Neutral Citation No: 2008 EWHC 733 (Admin)

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

Claim No CO 3162/2005;
CO 3988/2006;
CO 3783/2006

Before: Mr Michael Supperstone Q.C.
(Sitting as a Deputy High Court Judge)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 11 April 2008

(1) THE QUEEN on the application of 'S'
-v-
SECRETARY OF STATE FOR
THE HOME OFFICE

(2) THE QUEEN on the application of 'Q'
-v-
SECRETARY OF STATE FOR
THE HOME OFFICE

(3) THE QUEEN on the application of 'H'
-v-
SECRETARY OF STATE FOR
THE HOME OFFICE

Hearing Date: 19, 20 and 21 February, 2008

JUDGMENT

Mr Manjit S. Gill, QC and Ms Sonali Naik	instructed by Lawrence Lupin Solicitors for 'S' and Dexter Montague Solicitors for 'Q'
Mr Manjit S. Gill, QC and Mr Christopher Jacobs	instructed by Duncan Lewis & Co., Solicitors for H
Mr Robert Jay QC and Mr Robert Palmer	instructed by the Treasury Solicitor for the Secretary of State

The Deputy Judge:

Introduction

1. These three claims have been heard together because they raise a similar issue. All three Claimants are failed asylum seekers. Notwithstanding that, they claim to have been unlawfully deprived of the benefit of policies in force at the time of their arrival in the United Kingdom which would (if the policies had been applied to them during their currency) have had the effect that they were granted 4 years exceptional leave to remain (ELR), with the result that they would by now, in principle, have been eligible for indefinite leave to remain (ILR). Each seeks judicial review of the decision of the Secretary of State to refuse to treat them as if they had been granted ELR at the time the policies were in force, and to grant them ILR.

2. In essence in each case it is alleged that the refusal to grant them ILR now is so conspicuously unfair (or otherwise in breach of their legitimate expectation) as to amount to an abuse of power in the sense identified by the Court of Appeal in *Rashid v. SSHD* [2005] EWCA Civ 744.

Factual Background

The relevant facts: S

3. S, a national of Sierra Leone, arrived in the United Kingdom on 9 January 2000 and claimed asylum.

4. By a letter dated 4 February 2000 the Secretary of State informed the Law Society that:

> "... Sierra Leoneans who do not qualify for asylum will normally be granted 4 years ELR exceptional leave. It will be open to applicants to apply for settlement towards the end of the 4 year period."

5. Under cover of a letter dated 30 May 2000 S was issued with a SEF form (a document which asylum seekers are required to complete setting out the factual basis for their

claim for asylum), which he completed and returned to the Secretary of State. S was required to return this form to the Secretary of State within 21 days.

6. S's SEF was not linked to his file and, on 26 June 2000, shortly after the expiry of the time limit for returning the SEF, his application was refused for non-compliance.

7. On 6 September 2001 the Secretary of State announced the end of the ELR Policy due to improvements in the situation in Sierra Leone.

8. On 12 September 2001 the Secretary of State received from S (in a letter dated 30 August 2001) a witness statement setting out his substantive claim for asylum.

9. In January 2002, after his solicitors had contacted the Secretary of State, S was informed that his claim for asylum had been refused for non-compliance. S alleged that was the first time he knew of that decision (despite several reminders having been sent by his then solicitors to the Secretary of State in the 2 year period from the time of the claim in January 2000 to January 2002). The Secretary of State states that the first recorded communication from S was received on 12 September 2001, (see para 8 above).

10. By letter dated 26 June 2003 the Secretary of State notified S that it was accepted that his SEF had been returned in time and that the non-compliance refusal of 26 June 2000 would therefore be withdrawn.

11. On 7 August 2003 S submitted a further SEF and a statement setting out the basis of his claim.

12. On 25 February 2004 S was interviewed in relation to his asylum claim. Thereafter his claim for asylum was substantively considered. It was refused by letter dated 1 March 2004.

13. In a determination promulgated on 24 June 2004 S's appeal against the refusal of his claim for asylum was dismissed. In support of his claim that his Article 8 ECHR rights had been breached S argued that if his claim had been decided when it should

have been he would have been given 4 years exceptional leave and would now have been in a position to apply for indefinite leave to remain.

14. By a decision dated 9 December 2004 S was refused permission to appeal by the Immigration Appeal Tribunal. On 27 January 2005 his application under CPR 54 for statutory review of that decision was rejected. Richards J. stated that:

> "The IAT was right to conclude that the applicant could not succeed on his Article 8 claim ... Taking the case at its highest – that he would have qualified for exceptional leave to remain for 4 years if his application had been considered properly at the time and that he could thereafter have made an in-country application for indefinite leave to remain – and making all due allowance for the prejudice resulting from the administrative error and for the delay, I agree with the IAT that the balance would still come down clearly against any breach of Article 8, given the very limited nature of the private life he had established in this country ...".

15. Meanwhile by letter dated 25 January 2005 S had applied for leave to remain on the grounds that, as at the date of the original non-compliance refusal, he should have been granted ELR. By a decision dated 22 February 2005 the Secretary of State refused S's application. It is in respect of that decision that judicial review is sought, by a claim form filed on 20 May 2005.

16. On 7 July 2005 Beatson J. refused permission observing, inter alia, that the representations made on 25 January 2005 repeat in substance the grounds considered by the IAT and by Richards J. in the application for statutory review and are prima facie an abuse of process.

17. Following a renewal of the application for permission to apply for judicial review, on 2 November 2005 Calvert-Smith J. granted permission.

The relevant facts: Q

18. Q is an Afghan national who arrived in the United Kingdom on 21 November 2000 and claimed asylum on arrival.

19. He submitted a SEF form on 27 November 2000 setting out the details of his claim. He was interviewed for the purposes of determining that application on 3 May 2001. On the same day a decision was taken by the Secretary of State to refuse his

application on the grounds, among others, that he was not an Afghan national. The reasons that were given for that conclusion included the following:

> "18. ... although you managed to answer some questions about Afghanistan correctly, the Secretary of State considers it relevant that many of the questions that you were asked about Afghanistan were incorrectly answered (Questions 68, 69, 70, 71 and 74), and indicated that you had little knowledge of Afghanistan and life in Afghanistan. The Secretary of State has considered all the available evidence presented in your asylum claim, but has concluded that you are not genuinely of Afghan nationality.
>
> ...
>
> 20. The Secretary of State also notes that, when you applied for asylum, you were unable to provide any evidence to support your identity or nationality. The Secretary of State recognises that a person fleeing persecution may not be able to provide documentary or other proof to support their statements. However, allowance for such lack of evidence does not oblige the Secretary of State to accept unsupported statements as necessarily being true, especially if he has reason to doubt the credibility of the account."

20. Q appealed against that decision. On 27 March 2002 there was a hearing before an Adjudicator. By a letter dated 22 March 2002 the Home Office Presenting Officers Unit had notified the appellate authority that no Presenting Officer was available for the cases in the Adjudicator's list on that date. The letter indicated that no adjournment was sought and asked that the appeals be dismissed on the basis of the papers submitted by the Home Office. According to the Adjudicator's note of the hearing, Q's representative indicated that there were problems with proceeding in that it was "not clear how wrong appellant is said to have been" in the answers he gave in interview; copies of some Afghanistan identity documents had now been produced, "but the Home Office had not had a chance to look at these".

21. The Adjudicator adjourned the appeal until 28 May 2002 and made directions. (1) The Adjudicator's note of the hearing indicates that the first direction was for "the Home Office to reconsider if nationality is still disputed in light of documents now served for appellant – reps to forward original ID card to the Home Office for their consideration (give at least 8 weeks for the Home Office reconsideration)". The direction is recorded in different terms in the subsequent written directions, asking that such consideration be given "as soon as possible". (2) He gave a second direction to the effect that if the Secretary of State was still relying on the "wrong answers"

about Afghanistan referred to at paragraph 18 of the Reasons for Refusal letter, he should provide what he says are the correct answers for the next hearing.

22. On 18 April 2002 the Secretary of State stated that in light of the changed circumstances in Afghanistan:

> "In future we will normally only grant unsuccessful Afghan asylum seekers periods of exceptional leave to remain in the UK of 12 months at a time, instead of the period of 4 years, which has previously been usual to grant. There should be no expectation that subsequent periods of leave will be routinely granted."

23. On 30 April 2002 Q's solicitors wrote to the Secretary of State providing further evidence of Q's nationality, including a further copy of his appeal bundle and the original identity document. In respect of the identity document, his solicitors said as follows:

> "Unfortunately, this document has not been provided to yourselves previously but we trust that this will now be in order."

24. In the light of that evidence, the Secretary of State accepted that Q was an Afghan national. Accordingly at the appeal hearing on 28 May 2002 the Home Office Presenting Officer undertook that the Secretary of State would grant Q exceptional leave to remain for a period of 1 year. Q's counsel accepted that undertaking and withdrew Q's appeal. ELR was duly granted on 3 July 2002 until 3 July 2003.

25. Subsequently Q applied for an extension of his period of leave to remain, but this was refused on 8 June 2004. An appeal against that refusal was dismissed by an Adjudicator on 28 September 2004. Permission to appeal to the IAT was refused on 15 February 2005, and Q's rights of appeal were duly exhausted.

26. Q was detained on 8 May 2006 and removal directions were set for the following day. By representations dated 8 May 2006 Q sought to argue for the first time that the initial grant of 1 year's ELR, rather than 4 years ELR, had been unlawful, and that removal directions ought to be deferred. On 12 May 2006 Q applied for judicial review of the decision to remove him. By letter dated 2 June 2006 the Secretary of

State responded to the representations dated 8 May 2006, declining to grant Q the relief he sought.

27. Permission to apply for judicial review was refused on the papers by Silber J. on 11 July 2006. Q renewed his application and provided a witness statement dated 26 September 2006 in which he stated that he had had difficulties understanding the interpreter at his asylum interview. Further he provided explanations for the answers he gave on Afghanistan which were identified as being incorrect, and he argued that he also displayed knowledge of Afghanistan in answer to other questions. On a renewed application for permission Mr Nicholas Blake Q.C., sitting as a Deputy Judge of the High Court, on 29 September 2006 granted permission.

The relevant facts: H

28. H is a citizen of Afghanistan who arrived in the United Kingdom on 25 February 2000 and applied for asylum at the port of entry.

29. He arrived on a BA flight from Santiago, Chile. A contemporaneous manuscript attendance note made by Mr Ian Bell, an Immigration Officer, dated 25 February 2000 records that a BA representative in Santiago had stated that a group of 5 passengers had checked in for the flight in Santiago with Pakistani passports. Mr Bell witnessed a group of 5 individuals from that flight arrive at Gatwick Airport with no passports, one of whom was H.

30. H underwent a screening interview on the day of arrival when he was asked a number of questions relating to Afghanistan. He was interviewed in Farsi. He was unable to answer correctly a number of questions concerning Afghanistan (although he could answer some). He says that he speaks Dari, which is an Afghan derivative of Farsi.

31. The Immigration Service found 2 Pakistani passports near where 2 passengers (including H) were sitting on the plane from which H disembarked. The bio-data pages had been ripped out. On 26 February 2000 the Immigration Service asked the Entry Clearance Officer in Islamabad to undertake investigative work with the Pakistani passport authorities.

32. On 4 July 2000 H was sent a SEF to complete and return before 25 July 2000. By a letter dated 13 July 2000 H's then representatives, Shergill & Co, enclosed the completed SEF form. In that form H claimed that he had left Pakistan on 24 February 2000 to travel to the UK via Dubai. In fact H had arrived on 25 February 2000 on a flight from Santiago bound for Pakistan via Dubai.

33. By a letter dated 30 August 2000 the Secretary of State refused H's application for asylum on the basis of non-compliance, stating:

> "You have applied for leave to enter the United Kingdom on the grounds that if you were required to leave you would have to go to Pakistan where you fear persecution.
>
> On 4 July 2000 you were requested to complete and return a Statement of Evidence Form in support of your application for asylum on or before 25 July 2000. You have failed to return this form".

It is unclear whether this letter was sent to H or to his representatives. However the Secretary of State accepts that the refusal letter of 30 August 2000 amounted to an administrative error. On 5 October 2000 H's new solicitors, Sriharans, sent to the Secretary of State the SEF form that had been completed and sent to the Secretary of State on 13 July 2000.

34. However it was not until 31 July 2003 that the non-compliance decision was formally recorded as having been withdrawn. This is despite the fact that a decision that there should be substantive consideration of H's application was made on 19 February 2001. It is said on behalf of the Secretary of State that during the period February-October 2001 H's claim was part of the enormous backlog of asylum applications which had built up, owing to the very high number of claims in that year and previous years. Between October 2001 and May 2002 further efforts were made to clarify whether H was in fact a national of Pakistan. However, an examination of H's Home Office file discloses no satisfactory explanation for the delay between May 2002 and the end of July 2003, despite numerous chasing letters from Sriharans during that period.

35. H was interviewed on 26 August 2003, following which asylum was refused on 27 August 2003. The refusal letter refers to H's nationality as Afghan. It is noted that H claimed he left Afghanistan because of his fear of the Taliban and he also claims to fear the remnants of the Taliban regime. However in the Secretary of State's view the Taliban were "no longer a force which could represent a threat to [his] safety" (para 9). H's appeal to an Adjudicator was dismissed on 1 December 2003. There was no further appeal, with the result that all appeal rights were exhausted as at 15 December 2003.

36. Further submissions were made by a new firm of solicitors on H's behalf on 26 February 2004 which they asked to be treated as a fresh claim for asylum. By letter dated 30 November 2004 the Secretary of State refused to do so. Further submissions were then made by H's current solicitors on 16 February 2005; those were refused on 25 May 2005. On 23 January 2006 representations were made on his behalf by his current solicitors, arguing for the first time that he should have been granted 4 years ELR when he first applied for asylum, and would now be entitled to ILR if he had received the benefit of the policy to which he was entitled. On 25 April 2006 the Secretary of State rejected those representations and declined to treat them as a fresh claim. On 4 May 2006 H applied for judicial review of that decision. Permission to apply for judicial review was granted by Lloyd Jones J. at an oral hearing on 15 September 2006.

The Secretary of State's relevant ELR policies

Sierra Leone

37. (i) By letter dated 4 February 2000 the Secretary of State announced that:

> "Those Sierra Leoneans who do not qualify for asylum will normally be granted 4 years exceptional leave. It will be open to applicants to apply for settlement towards the end of the 4 year period.

(ii) By letter dated 6 September 2001 the Secretary of State announced the end of the Policy due to improvements in the situation in Sierra Leone.

Afghanistan

38. The Secretary of State's Operational Guidance Note of February 2003 states as follows:

> "On 18 April 2002 the long-standing practice of granting exceptional leave (ELE/R) for a period of 4 years to those applicants from Afghanistan who did not meet the criteria in the 1951 UN Refugee Convention for Asylum was altered. As a result of changing country conditions Ministers agreed that the period of exceptional leave granted to applicants who do not meet the criteria for asylum would be reduced to 12 months. This policy applied to all final decisions made as from 18 April 2002 until 10 July 2002.
> ...
> ... Those applicants previously granted 4 years ELE/R whose period of ELR comes to an end and who did not take up the opportunity for voluntary return will normally be granted ILR. There may be specific cases where this will not be appropriate e.g. in light of the conduct of an individual during the period they have on exceptional leave."

General

39. Further in *R (A): (H) and (AH) v Secretary of State for the Home Department* [2006] EWHC 526 (Admin) the Secretary of State conceded that 4 years ELR is normally extended to ILR:

> "12. In the circumstances, Mr Tam conceded that, had the practice or policy been applied as it should have been, A and H should have been accorded refugee status and so granted ILR. AH should (as I assume in the light of Mr Saunders' statement) have been granted ELR (since at the time of the decision he was not regarded as having established an entitlement to refugee status). The practice at the time was to grant ELR for 4 years. It was further (and remains) the practice or policy to grant ILR to an applicant who had, without any contraventions of the law, remained here for 4 years in accordance with his ELR. Thus, it is submitted, each of the applicants should now be granted ILR, A and H because they ought to have been granted it when their applications were considered before March 2003 and AH because he should have been granted at least 4 years ELR which would, had he been able to apply have resulted in ILR."

Legal Principles

40. In *Rashid* the Court of Appeal considered whether an asylum seeker should be entitled to benefit from a policy which, although now repealed, had been in force

throughout the period when his claim for asylum was substantively refused and the subsequent appeal process, and which had erroneously not been applied to his case. The Secretary of State accepted that the Claimant should have had the advantage of the asylum policy in 2001 and should have been granted refugee status. There was no satisfactory explanation for why the policy had not been applied.

41. Pill LJ described the failures in the Home Office in this case as "startling and prolonged" with the result that "a considerable number of people were thereby involved in relying on arguments that were contrary to the Secretary of State's policy. The error extended to instructions given to the Treasury Solicitor and to counsel. ..". On those facts, Pill LJ (with whom the other Lord Justices agreed) concluded as follows:

> "I agree with the judge's conclusion that the degree of unfairness was such as to amount to an abuse of power requiring the intervention of the court. The persistence of the conduct, and lack of explanation for it, contribute to that conclusion. This was far from a single error in an obscure field. A state of affairs was permitted to continue for a long time and in relation to a country which at the time would have been expected to be in the forefront of the respondent's deliberations. I am very far from saying that administrative errors may often lead to a finding of conspicuous unfairness amounting to an abuse." [36]

The remedy of the court was not to make a declaration that the claimant was entitled to refugee status, but to declare that the claimant was entitled to a grant of indefinite leave to remain in the UK. It was said "that provides a remedy for the unfairness and is the appropriate response in the circumstances" [39].

42. Dyson LJ referred to the situation as being one of "flagrant and prolonged incompetence", which was "a far cry from the case of a mistake which is short-lived and the reasons for which are fully explained. The unfairness in this case has been aggravated by the fact that ... the claimant was not treated in the same way as M and A, with whose cases his case had been linked procedurally. Had he been so treated, he would have had the benefit of the policy and been accorded full refugee status" [53]. Dyson LJ concluded that the Secretary of State had acted unlawfully "in choosing to ignore his policy" and "in so doing, he acted with conspicuous unfairness amounting to an abuse of power". [54]

43. In the subsequent case of *SSHD v. R (S)* [2007] EWCA Civ 546 the Court of Appeal considered the scope of the judgment in *Rashid.* Carnwath LJ did not find the reasoning in *Rashid* altogether convincing, although the result seemed just [39]. In his view "abuse of power is not a special and more extreme category of illegality, and is rather a "general concept" underlying other "particular forms"" [40]. Further he had "doubts about the weight put by the judgments upon the Department's conduct. The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck or sheer muddle". [41] Carnwath LJ continued:

> "45. Our task, however, is not to search for conceptual explanations, but to extract a principled basis for deciding the present case. We are of course bound by *Rashid* for what it decided. In principle, that must be found in the majority judgment of Pill LJ. As I read his judgment, the steps in his reasoning (para 36-40) can be broken down as follows:
>
> i) Serious administrative errors by the Secretary of State at the earlier stage had resulted in "conspicuous unfairness amounting to an abuse", and thus illegality;
>
> ii) The court should "give such relief as it properly can";
>
> iii) Although the applicant was no longer entitled to refugee status as such, the Secretary of State had a "residual power" to grant indefinite leave;
>
> iv) The grant of indefinite leave would provide a remedy for the unfairness;
>
> v) There were no countervailing considerations of public interest;
>
> vi) Accordingly, the "appropriate response in the circumstances" would be for the court to declare that ILR should be granted.
>
> 46. The key in my view must lie in his emphasis on the scope of the remedial powers of the Secretary of State (steps (iii) and (iv)). Although he seems to have expressed the result as an exercise of the court's remedial discretion, the court itself had no power to grant ILR. Nor, on a conventional analysis, did it have power to direct the Secretary of State to grant ILR. The power and the discretion rested with the Secretary of State. It was not open to the court to assume that function (cf *R v. Barnet LBC, ex p Shah* [1983] 2 AC 309, 350 F-G). However, it was open to the court to determine that a legally material factor in the exercise of that discretion was the correction of injustice. That proposition did not require express statutory authority. It was implicit in the principles of fairness and consistency which underlay the whole statutory

scheme. Further, in an extreme case, the court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion.

47. On that analysis of *Rashid*, the court's intervention was directed at the appropriate target, and involved no conflict with *Ravichandran*. It respected the principle that the Secretary of State's decision should be made on the basis of present circumstances. But it recognised that those circumstances might include the present need to remedy justice caused by past illegality".

44. On two further occasions the Court of Appeal has considered the application of the *Rashid* principle. Both cases concerned Afghan nationals who claimed the benefit of the ELR policy.

45. In *R (ZK (Afghanistan) and Another) v. SSHD* [2007] EWCA Civ. 615 Pill LJ (in a judgment with which Rix and Longmore LJJ agreed) said that:

"25. ... if a claim based on subsequent discovery of a legitimate expectation unknown earlier were to have prospects of success, it would need to be supported by coherent evidence from or on behalf of the appellant quite absent in the present case. ELR is discretionary relief which may be granted by the respondent when asylum is refused and it is not known why relief from the failure to grant it was not sought earlier. The solicitors apparently claim that the pre-April 2002 policy became known to them only early in 2004 (though the change of policy was announced in Parliament in July 2002), and the applicant instructed them only much later. There is no adequate explanation, by way of evidence, for the very long passage of time before the claim for reconsideration was made.

26. I would take it further. The submission that there has been an abuse of power because of conspicuous unfairness has no real prospects of success. The delay in making the decision and the failure to grant ELR for 4 years, are far removed from the cumulative errors which gave rise to a finding in *Rashid* that there had been an abuse of power. In *Rashid*, the policy relied on was a policy under which asylum, as distinct from leave to remain, should have been granted. Serious errors of administration occurred, amounting in the words of Dyson LJ, to "flagrant and prolonged incompetence".

46. In *DS (Afghanistan) v. SSHD* [2007] EWCA Civ. 774 the Court of Appeal considered the case of an Afghan national who claimed asylum on 5 December 2001. His claim was refused on 7 February 2002. He was not granted 4 years ELR because he was not in the Secretary of State's view a national of Afghanistan. By the time of the Court of Appeal hearing, it was common ground that that view was wrong and the appellant

was indeed an Afghan national, and that had this been recognised at the time of his application he would have been granted 4 years exceptional leave to remain. Sedley LJ distinguished *Rashid* as "an egregious case of persistent mismanagement of an asylum claim so as to deny an Iraqi Kurd the asylum which it was government policy at the material time to grant" [8]. The appellant's case differed from *Rashid* in at least three respects:

> "(a) The failure to recognise this appellant's nationality was not caused by the deliberate or negligent oversight of a policy which would have protected him but by a mistaken belief that he was not of Afghan nationality.
>
> (b) The failure was corrected as soon as proof of his nationality in the form of an authentic passport was produced to the Home Office.
>
> (c) The policy, had it been applied, would not have afforded him either refugee status or indefinite leave to remain but only exceptional leave expiring in February 2006. All being well, however, there was no reason why this should not have been followed by a grant of indefinite leave" [11].

He added:

> "... the Home Office had reached a rational and legally permissible decision on the material then in its hands. When further material was supplied it responsibly altered its position and conceded that the appellant was an Afghan national" [15].

47. Administrative delay in itself, even if it results in less favourable treatment, does not provide the basis for a remedy. (*SSHD v. R (S)* (above), per Carnwath LJ at [48]).

Submissions

Submissions in the case of S

48. Mr Gill QC, on behalf of S, submits that there have been a series of administrative errors and failures by the Secretary of State in the determination of the Claimant's asylum claim which have led to prejudice, loss and detriment, including in particular the loss of 4 years exceptional leave to remain. The Secretary of State's conduct has therefore deprived the Claimant of an entitlement to obtain indefinite leave to remain that he could reasonably have expected would accrue to him and which it would now be unfair, unlawful and an abuse of power to deny to him.

49. Mr Gill relies upon the Secretary of State's erroneous decision to refuse S's asylum application for non-compliance, taken with the failure to serve notice of that decision as amounting to an error of law. He submits that the non-compliance refusal was in law a substantive refusal of asylum (even if the Secretary of State did not in fact consider the claim in a substantive manner) and it carried a full right of appeal at which an immigration adjudicator would have been required to assess the asylum issue on its merits: *Ali Haddad v. SSHD* [2000] INLR 117 (IAT, Collins J. presiding). Thus the error in failing to link up the SEF to the Claimant's file directly led to the loss of the right of appeal and the loss of 4 years ELR. Further, it was claimed this error was no mere one-off mistake with short-lived or easily reversible consequences. It was symptomatic of a systemic failure in that a high volume of SEFs were simply not linked up with files leading to a breakdown of lawful decision-making.

50. I do not accept this submission. The decision to refuse the application for non-compliance is accepted by the Secretary of State to have been in error by reason of an administrative mistake. Mr Jay QC, on behalf of the Secretary of State, accepts that a non-compliance refusal amounts to refusal of asylum and that it is a refusal which if appealed may lead to a substantive determination of a claim. However I agree with Mr Jay that critically a refusal of asylum in those circumstances is not a determination either way as to whether or not the applicant does on the facts "qualify for asylum"; that decision would only be made upon the full appeal. It is only in respect of someone whom the Secretary of State has concluded does not qualify for asylum that the policy is engaged.

51. Accordingly there was no deliberate or negligent failure to apply the ELR policy to S upon the erroneous non-compliance refusal. In theory had the decision been served and appealed, there could have been a full appeal hearing; however, in practice, upon discovery of the error the decision would have been withdrawn and the application reconsidered on the basis of the submitted SEF and an asylum interview (as occurred in the case of *Joseph v. Secretary of State for the Home Department* [2002] EWHC 758). It follows that no error of law has been disclosed in the handling of S's claim, despite the administrative error in treating his claim as a non-compliance refusal.

52. Further Mr Jay submits that even if the Secretary of State unlawfully withheld the benefit of the ELR policy upon the consideration of the initial application for asylum, the unlawfulness did not give rise to such conspicuous unfairness that it may be said that the Secretary of State erred in law in failing to take it into account as being effectively determinative of the later application for leave to remain (with the result that the court would be justified in making a direction to the Secretary of State to reconsider an otherwise lawful decision with the expectation that leave should be granted).

53. I accept this submission for the following reasons. First, even on S's case that the issue of the administrative error and the delay was raised on the statutory appeal by reference to *Rashid* in the context of Article 8 considerations, the present claim is very considerably out of time. Second, despite reference in the letter dated 24 January 2002 from the S's solicitors to "several reminders" being sent over the 2 year period from 9 January 2000, the earliest recorded "chaser" received by the Secretary of State was on 12 September 2001, after the ELR policy had been withdrawn. Third, whilst any delay after 12 September 2001 can properly be criticised, it does not assist S's claim as the ELR policy had been withdrawn on 6 September 2001.

54. For these reasons neither the administrative error (the reason for which was explained), nor the delay, nor any other circumstances in the case, considered individually or cumulatively, amount to "conspicuous unfairness" as identified in *Rashid.*

55. In the light of these conclusions it is not necessary for me to determine whether, as Mr Jay submits, it is an abuse of process for S to advance arguments in relation to the ELR policy that either were or could have been put forward on the statutory review, and in the circumstances I do not do so.

Submissions in the case of Q

56. Mr Gill repeats the submission set out in paragraph 48 above. He submits that the history of the present case and the conduct of the Secretary of State demonstrate unfairness (and therefore illegality) of a sort which needs to be rectified. In particular

he submits that this case raises similar issues to those identified in *R (Mugisha) v. Secretary of State for the Home Department* [2006] INLR 335 in relation to the initial assessment of Q's nationality.

57. Q's attempt to impugn the decision of the Secretary of State dated 3 May 2001 as being irrational was based principally upon the content of the report of Dr. Ballard, an expert Social Anthropologist, dated 6 February 2008. Following a detailed analysis of the interview of Q on 3 May 2001, Dr Ballard concluded:

> "... I find myself hard pressed to offer any kind of support to the SSHD's assertion that there were good grounds to have concluded that [Q] was not an Afghan national. On the contrary not only does [Q] appear to have done his best to answer all the questions put to him as fully and accurately as he could, but in my opinion the answers he gave to the questions posed were clear, coherent, and – in so far as he was able to comprehend just what it was that his interrogators were driving at – accurate and appropriate."

Dr Ballard went on to make two specific criticisms of the interviewing process. First, he said that "the yardsticks with which [the interviewer] had been provided to fulfil her task of checking the true identity of asylum seekers claiming to be from Afghanistan were ... woefully inadequate as a means of fulfilling her task with any degree of accuracy." Second, he said that "Home Office officials appear to have entirely overlooked the possibility of seeking assistance from their colleagues in the Foreign and Commonwealth Office who could readily have provided more sophisticated advice as to how their objectives might be more professionally achieved".

58. I have considered with care the contents of Dr Ballard's report and the specific deficiencies and inaccuracies in relation to the interviewing process that have been identified. It does appear that the judgment that some of the answers given by Q were wrong was incorrect. However, in my view the evidence falls far short of establishing that the decision of the Secretary of State was irrational. In reaching this conclusion I bear in mind three points made by Mr Jay. First, no concerns as to the language of the interview were raised at the time. Second, whatever disputes experts may have on the question as to the extent of Dari speakers in Pakistan, it cannot be said that the Secretary of State acted unreasonably in proceeding on the basis that a claimed

familiarity with Dari was not adequate to establish Afghan nationality. Third, the fairness of the interview procedure should be viewed against the background of the availability of an appeal process to correct errors. In my judgment the *Mugisha* decision does not assist Q with regard to these matters.

59. Further even if there was any unlawfulness in the decision of 3 May 2001, I accept Mr Jay's submission that the claim for relief now made is defeated by the very considerable delay that has occurred before it was pursued. By letter dated 11 March 2002 the Home Office confirmed to Q's solicitors that "[their] understanding of the Home Office's policy to grant Afghan nationals exceptional leave to remain for a period of 4 years is correct". Nevertheless Q (through his Counsel) at the hearing on 28 May 2002 withdrew his appeal upon the undertaking by the Secretary of State to grant him exceptional leave to remain for a period of 12 months. It is not necessary for me to resolve an issue that arose as to whether Q could have argued on the appeal that he was in law entitled to 4 years ELR; even if he could not at that or any subsequent appeal, there was nothing to prevent him seeking to challenge the failure to grant him 4 years ELR by way of judicial review.

60. I find there is no basis to Q's allegation that the treatment of Q by the Secretary of State was inconsistent with the treatment of his fellow nationals. If they were, as is asserted, "speedily granted some kind of status", that presumably was because the Secretary of State was satisfied of their nationality at the appropriate time. There is no evidence indicating to the contrary.

Submissions in the case of H

61. Mr Jacobs for H submits that the refusal letter of 30 August 2000 (which amounted to an administrative error), together with the unfounded allegation of disputed nationality and the unreasonable delay in dealing with H's application for asylum, gives rise to an expectation or entitlement under the Secretary of State's policy in force at the time when the application for asylum was made that (absent criminal convictions) H would be granted indefinite leave to remain.

could lead to the conclusion that the Secretary of State acted unlawfully in failing to grant 4 years ELR. The delay caused by the initial error in treating the case as one of non-compliance was short-lived in its effect: that the decision was erroneous was recognised in early October 2000. The delay that then occurred until October 2001 when substantive consideration was given to the claim and further inquiries were made in order to ascertain the nationality of H was properly criticised by Mr Jacobs. Requests by H's solicitors to be informed as to the progress of the claim were largely being ignored. Nevertheless the delay in itself during the period up to 18 April 2002 does not provide the basis for a remedy.

66. Further in my judgment even if there was any unlawfulness in the Secretary of State's treatment of H's application, there was no conspicuous unfairness that could result in the grant of ILR. In reaching this conclusion I bear in mind, in particular, the following matters: (1) the delay was caused by an administrative error which has been properly explained; (2) the delay was short-lived in its effect; (3) the delay from October 2000 when the original error was identified until October 2001 when the file was "actioned" for substantive consideration does not provide the basis for a remedy; (4) I am not satisfied that but for the erroneous non-compliance refusal, H would have been recognised as an Afghan national and granted ELR before 18 April 2002; (5) the Secretary of State was entitled to complete his investigations into the nationality of H; and (6) there was no inconsistency between the treatment of H and other Afghan nationals on his flight from Santiago. It seems that one such person was granted ELR, but an investigation was then pursued with the aim of depriving him of that status by reason of his deception.

67. In a witness statement dated 18 February 2008 H confirms that one of the persons with whom he travelled to the UK "was granted 4 years ELR in late 2000 whilst we were living together and he was subsequently granted settled status ..." (para 4). H further confirms that "[he] had heard from [his] friends in 2000 that the Home Office had a policy of granting 4 years exceptional leave to remain where an asylum claim was refused" (para 7). Yet it was not until 23 January 2006 that H sought to raise a "fresh claim" by reference to the alleged failure to grant him ELR nearly 4 years earlier. H has provided no proper explanation as to why he did not claim that he is entitled to 4 years ELR, and then IRL, earlier.

Conclusion

68. In my judgment none of these three Claimants have established that the refusal to grant them 4 years ELR and subsequently ILR is so conspicuously unfair (or otherwise in breach of their legitimate expectations) as to amount to an abuse of power in the sense identified by the Court of Appeal in *Rashid.* For the reasons that I have explained these claims will be dismissed.