the UKBA's Asylum Policy Unit prepared an options paper and draft guidance. Section 4.1 of the draft guidance was headed "The applicant must be present in the UK". The text states that the judgment in *R (S)* "is not extra-territorial and does not require BIA to grant entry clearance to those who may have benefited from the ELR policy at the time but who have subsequently been removed".

28. Mr Forshaw stated (paragraph 6):

> "it was necessary for the UK Border Agency to decide on what the precise scope of any policy arising from the judgment [in *R (S)*] should be, taking into account both the judgment and the fact that there were outstanding judicial review challenges from cases which fell outside the direct terms of the judgment (in that asylum had not been claimed prior to 1 January 2001, but which had nevertheless been delayed beyond the expiry of the country-specific four year ELR policy)".

He explained (paragraph 10) that the policy would cover asylum claims from applicable countries made post-January 2001 but before the ending of country-specific four year ELR policies because:

> "PSA targets were still in force post-January 2001 and it was considered that the rationale of the Court of Appeal's judgment in *R (S)* should be applied".

A restriction in the 3 September 2008 Interim Guidance Note that the claim be made 61 days before the ending of the relevant country policy was also removed.

29. Draft policies dated November 2007, 1 April 2008 and 1 August 2008 all included the statement "cases must meet the following criteria to be considered under *R (S)*:- …the applicant is in the UK at present". The policy as set out in the April 2008 draft received ministerial approval on 23 May 2008.

30. A version of the final policy was published on 4 September 2008. It comprises an eight stage test, guiding officers through to a conclusion as to whether the *R(S)* policy

applies to a given case. At each stage, where the answer is "no" and the individual is stated not to qualify under the *R(S)* policy, an unpublished and restricted section directs the officer to refer to Chapter 53 of the UKBA's Operational Enforcement Manual. The unpublished version contains an additional stage, stage 7. The nine stages in the unpublished version are set out in the Appendix to this judgment.

31. Neither the published nor the unpublished versions of the final policy contain the material in the October 2007 draft under the heading "The applicant must be present in the UK" and the statements in later drafts, including the April 2008 draft approved by the Minister that "cases must meet the following criteria under R(S)" the last of which was "the applicant is in the UK at present". It is only necessary to set out the additional stage in the unpublished version of the policy. This is:

> "RESTRICTED – NOT FOR DISCLOSURE – START OF SECTION
> **Stage 7**
> **Has the individual remained in the UK?**
> - If yes, proceed to stage 8.
> - If no, refer to Cases where the individual has left the UK before making a decision as to whether the individual is excluded from the *R (S)* policy criteria. If ineligible refer to chapter 3 of Enforcement Instructions"

32. The "*Cases where the individual has left the UK*" section is also restricted and not for disclosure. It states:

> "Where an individual applies for ILR on the basis of the *R (S)* judgment, but has left the UK (either voluntarily or forcibly) by the time consideration of that application takes place, case owners/workers should approach a [senior caseworker] for further advice. This is also the case where an individual has left the UK (either voluntarily or forcibly) and applies for ILR on the basis of the *R (S)* judgment following their departure. Further guidance on handling these cases will be published shortly."

33. Mr Forshaw's evidence does not explain why the express references to the need for the applicant to have remained in the UK which were in the Interim Guidance Notes and the various iterations of the draft policy were not in the published version of the policy. What he stated is:

> "14…it is apparent that the policy is written on the understanding that is applicable to those persons who are still in the United Kingdom. This was because it remained the intention behind the policy that those who had left the UK would not ordinarily be entitled to benefit.
>
> 15. For example, the policy guidance refers to the possibility that eligible applicants will be granted indefinite leave to remain in the United Kingdom, not indefinite leave to enter. Section 9 of the [unpublished version of] policy notes that, '*the individual meets the R (S) policy criteria. Any* ***removal*** *action should be suspended and a grant of* ***ILR*** *should be implemented'* (emphasis added).
>
> 16. Further, the final paragraph of the section on Policy Background notes that, '*if, having considered the case in accordance with this guidance, the individual is not eligible for ILR and removal action will follow, case owners/workers should refer to the guidance for considering other extenuating circumstances.'* The guidance on extenuating circumstances is contained in chapter 3 of the Enforcement Instructions and Guidance and refers to a range of factors that should be taken into account before a decision to remove an applicant is taken. The guidance states, '*it is the policy of the Agency to remove those persons found to have entered the UK unlawfully unless it would be a breach of the Refugee Convention or ECHR or*

> *there are compelling reasons, usually of a compassionate nature for not doing so in an individual case'.* It further states, '*full account must be taken of all relevant circumstances before a decision to remove is taken on a case. The factors to be considered are the same as those outlined in paragraph 395C of the Immigration Rules'.*"

34. Mr Forshaw stated that the unpublished paragraph 7 was inserted into the policy because in the period before publication the Secretary of State faced two claims for judicial review by claimants who had been removed from the United Kingdom after the decision of the Court of Appeal in *R (S)* and the Interim Guidance of 3 September 2007 had been published. At that stage the Interim Guidance only covered those who claimed asylum before 1 January 2001. As finally settled, the policy applied to those who claimed asylum both before and after January 2001. Mr Forshaw stated (paragraph 17) that "in essence these judicial review claims raised the particular issue of what should happen to those removed after *R (S)* had been handed down, between the publication of the Interim Policy and the publication [of] the final policy and who fell within the terms of the final policy".

35. Paragraph 18 of Mr Forshaw's statement refers to further discussion "as to how the policy should be amended to take account of such unanticipated scenarios". Following this, the unpublished section of the policy on "*Cases where the individual has left the UK*" was inserted into it. Mr Forshaw stated:

> "The draft versions of the *R (S)* policy that were written prior to the final publication of the Policy left open options for dealing with cases like those…where submissions has been made after the *R (S)* judgment but at a time when applicants were not, in fact, within the terms of any policy at the time of their removal. It was decided that such cases should be referred to a senior case worker though it did not instruct that they were to be granted leave. It simply noted that further guidance would be issued.
>
> 19. It was never the case that UKBA intended the policy to benefit those who had left the UK *before* the judgment in *R (S)*. Besides any other consideration, it would not be possible to quantify how many cases might be affected by that amendment. Nor can it be said that it is unfair not to apply the policy when the person concerned has left the UK either voluntarily or forcibly before they could have had any expectation of a grant of ILR which arose from the *R (S)* judgment."

He also stated (paragraph 20):

> "The UK Border Agency was fully aware both before and immediately after the *R (S)* judgment that persons whose cases were similar or identical to that of S had been removed from the UK to Afghanistan. The UK Border Agency made a conscious decision that such cases should be availed by the policy which later emerged. That it was not intended that the policy should apply to persons removed prior to the judgment is demonstrated by the fact that earlier drafts of the policy, including that which was eventually approved by the Minister for Immigration on 23 May 2008 clearly stated that, in order to benefit from the policy, an applicant had to have remained in the UK and the options put forward at a very stage made clear that the Policy was not intended to form the basis for an entry clearance application. There would have been no requirement for these provisions had it been intended that the Policy should also apply to persons removed from the UK prior to the judgment."

36. Mr Forshaw acknowledged that the wording of the unpublished stage 7 of the final policy "could have been clearer and that this section should perhaps have been included in the published Policy". He stated (paragraph 21) that it was the emergence of an unanticipated scenario of a person being removed after the judgment but before

the introduction of the final version of the policy that led to this change and that it has not been possible to form the general guidance referred to because one of the cases giving rise to the inclusion of the later guidance is still ongoing.

37. On 7 November 2008, some 17 months after the decision in *R (S)*'s case, over 30 months after his removal from the United Kingdom, and two months after the publication of the *R (S)* policy, the claimant's solicitors wrote to the fresh claims section asking that the Secretary of State grant the claimant exceptional leave to enter the United Kingdom on account of his particular circumstances. The letter set out the factual background and made detailed representations as to the applicability of *R(S)* to the claimant.

38. The letter also enclosed a copy of a letter the claimant had written to his solicitor. This gave his account of what happened on his arrival in Afghanistan, his interview by the authorities there, that he did not tell them the truth because if they had found out his true identity they would have handed him over to his enemies, the Northern Alliance or the Mujahaddin and because, as a doctor he would be presumed to have a lot of money and a big bribe would have been demanded. The claimant's letter stated that he was released after three days and told to return in two weeks time. He also stated his house in Kabul had been destroyed, that it was dangerous to be in Kabul without an identity card, and that he went to his home town. There he found that his mother had died and that his family house was occupied by other people. He also stated that he was told that a Mujahaddin leader who is now a member of the Afghanistani Parliament was looking for him, that he went to Peshawar, made contact with friends in England, and was encouraged to keep going.

39. The claimant's solicitors' letter before claim is dated 30 July 2009. After referring to the Court of Appeal decision in *R (S)*, it states that the facts relating to the claimant are "identical and arguably more compelling than those of *R (S)*". The letter referred to the delay in dealing with the claimant's application for asylum, the result that he failed to benefit from a policy that would have resulted in him being granted leave and subsequently indefinite leave to remain, the decision to remove him, and the failure to respond to the letter dated 7 November 2008, over 8 months earlier. There was no reply to this letter. Proceedings were, as I have stated, instituted on 14 December 2009.

40. The UK Border Agency replied to the letter dated 30 July in a letter dated 21 December 2009. The writer apologised for the delay in responding to the letter. It was stated that the delay was "as a result of the exceptional nature of your representations on behalf of" the claimant. After setting out the background facts and the history of the policy that was ruled unlawful in *R (S)*'s case, the letter states:

> "Although the UK Border Agency apologises to your client for the delay in considering his initial asylum claim, it is not accepted that there are grounds to grant leave to enter.
>
> UKBA has a policy in place to give guidance where an individual appears to have lost the benefit of a country-specific ELR policy unfairly as a result of a delay in deciding his case. For your reference this policy is available on the UKBA website at [the location is stated]. This policy is not intended to avail persons who are outside the United Kingdom. Your client therefore does not qualify for leave to enter on the basis of the *R (S)* policy."

There is no reference in this letter to delay on the part of the claimant. That was first raised in the defendant's summary grounds.

41. In a letter dated 2 July 2010, the defendant wrote "to provide a supplemental response to matters raised in [the] letter of 30 July 2009 and [the claimant's] application for judicial review". After referring to the guidance published in September 2008 the letter states:

> "*Intention of the policy*
>
> 5. In our letter of 21 December 2009 it was averred that the policy was 'not intended to avail persons who are outside the United Kingdom'. The policy addresses application for Indefinite Leave to *Remain* in the United Kingdom. The benefits of the policy do not and were never intended to apply to persons who had already left the United Kingdom (either voluntarily or through enforced removal) prior to the *R (S)* Court of Appeal judgment. This is also clear from stage 8 of the [published] policy criteria which describes the appropriate outcome where stages 1 to 7 of the policy criteria have been met (emphasis supplied):
>
> > 'The individual meets the *R (S)* policy criteria. **Any removal directions should be suspended** and a grant of ILR should be implemented'.
>
> *Chapter 53 of the Enforcement Instructions and Guidance*
>
> 6. At stage 7 of the [unpublished] policy relating to *Has the individual remained in the UK?*, it notes that where an applicant who has not remained in the UK is ineligible under the policy, reference should be made to chapter 53 of the Enforcement Instructions. The same reference is made at stages 1, 3, 4, 5, 6, and 8 of the policy where the applicant does not meet the eligibility criterion. Chapter 53 of the UK Border Agency's Enforcement Instructions and Guidance covers certain factors (both positive and negative) that…are to be taken into account before a decision is taken to remove an illegal entrant or person subject to administrative removal. It is noted that the direction to refer to chapter 53 consideration would not however be relevant in a case such as Mr Khitab's given that he had already been removed from the United Kingdom. The reference to chapter 53 is relevant to the other stages listed above as in those circumstances the applicant applying under the *R (S)* policy would still be present in the United Kingdom."

42. In this letter the defendant also elaborated on the submission in the summary grounds that the claim was precluded by the claimant's delay. It is stated that the claimant had not applied to the Secretary of State for ILR until some four years after the refusal of his asylum claim and did not institute these proceedings until five years after the refusal. The letter stated the claimant was thus barred from relief under the principles set out by the Court of Appeal in *R (S, H and Q) v Secretary of State for the Home Department* [2009] EWCA Civ 142. The Court of Appeal had affirmed the principle that where a claimant seeks to challenge a failure to grant ILR based upon delay/"conspicuous unfairness" a court should not intervene unless the proceedings had been brought promptly following a decision not to grant asylum (paragraph 7) and (paragraph 11) that leave was refused on the principles set out by Goldring LJ in *S*, *H*, and *Q*'s case.

43. The statement by Ms Bushra Ali states that the claimant has told her that on 16 April 2010 he was residing illegally in the Ukraine without valid papers, that he has been robbed at knifepoint on two occasions and had all his belongings stolen, and has been forced to pay bribes to police officers. He has not applied for asylum or reported the

crimes that are being committed against him to the Ukrainian authorities because he fears that they will remove him to Afghanistan.

Discussion

(1) Does the R (S) policy potentially apply to a person outside the United Kingdom?

44. Mr Kellar's skeleton argument (paragraph 34) accepted that the approach to be adopted in interpreting the policy of a government Minister is that set out by the Court of Appeal in *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72. In that case the court considered an *ex gratia* compensation scheme which was the subject of a Ministerial statement to Parliament and aimed at the public. Hooper LJ, delivering the judgment of the court, stated that it was for the court to determine the meaning of the policy in question. It would do so by the application of the test set out in *R v Criminal Injuries Compensation Board, ex parte Webb* [1987] QB 74, at 78, that is "deciding what would be a reasonable and literate man's understanding of the circumstances" in which he could qualify.

45. The position taken on behalf of the Secretary of State in the present case means it is not necessary to decide whether the approach in *Raissi*'s case applies to a policy, only part of which is available to the public and which is primarily designed to provide guidance to decision makers within a government department or agency. It has been suggested on behalf of the Secretary of State that a policy aimed internally to guide departmental decision makers is to be construed in accordance with the decision in *R (Gashi) v Secretary of State for the Home Department* [2003] EWHC 1198 (Admin): see, for example, *R (S) v Secretary of State for the Home Department* [2008] EWHC 2069 (Admin) where Blair J also did not have to make a decision on the point. See also the cases listed in Fordham's *Judicial Review Handbook* 29.5.10(c). In *Gashi*'s case Maurice Kay J, as he then was, held that the approach of the court should be to ask whether the construction of the policy given by a Secretary of State was one which was not *Wednesbury* reasonable. I observe that *Gashi*'s case was not referred to or cited to the Court of Appeal in *Raissi*'s case. In any event, once a policy is substantially published, as the *R (S)* policy was, it cannot be regarded as aimed solely internally.

46. I have set out the differences between the published and the unpublished policy at [30] – [32]. Mr Kellar submitted that it is clear from both that the policy does not apply to a person in the position of the claimant in this case. This is because the policy does not apply to those outside the United Kingdom and the claimant was removed from the United Kingdom 17 months before the decision in *R (S)*'s case and 33 months before the publication of the *R (S)* policy on 4 September 2008.

47. Mr Kellar also submitted that, since the published policy did not contain what is in stage 7 of the unpublished policy, there could be no expectation by the claimant, let alone a legitimate expectation giving rise to a public law claim, that the policy would apply to a person in his position. While this may be so, legitimate expectation is not the only way in which a ground of review might arise in the circumstances of this case. If, on the true construction of the totality of the policy, it leaves open the possibility of its application to the case of a person who has left the United Kingdom, the decision-maker must take account of that factor. If the decision maker does not, he

will have failed to take account of a relevant consideration, that is the unpublished stage 7 of the policy. In this case the decision letter dated 21 December 2009 states "this policy is not intended to avail persons who are outside the United Kingdom" and "your client *therefore* does not qualify for leave to enter on the basis of the *R (S)* policy" (emphasis added). This letter does not appear to have taken account of stage 7. It could have done so by adding at the end of the first sentence quoted something along the lines of "save possibly for those who left or were removed between the date of the Court of Appeal's decision and the publication of the policy on the UKBA's website".

48. The question is whether, on its true construction, in the light of the authorities to which I have referred, the policy as a whole applies to those outside the United Kingdom. Notwithstanding the force of Mr Kellar's submissions, I have concluded that the reasonable and literate person reading the full policy would not have concluded that it was confined to those still within the United Kingdom. The rationale of the decision in *R (S)*'s case was the unfairness that resulted from putting a whole class of asylum applicants "on hold". That was also the rationale of the defendant's policy. That rationale does not only apply to those whose asylum applications were rejected but are still in the United Kingdom. Moreover, although the claimant in *R (S)*'s case had not been removed, the policy went further than the decision in *R (S)*'s case. It did so by applying to those who applied for asylum after January 2001 but before the ending of country-specific four year policies.

49. Mr Kellar relied on the references to chapter 53 of the Enforcement Instructions in stages 3-8. Chapter 53 concerns extenuating circumstances as a ground for not removing a person from the United Kingdom. He submitted this showed the policy did not extend to those who were no longer in the United Kingdom. He also relied on stage 9 of the full version (stage 8 of the published version). That states that if the individual meets the *R (S)* policy criteria "any *removal action* should be suspended and a grant of ILR should be implemented". That, he submitted, shows its prospective nature of the policy and its applicability only to those still in the country and not to those who have been removed. He accepted that it is only by inference from the references to chapter 53 and to the suspension of removal action that one can say that the published policy does not apply to those who are outside the United Kingdom.

50. The difficulty with these submissions is that, notwithstanding the indications from those references, the unpublished stage 7 of the full policy explicitly addresses the position of those who have not remained in the UK. Its second bullet-point, unlike the second bullet-points in stages 3-6, does not state that, if the answer to the question is "no", the individual "does not qualify" under the *R (S)* policy criteria. It requires only a reference to the "*Cases where the individual has left the UK*" guidance. That guidance states that in such cases case owners/workers should approach a senior case worker for further advice. Moreover, that guidance states that it applies to the case where an individual has applied for ILR on the basis of the *R (S)* judgment either before or after they have left the UK.

51. The statements in the interim guidance and the draft policies that only those within the UK could benefit from them would have been of assistance in resolving any ambiguity resulting from the references to chapter 53 and suspending removal directions if the entirety of the *R (S)* policy was as contained in the published policy.

But as, in accordance with the approach set out by Hooper LJ in *Raissi*'s case, what has to be construed is the full policy, the position is different. One has to take account of the unpublished paragraphs. It is clear from a consideration of the full policy including those paragraphs that there is no longer an intention to exclude all those who have left the United Kingdom.

52. I do not consider that the result would be different in this case on the approach taken by Maurice Kay J in *Gashi*'s case. On the text of the full *R (S)* policy, it would be *Wednesbury* unreasonable to construe it in the way Mr Kellar invited me to do. First, there is no indication in the unpublished paragraphs that it is only applicants in the position of the two applicants to which Mr Forshaw referred, i.e. those who left after the Court of Appeal's decision in *R (S)*'s case but before the formation of the policy in September 2008, who fall within the unpublished stage 7 and the "*Cases where the individual has left the UK*" guidance. Secondly, there is no indication from the documents before the court or in Mr Forshaw's evidence that the senior caseworkers to whom caseworkers were to refer for advice were told that the intention behind the unpublished paragraphs was limited to such cases. Indeed Mr Forshaw's evidence (paragraphs 18 and 22) is that it was anticipated that further guidance would be issued but because one of the cases has not been resolved it has not been possible to formulate general guidance. Thirdly, Mr Forshaw does not state that individual guidance was given to senior case workers. All he states is that in formulating the paragraphs he did not intend the policy to benefit those who had left the United Kingdom before the judgment in *R (S)*'s case *inter alia* because it would not be possible to quantify how many cases might be affected.

53. There is no indication in the text of the full policy that it gives effect to Mr Forshaw's intention and that a person in the position of the claimant is excluded. Moreover, the unpublished stage 7 and the "*Cases where the individual has left the UK*" section contain a positive indication that a person not in the United Kingdom is not automatically excluded from the policy and might be able to show that he or she should be accorded its benefits. The unpublished paragraphs (see paragraph 18 of Mr Forshaw's statement) were inserted "to take account of such unanticipated scenarios" but there is nothing in their wording making a distinction between those who left before the decision of the Court of Appeal in *R (S)* and those who left afterwards but before the publication of part of the policy on 4 September 2008. Nor does Mr Forshaw explain why it was decided to remove the explicit exclusion of people not in the United Kingdom (which was a feature of the guidance and all versions of the draft policy) from the final version. In effect what is submitted on behalf of the Secretary of State is that the intention of the officials responsible for a policy, unexpressed in any document prior to Mr Forshaw's statement dated 3 November 2010, should prevail over the express wording of the two unpublished sections of the policy.

(2) Delay

54. The effect of delay on a claim that errors of law or other public law flaws by the Secretary of State had deprived an unsuccessful applicant for asylum of a potential entitlement under a policy withdrawn before a decision was made was considered by the Court of Appeal in *R (ZK and YM Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 619 and *R (S, H and Q) v Secretary of State for the Home Department* [2009] EWCA Civ 142. In an earlier decision, *HB (Ethiopia) v*

Secretary of State for the Home Department [2006] EWCA Civ 1713 Buxton LJ with whom Latham and Longmore LJJ agreed summarised (see [24]) the law in relation to delay by the Secretary of State in dealing with an application in nine helpful propositions. Although these do not explicitly refer to the position where the effect of delay is to deprive a person of potential entitlement under a policy which, but for the delay, would have been applicable, they have been of considerable assistance in the more recent cases. The position is that, in order for the court to grant relief, an applicant must show both error of law or another public law flaw, and "conspicuous unfairness": see *Rashid*'s case discussed earlier in this judgment at [14] – [16] and [21] – [22]. Where there is delay by a claimant the recent cases show it will be difficult to establish conspicuous unfairness.

55. In *ZK and YM*'s case the appellants relied on the respondent's delay in taking decisions and, in the case of *ZK*, on the failure to apply a current policy at the time his claim for asylum was refused on 3 April 2001. He instituted proceedings for judicial review after his appeals were dismissed: see [2007] EWCA Civ 615 at [5] and [8] and [9]. Pill LJ with whom Rix and Longmore LJJ agreed dismissed *ZK*'s claim on the ground that the defendant had not acted unlawfully or irrationally. He, however, stated (at [25] and [26]) that, had there been, the claim would have failed because "there is no adequate explanation, by way of evidence, for the very long passage of time before the claim for reconsideration was made". In that case the delay was of some four and a half years.

56. In *S, H and Q*'s case the applicants argued that, because of the way the Secretary of State dealt with their applications for asylum, they were deprived of a potential entitlement to four years exceptional leave to remain and thus to indefinite leave to remain which would have followed the granting of four years exceptional leave. *S*'s application for asylum was refused on 1 March 2004. On 25 January 2005 he applied for leave to remain on the ground that, as at the date of an earlier non-compliance refusal on 26 June 2000, he should have been granted exceptional leave to remain. This application was made before Richards J rejected his application for statutory review on 27 January 2005.

57. *H*'s application for asylum was refused on 28 August 2003. His appeal rights were exhausted on 15 December 2003. On 23 January 2006 fresh representations, submitting for the first time that he should have been granted four years exceptional leave to remain when he first applied for asylum, were made. Goldring LJ stated (see [83] and [110]) that from the dates of the refusal of asylum *S* and *H* could have advanced the claim that they subsequently made. When setting out the legal position earlier in his judgment he stated:

> "…The court will not intervene unless proceedings have been brought promptly following a decision by the Secretary of State not to grant asylum. For in such circumstances, it will be very difficult indeed to show conspicuous unfairness." (at [50]).

The case of *Q*, the third appellant, was said to be "hopelessly out of time": see [133] – [134]. *Q*'s Afghani nationality was accepted on 18 April 2002 but *Q* did not suggest that the Secretary of State had failed properly to apply his policy and to grant him four years exceptional leave to remain until 8 May 2006.

58. It was submitted by Mr Jacobs that there is no delay by the claimant in this case because he is not relying on the old exceptional leave to remain policy after its withdrawal. He is relying on the new *R (S)* policy which remains in force. He submitted that one cannot measure time from the refusal of the claimant's application for asylum on 26 November 2004 because the material policy on which the claimant now relies, the *R (S)* policy, was not promulgated then. Accordingly, he submitted that Mr Kellar's submission based on the judgment of Goldring LJ in *S, H and Q*'s case, should be rejected. He also submitted that time should not be measured from the date of the decision in *R (S)* because the policy was not promulgated for some 15 months after the Court of Appeal's decision in that case.

59. Secondly, Mr Jacobs submitted that, although the Court of Appeal in *S, H and Q*'s cases considered the decision in *R (S)*'s case, it did not consider the applicability of the *R (S)* policy to the appellants in that case. He submitted that what subsequently happened to *H* showed that it does not follow that, because an individual's delay meant that there was no conspicuous unfairness in the decision of the Secretary of State, that the same individual is precluded from the benefit of the *R (S)* policy. In *H*'s case Goldring LJ found ([108]) that the Secretary of State had not unlawfully withheld the benefit of the ELR policy from him, but that if he had, *H* was precluded from relief ([110]) by reason of his delay. Notwithstanding this a decision letter dated 25 February 2010 the UKBA stated that H's asylum case had been reviewed "in the light of the policy arising from the Court of Appeal's judgment and it has been decided that it would be appropriate to grant you ILR under the scope of *R (S)*".

60. Mr Kellar submitted that Goldring LJ disposed of *S, H and Q*'s cases on the basis that they had delayed in bringing their claims, and that (skeleton argument, paragraph 53) "it is clear that his determination on the time point did not depend on the underlying factual basis for the allegations of delay/unfairness before him". This, he argued, had been done after the court considered the application of the principles to be derived from the Court of Appeal's decision in *R (S)*'s case and the later decisions of the court in *R (DS Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 774 and *R (ZK and YM Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 615.

61. It was not, Mr Kellar argued, surprising that no delay point was taken in *R (S)*. In that case the claimant's application for discretionary leave was brought before he exhausted his appeal rights, and his application for judicial review was brought within two months of the refusal of discretionary leave. Mr Kellar submitted that, in the present case, from 26 November 2004 the claimant knew that his application for asylum had been rejected, that he had not been given exceptional leave to remain and that he had missed out on the four-year policy. His appeal rights were exhausted in April 2005 but the application which has given rise to these proceedings was made three and a half years later on 7 November 2008. I, however, observe that the contrast between this claimant's case and *H*'s case is less stark but *H* has nevertheless been given the benefit of the *R (S)* policy. His application for asylum was refused on 27 August 2003, his appeal rights were exhausted on 15 December 2003 but it was only on 23 January 2006, over two years later that he first raised the question that he should have been given four years exceptional leave to remain: see *S, H and Q*'s case at [92] and [110].

62. There are differences between the case of this claimant and that of *H*. For example, this claimant raised the "*Rashid* unfairness" point in his application for reconsideration but did not pursue it in the High Court after the Senior Immigration Judge rejected it on what might, in the light of the subsequent decision of the Court of Appeal in *Rashid*'s case, have been thought to be questionable grounds. There is also the fact that in *H*'s case the point was first raised two years after the exhaustion of *H*'s appeal rights whereas in the present case it is over three and a half years later. Finally, it appears from the correspondence that *H* was still in the United Kingdom when the decision as to the applicability of the *R (S)* policy to his case was considered.

63. As to the first of these distinctions, it might be asked why, as the claimant did not pursue the *Rashid* point to its full extent by making an application to the High Court, he should be given a second bite of the cherry simply because of the introduction of the *R (S)* policy at a later stage. But he would be in no different position to others since it is not a feature of the full *R (S)* policy that only those who have not raised a *Rashid* unfairness point during the consideration of their cases at earlier stages are to have the benefit of the new policy. In any event as Mr Forshaw's evidence shows, the policy has been framed in a way that is broader than the facts that gave rise to the proceedings in *R (S)*'s case.

64. I have referred to the fact that delay by the claimant was not raised by the defendant when first making the decision. The only reason given in the letter dated 21 December 2009 for rejecting the claimant's representations was that the policy was "not intended to avail persons who are outside the United Kingdom" and that he "therefore" did not "qualify on the basis of the *R (S)* policy". It was only six months later and some two and a half months after permission had been given that (see [41]) the defendant stated that the claimant's claim was out of time.

65. The court regularly looks at the case before it in the light of all the material it has regarding the decision-maker's powers and reasoning: *R v Oadby & Wigston BC, ex p. Dickman* (1996) 28 HLR 806, at 812 *per* Buxton J. Moreover, the courts have dealt with later decision letters and retrospective reasons in a flexible way save where the later decision or reasons contradict the earlier one: see the cases listed in Fordham's *Judicial Review Handbook*, 62.4. However, it is not ordinarily open to a decision-maker who is required to give reasons to respond to a challenge by giving different or better reasons: *R v Westminster CC ex p. Ermakov* [1996] 2 AL ER 302 at [44]. Although this is not a reasons challenge, the approach of the court to post-challenge reasons is of some assistance. Courts have approached later reasons with some circumspection. Notwithstanding such circumspection, in the present case the later letter does not contradict the earlier. It only adds a further factor.

66. I have concluded that the claimant's case does not fail on the ground of delay. First, the policy on which he relies is an existing one and not one that has been withdrawn. Secondly, his application was made within two months of the publication of that policy. Thirdly, the decision in *S, H and Q*'s case is relied on in the defendant's post-proceedings supplemental response dated 2 July 2010. It does not, however, appear that the supplemental response took any account of the fact (which was before Wyn Williams J at the hearing in April) that five months earlier, in February 2010, *H*, who the Court of Appeal held was precluded from relief because he had not brought proceedings promptly after the decision not to grant him asylum when he could have

advanced the claim he subsequently made, was nevertheless able to benefit from the *R (S)* policy.

(3) Conclusion

67. I have concluded that in the particular circumstances of this case the decisions in the letters dated 21 December 2009 and 2 July 2010 should be set aside and the claimant's case be remitted to the Secretary of State for consideration in the light of this judgment. This is primarily because the Secretary of State maintained that the claimant was not eligible for the *R (S)* policy because he was outside the United Kingdom notwithstanding the unpublished stage 7 and "*Cases where the individual has left the UK*" and because the *R (S)* policy is a current policy not a superseded one. I have also taken account of the different outcome in *H*'s case, notwithstanding the Court of Appeal's decision. I note that in *Rashid*'s case the Court of Appeal took account of the difference between the treatment of the claimant in that case and that of *M* and *A* in assessing whether there had been unfairness: see [2005] EWCA Civ 744 at [33] and [53] *per* Pill and Dyson LJJ. I have referred to possible differences between the claimant's case and that of *H* and, unlike the others involved in *Rashid*'s case, *H*'s case and the claimant's were not procedurally linked. However, the fact that *H* could qualify under the *R (S)* policy notwithstanding the decision of the Court of Appeal that he was precluded from relief in respect of the effect of the illegality in relation to his claim to be entitled to exceptional leave to remain is striking and justifies reconsideration.

68. For this reasons this application is granted. The decisions in the letters dated 21 December 2009 and 7 July 2010 are set aside and the Secretary of State should reconsider whether, in the light of the claimant's circumstances and this judgment, the claimant should be granted leave to enter the United Kingdom or entry clearance to enable his case to be considered under the *R (S)* policy.

Appendix: The *R (S)* policy

Stage 1
Is the individual a national of a country where a policy to grant 4 years exceptional leave to enter or remain in the UK was in force at 1 January 2001? (See Country Specific Four Year ELR Policies and if the individual is Iraqi, also Hybrid cases)

- If yes, proceed to stage 2
- If no, the individual does not qualify under the R (S) policy criteria. **RESTRICTED – NOT FOR DISCLOSURE** Refer to Chapter 53 of Enforcement Instructions **RESTRICTED – END OF SECTION**
- If unclear because the individual is a disputed nationality case, refer to Doubtful or disputed nationality cases for further information

Stage 2
Has the asylum application been refused, or if not previously decided, does the application now fall to be refused?

- If yes, proceed to stage 4
- If no, proceed to stage 3

Stage 3

Was the individual granted ELR under a subsequent country ELR policy but the grant of ELR was for less than four years?

- If yes, proceed to stage 4
- If no, the individual does not qualify under the R (S) policy criteria. **RESTRICTED – NOT FOR DISCLOSURE** Refer to Chapter 53 of Enforcement Instructions **RESTRICTED – END OF SECTION**

Stage 4

Was the initial asylum application made prior to the expiry date of the relevant ELR policy including on the actual date the ELR policy expired? (Dates listed in Country Specific Four Year ELR Policies

- If yes, proceed to stage 5.
- If no, the individual does not qualify under the R (S) policy criteria. **RESTRICTED – NOT FOR DISCLOSURE** Refer to Chapter 53 of Enforcement Instructions **RESTRICTED – END OF SECTION**

Stage 5

Had the case not been decided before the four year ELR policy expired, or had it been decided and the decision was withdrawn prior to the expiry of the four year ELR policy?

- If yes, proceed to stage 6
- If no, the individual does not qualify under the R (S) policy criteria. **RESTRICTED – NOT FOR DISCLOSURE** Refer to Chapter 53 of Enforcement Instructions **RESTRICTED – END OF SECTION**

Stage 6

Was the benefit of the ELR policy lost as a result of the individual's own actions, such as where the delay to reach a decision was caused by his failure to co-operate with the asylum process?

- If no, proceed to stage 7
- If yes, the individual does not qualify under the R (S) policy criteria. **RESTRICTED – NOT FOR DISCLOSURE** Refer to Chapter 53 of Enforcement Instructions **RESTRICTED – END OF SECTION**

RESTRICTED – NOT FOR DISCLOSURE – START OF SECTION

Stage 7

Has the individual remained in the UK?

- If yes, proceed to stage 8
- If no, refer to Cases where the individual has left the UK before making a decision as to whether the individual is excluded from the R (S) policy criteria. If ineligible refer to Chapter 53 of Enforcement Instructions

RESTRICTED – NOT FOR DISCLOSURE – END OF SECTION

Stage 8 [Stage 7 of published version]

Does the individual pass character and background checks? Refer to the AI Exceptional Leave to Remain – Circumstances in which it will not be appropriate to grant settlement.

- If yes, proceed to stage 9
- If no, the individual does not qualify under the R (S) policy criteria. **RESTRICTED – NOT FOR DISCLOSURE** Refer to Chapter 53 of Enforcement Instructions **RESTRICTED – END OF SECTION**

Stage 9 [Stage 8 of published version]

The individual meets the R (S) policy criteria. Any removal action should be suspended and a grant of ILR should be implemented. RESTRICTED – NOT FOR DISCLOSURE CID must be updated – see 'Updating CID following an R (S) policy decision' and 'Updating CID following an R (S) and Iraqi hybrid decision' below. **RESTRICTED – END OF SECTION**

RESTRICTED – NOT FOR DISCLOSURE – START OF SECTION

Cases where the individual has left the UK

Where an individual applies for ILR on the basis of the R (S) judgment, but has left the UK (either voluntarily or forcibly) by the time consideration of that application takes the place, Case Owners/Workers should approach a SCW for further advice. This is also the case where an individual has left the UK (either voluntarily or forcibly) and applies for ILR on the basis of the R (S) judgment following their departure.

Further guidance on handling these cases will be published shortly

RESTRICTED – NOT FOR DISCLOSURE – END OF SECTION

POLICY BACKGROUND

In considering whether the benefit of an ELR policy was lost unfairly, Case Owners/Workers should consider the ruling in R (S) [2007] EWCA Civ 546.

'S' was an Afghan asylum claimant whose application was made in 1999 and refused in 2004. The Court of Appeal found that the introduction of new Public Services Agreement (PSA) targets from 2001 (to decide 60% of new decisions with 61 days) had resulted in UK Border Agency (formerly Immigration and Nationality Directorate (IND)) prioritising new casework to meet those targets at the expense of older cases. On 19 July 2007 the Court of Appeal ruled that this was unlawful, not because of the delay, but because the effect of a blanket backlogging of cases was to unlawfully fetter the Secretary of State's discretion.

The unlawful fettering of discretion meant that some individuals, including S, lost out on the benefit of a policy to grant failed asylum seekers from Afghanistan four years ELR. The judgment indicated that the appropriate remedy would be reconsideration by the UK Border Agency (formerly IND) and, where the ELR would have led to Indefinite Leave to Remain (ILR) (i.e. where the ELR policy in question was a four year policy), a grant of ILR should be made.

There are certain groups of individuals who may fall within the R (S) judgment. The groups potentially caught by the judgment are those who lost the benefit of a four year country specific ELR policy because of the specific decision taken by the Home Office after January 2001. Only a small number of nationalities are affected and even then only in certain circumstances.

Individuals do not have to apply under the R (S) criteria. When working on a file of an individual who is accepted to be a national of a country for which a four year ELR policy was in place on 1st January 2001, Case Owners/Workers need to check the details of the individuals case against the criteria listed above to identify whether the case falls to be granted ILR.

RESTRICTED – NOT FOR DISCLOSURE – START OF SECTION

If, having considered the case in accordance with this guidance, the individual is not eligible for ILR and removal action will follow, Case Owners/Workers should refer to the guidance for considering other extenuating circumstances (paragraph 395C of the Immigration Rules) as covered by Chapter 53 of the Enforcement Instructions and Guidance

RESTRICTED – NOT FOR DISCLOSURE – END OF SECTION