Neutral Citation Number: [2009] EWCA Civ 334

Case Nos: C4/2008/0992
C4/2008/0980
C4/2008/0976

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HH Judge Michael Supperstone QC, Deputy High Court Judge
CO/3988/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2009

Before :

LORD JUSTICE LAWS
LADY JUSTICE ARDEN
and
LORD JUSTICE GOLDRING

- -

Between :

THE QUEEN on the application of **(1) 'S'** **(2) 'H'** **(3) 'Q'**	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Manjit Gill QC and **Sonali Naik** (instructed by **Lawrence Lupin** and **Dexter Montagu** Solicitors) for (1) **'S' &** (3) **'Q'**
Manjit Gill QC and **Christopher Jacobs** (instructed by **Duncan Lewis** Solicitors) for (2) **H'': Appellants**
Robert Jay QC and **Robert Palmer** (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 14 January 2009

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Approved Judgment

Lord Justice Goldring :

Introduction

1. Mr. Siaka ("S") comes from Sierra Leone. He arrived in the United Kingom on 9 January 2000, and claimed asylum. Mr. Hotak ("H") and Mr. Quarashee ("Q") are both now accepted to come from Afghanistan. They arrived respectively on 25 February 2000 and 21 November 2000.

2. Between 4 February 2000 and 6 September 2001 the Secretary of State's policy in respect of Sierra Leone was 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."

3. Absent particular circumstances which do not apply in S's case, exceptional leave to remain ("ELR") would as a matter of course be followed by indefinite leave to remain ("ILR").

4. The policy in respect of Afghanistan is encapsulated by the Operational Guidance Note of February 2003 which states that:

> "On 18 April 2002 the long-standing practice of granting exceptional leave to remain (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 eg. in the light of the conduct of an individual "

5. In neither H's nor Q's case is it said ILR would not have been appropriate.

6. The appellants' claims for asylum failed. Each however says that although not eligible for asylum and in need of international protection, because of the way the Secretary of State dealt with his claim, he has been deprived of the benefit of the policy applicable to him. He should now be treated as if he had been granted 4 years' ELR in accordance with that policy. The Secretary of State has acted unlawfully in refusing him the ILR which would have followed the granting of 4 years' ELR.

The applicable law

7. I start with the basic general principle. It is not in dispute. The decisions which it is sought to quash are those refusing to grant ILR. The lawfulness of those decisions is to be assessed by reference to the law and facts obtaining at the time they were taken: see *Ravichandran* [1996] Imm AR 97. At the time they were taken the policies were no longer in force. It was safe for the appellants to return home.

8. Although many different submissions are advanced by Mr. Gill QC in his lengthy skeleton arguments on behalf of the appellants, his primary argument is that in each case the Secretary of State's refusal now to grant ILR is in breach of the appellant's legitimate expectation and so conspicuously unfair as to amount to an abuse of power in the sense identified by this court in *Rashid v Secretary of State for the Home Department* [2005] EWCA 744. Each appellant, it is said, had a legitimate expectation that before the policy which applied to him was withdrawn, he would be granted 4 years' ELR in accordance with it. That would have resulted in ILR. That substantive legitimate expectation was frustrated because of a serious administrative breakdown in the Immigration and Nationality Directorate. In now refusing ILR the Secretary of State has failed to have sufficient regard to her predecessor's previous unlawful failure to fulfil the appellants' legitimate expectation that they would benefit from the policy. Had she had sufficient regard to that previous illegality, and taking into account events since, she would have granted ILR. Her refusal to do so was conspicuously unfair and amounted to an abuse of power.

9. He further submits that whether or not there was previous illegality, the appellants are in all the circumstances entitled to relief.

The authorities

10. Mr. Rashid was an Iraqi Kurd. His claim for asylum was refused by the Secretary of State and on appeal, at a time when there existed a Home Office Policy to the effect that internal relocation in the Kurdish Autonomous Area of Iraq would not be relied upon as a reason to refuse refugee status. The policy was in force between December 2001 and 21 March 2003. On 12 March 2003, (in other words, when the policy was still in force), Mr. Rashid's solicitors wrote to the Secretary of State, both drawing attention to it and explaining how it had been applied by the Secretary of State to two other cases procedurally linked to Mr. Rashid's. The Secretary of State responded on 16 January 2004. In the light of the policy's withdrawal the Secretary of State refused to grant asylum and ILR.

11. Dyson LJ defined the "stark question" which arose in *Rashid*, in the following terms:

> "…which of the two considerations should prevail: justice and fairness which suggest the conclusion that, even if he is not now accorded full refugee status, the claimant should at least not be returned to Iraq, or the principle in *Ravichandran*, which suggests that he should be returned to Iraq. "

12. The facts were striking (and as will become apparent, of quite a different order to those in the present cases). As Pill LJ said:

> "[13] The failures in the Home Office in this case were startling and prolonged…

> [31] I find it difficult to understand how the failure to apply the correct policy…can have been persisted in for such a long period…I am unable to understand why a fundamental element in the asylum policy…was unknown to all those who dealt with the…case. No explanation has been offered…Further, a bad point…was taken against the claimant's case on its own facts…
>
> [36] 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 at 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 abuse."

13. Dyson LJ agreed. At paragraph 53 of his judgment he said:

> "In the absence of any explanation, I consider the court is entitled at the very least to infer that there has been flagrant and prolonged incompetence in this case. This is 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…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."

14. In short, *Rashid* was a case in which, among other things:

    (1) A substantive decision was taken to refuse asylum when under the policy existing at the time it should have been granted.

    (2) Throughout the claim for asylum and subsequent appeals the policy was not applied when it should have been.

    (3) It was persistently argued that asylum should not be granted.

    (4) In the face of many requests there was a failure to disclose until shortly before the Court of Appeal was due to hear the case that the policy had been applied to two other people in almost identical circumstances to Mr. Rashid and whose cases were linked procedurally to his. That was so even though Mr. Rashid during the currency of the policy was asking to be treated in a manner consistent with others.

    (5) No explanation was offered for what had happened.

(6) No countervailing public interest was put forward.

15. As to the principle he was applying, Pill LJ said:

> "[25] In my judgment, there plainly is a legitimate expectation in a claimant for asylum that the Secretary of State will apply his policy on asylum to the claim. Whether the claimant knows of the policy is not, in the present context, relevant…
>
> [34] I accept [the Secretary of State's] submission that this is not the typical case of legitimate expectation…It is…a claim of unfairness amounting to an abuse of power, of which legitimate expectation is only one application. The abuse is based on an expectation that a general policy for dealing with asylum applications will be applied and applied uniformly. Serious errors of administration have resulted in conspicuous unfairness to the claimant."

16. For reasons which he believed were "substantially the same as those of Pill LJ," Dyson LJ agreed. He said that:

> "[46] A useful starting point for the discussion is the statement by the Court of Appeal in *R (Bibi) v London Borough of Newham; R (Al Nasheed) v London Borough of Newham* [2002] 1 WLR 237 at [24]:
>
> > "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what had the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.""

17. Dyson LJ thought the real difficulty lay in the second question. He said:

> "[49] As Laws LJ said in *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115…the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review…
>
> [50] The nature of the decision will, therefore, always be relevant to the question whether the frustration of an expectation is an abuse of power…The degree of unfairness is also material…The more extreme the unfairness, the more likely it is to be characterised as an abuse of power…
>
> [51] In the present case, to hold the Secretary of State to the policy that was in force between December 2001 and March 2003 *in relation to cases that he considered during that period* does not of itself raise any wide-ranging issues of policy. I do

> accept, however, that to hold him to that policy in circumstances where, at the latest stage of the decision-making process, the policy had been withdrawn, would infringe the important principle established by *Ravichandran*.
>
> [52] But as against that…it is clear there has been conspicuous unfairness in this case…"

18. Having summarised the factual position, he said:

> "[54] Accordingly, the answer to the second of the three questions identified in *R (Bibi) v London Borough of Newham; R (Al Nasheed) v London Borough of Newham*…[2002] 1 WLR 237 is that the Secretary of State acted unlawfully in choosing to ignore his policy. In so doing, he acted with conspicuous unfairness amounting to an abuse of power."

19. May LJ agreed with the reasoning and conclusion of Pill LJ.

20. In *R(S) v Secretary of State for the Home Office Department* [2007] EWCA 546, this court considered the principle applied in *Rashid*.

21. The Respondent was from Afghanistan. He claimed asylum in 1999, when the 4 year ELR policy applied. In January 2001, in pursuance of a public service agreement with the Treasury, the Secretary of State put on hold all claims made prior to January 2001. That was to meet a target agreed with the Treasury of deciding 60% of all claims submitted after 1 January 2001 within 61 days. In January 2002 S was told that his claim had been put on hold. It was only considered in March 2004. By then of course the policy had been withdrawn. He was refused asylum. The policy was not applied. The Court of Appeal held that by agreeing with the Treasury to put on hold all pre-January 2001 claims, the Secretary of State unlawfully fettered his discretion, since it precluded him from considering individual cases on their merits and allowed treatment of applications to him to be dictated by another government body. That second feature, the Court held, also made the case one of conspicuous unfairness amounting to abuse of power. It was in that context that the court (unnecessarily for the purposes of its decision), considered the scope of the judgment in *Rashid*.

22. Carnwath LJ said that:

> "[34] In analysing the judgments in *Rashid*, it is important in my view to bear in mind that there were logically two distinct questions:
>
> (i) Were the decisions made between 2001 and 2003 legally flawed, because of failure to apply the correct policy?"
> (ii) If so, what was the relevance (if any) of that finding to the legality of, or the court's powers in respect of, the 2004 decisions, made when the policy was no longer in force?"

23. As Carnwath LJ said, there was in *Rashid* no real dispute but that the decisions in 2001 and 2003 were legally flawed because of the failure to apply the correct policy. The real difficulty was the relationship between that unlawfulness and the decision under review. Carnwath LJ summarised it in the following way:

> "[35]…[Dyson LJ] saw a tension between the requirements of fairness in respect of the earlier decisions, and the *Ravichandran* principle as applied to those under review. It was one thing to hold the Secretary of State to his policy while it was still in force, but another to do so in relation to decisions made after it was withdrawn.
> [36] The extra element needed to bridge that gap was "conspicuous unfairness", sufficiently extreme "to be characterised as an abuse of power." Dyson LJ found that extra element in the combination of "flagrant and prolonged incompetence" and of inconsistency in the treatment of the applicant as compared to others in the same position…
> [37] Thus, in Dyson LJ's view, the issue was one of degree; unfairness might be sufficiently extreme to amount to "abuse of power," and so trump the *Ravichandran* principle."

24. That accorded with the approach of Collins J in *R(A) v Secretary of State for the Home Department; R (H) v Secretary of State for the Home Department) ; R(AH) v Secretary of State for the Home Department* [2006] EWHC 526 (Admin).

25. Carnwath LJ, in paragraphs 39 and 40 of his judgment, did not find the reasoning in *Rashid* altogether convincing. As he understood it, abuse of power was not on the basis of previous authority "a magic ingredient, able to achieve remedial results which other forms of illegality cannot match." It was rather part of the rationale for the protection of a substantive legitimate expectation, not of itself a standard of review.

26. He also doubted the weight placed upon the Department's conduct in *Rashid*:

> "[41] 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. It is the unlawfulness, not the cause of it, which justifies the court's intervention and provides the basis for the remedy."

27. As he saw it, what on the authorities was important, was not the degree or nature of the incompetence of the public authority, but the substantive effect of the change of practice. Carnwath LJ referred to what Simon Brown LJ (as he then was), said in *R v Inland Revenue Commissioners, ex parte Unilever plc and related application* [1996] STC 681 (at 695a):

> "Unfairness amounting to an abuse of power, as envisaged in *Preston* and the other Revenue cases is unlawful, not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power."

28. Carnwath LJ said [43]:

> "This passage cannot be read as supporting a new and more potent category of judicial review, depending on the flagrancy of the administrative failing. On the contrary the expression "illogical or immoral" was clearly intended to assimilate the test in Lord Diplock's definition of irrationality in [*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374] ("outrageous in its defiance of logic or of accepted moral standards")…"

29. He referred to an article by Mark Elliott of the Centre for Public Law at Cambridge, entitled "*Legitimate Expectation, Consistency and Abuse of Power*" [2005] JR 281. In the course of that article, Elliott questioned as the grounds for intervention in *Rashid*, reliance upon the doctrine of legitimate expectation. Carnwath LJ put it in these terms:

> "[44] [Elliott] acknowledges that *Rashid* represents a significant step forward; indeed, that it might be read as indicating "a possibility of court intervention where something has gone badly wrong, even if the court cannot quite put its finger on it." However he sees the better interpretation as being that abuse of power is operating:
>
> > "in light of exceptional circumstances, to liberalise the existing heads of review (thus ensuring the protection of the norms underpinning them) by facilitating intervention in circumstances closely analogous to, but technically outwith, those in which such heads of review would usually operate."
>
> [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…did it have power to direct the Secretary of State to grant ILR. The power and discretion rested with the Secretary of State…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 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 injustice caused by past illegality…

[54] [In the present case at first instance], Collins J was "not impressed" by the Department's conduct, but felt unable to say that it was not "so obviously and conspicuously unfair as to amount to an abuse of power. For the reasons I have explained, I derive a somewhat different test from *Rashid*. The issue is not so much whether the unfairness is obvious or conspicuous, but whether it amounts to illegality which on reconsideration the Department has power to correct. If it has such power and there are no countervailing considerations, it should do so. Following *Rashid* the court has power to order reconsideration on the proper basis."

30. Moore-Bick LJ agreed with Carnwath LJ's analysis and comments. He said that:

"[69] In particular I agree that the key to a proper understanding of the decision lies in the court's recognition that the Secretary of State had power to grant relief of a kind that would remedy the earlier injustice and his failure to take such

> matters into account when making his decision laid it open to challenge.
>
> [70] The first question for us to consider…is whether the Secretary of State's decision to defer consideration of the claimant's application was unlawful because it involved an abuse of power. Abuse of power has increasingly been recognised as a unifying principle underlying other well-recognised grounds for regarding administrative acts as unlawful…The expression "abuse of power" might suggest deliberate misconduct on the part of the Secretary of State or one of his officials with the intention of achieving some ulterior objective, but I think it is clear that it is not in fact limited to acts of that kind. The expression that has most commonly been used to identify abuse of power is "conspicuous unfairness," a phrase that is more naturally directed at the consequences of the acts or omission in question than the motives behind them. I respectfully agree with Carnwath LJ that abuse of process should not be regarded as a more serious form of unlawfulness than *Wednesbury* unreasonableness or denial of legitimate expectation, nor as one which gives rise to different or more far-reaching consequences."

31. In *DS (Afghanistan) v SSHD* [2007] EWCA Civ 774, the Court of Appeal considered the case of an Afghan national who had claimed asylum on 5 December 2001, but whose 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. It was also common ground that had that been recognised at the time of his application, he would have been granted 4 years' ELR.

32. Sedley LJ found [7] that the Secretary of State's erroneous view had been based on "a series of apparent or real inconsistencies or gaps in the information supplied by the appellant in answer to questions designed to test his personal veracity and his knowledge of Afghanistan, leading the writer to conclude that he was not of Afghan origin. It has to be said that a number of the things fastened upon by the letter-writer look factitious and designed to find fault; but I am unable to accept that the letter is so deficient in rationality or fair-mindedness as to amount in law to no decision at all."

33. He 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]. DS's case was different: the failure to recognise his nationality "was not caused by either deliberate or negligent oversight of a policy which would have protected him but by a mistaken belief that he was not of Afghan nationality." The failure had in any event been corrected as soon as proof of his nationality in the form of an authentic passport had been produced to the Home Office [11]. He said that the Home Office had at each stage:

> "reached a rational and legally permissible decision on the material then in its hands" [15].

34. In *R (ZK (Afghanistan) and another v Secretary of State for the Home Department* [2007] EWCA Civ 615, among other things, the effect of a claimant's delay in bringing proceedings based upon *Rashid* was considered. ZK had been refused asylum in April 2001. His appeal to the adjudicator was dismissed in February 2002. On 11 July 2002 he was granted 12 months' ELR. On 29 July 2004 a further application for ELR was refused. His appeal failed. Permission to appeal to the IAT was refused on 29 July 2004. On 13 October 2005 he made "fresh representations." He suggested, for the first time, that the Secretary of State had failed to give consideration to his own policy in April 2001 and relied upon *Rashid*. Forbes J's refusal to grant permission for judicial review was in terms upheld by this court. He stated:

> "In this case the Claimant had ample opportunity to seek appropriate relief by way of judicial review in respect of any delay in dealing with his original asylum claim at the time that process was going through, but he did not do so. Rather, he waited until the decision was made on 3 April 2001 and then, as he was entitled to, he resorted to the appropriate appeal procedure. I agree with the submission that to suggest some 4½ years later that there has been prejudicial delay in dealing with [the] original claim for refugee status is, in effect, an abuse of process. In this particular case there are no exceptional features that would justify intervention by the courts because of any earlier delay with regard to the decision on the original claim for refugee status."

35. In refusing permission to appeal on the papers, Buxton LJ said:

> "The judge was plainly right in finding that the essence of the complaint was not in relation to any new facts, but an attempt to challenge decisions now many years old." It was "hopelessly out of time".

36. Latham LJ granted permission to appeal after an oral hearing, in which he said he saw "absolutely no merit in these cases", which were, on their face "abuses of process", but considered that the court should provide some guidance.

37. Pill LJ, with whom Rix and Longmore LJJ agreed, gave the leading judgment in the Court of Appeal. He agreed with Buxton LJ's and Latham LJ's comments. He said:

> "[25]…I would add, however, that 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 in 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 go 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 four 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"."

38. The case of the second appellant, YM, was a straightforward one of delay. He had claimed asylum on 30 October 1999, but his application was not refused until 12 September 2002, after the Afghan ELR policy had expired. Pill LJ said ([27]):

> "…The delay in considering the original claim…was unfortunate but it was not challenged at the time and falls very far short of the abuse of power found to have occurred in *Rashid*."

39. Mr. Gill does not accept the analysis of *Rashid* by Carnwath LJ in *S*. It was unnecessary to the decision and this court is not bound to follow it. His argument may be summarised in the following way.

40. First, he submits that the court has a role to play when it can be shown that a public authority has failed to follow the procedure which it has promised it would. It is in the interests of good administration that a public authority should act fairly and should implement its promise: see *Attorney-General of Hong Kong v Ng Yeuen Shiu* [1983] 2 AC 629. Where, as he submits was the case in respect of each of these appellants, there has been a systemic and deplorable breakdown of systems, the court should intervene.

41. Second, although in each of the present cases there was previous unlawful conduct by the Secretary State in failing to apply the relevant policy, that is not a necessary prerequisite. An appellant is entitled to succeed if he can show that in the light of the nature and extent of breakdown in the administrative system, no Secretary of State could now reasonably decide not to grant ILR.

42. Third, Mr. Gill submits that for the Secretary of State later to take a rational decision, it is necessary for her to have regard not only to what happened regarding the person during the time the policy was in force, but to subsequent events. In each of the present cases there has been "prejudice, loss and moral detriment." As he put it, "what has happened to a person is part of the matrix to be considered by the Secretary of State in making a rational decision." By moral detriment, he means the leaving of the individuals in a state of anxiety and uncertainty for a substantial time regarding their position in the United Kingdom. In none of the present cases, he submits, has the Secretary of State engaged with the degree of administrative error and the effect on the individual.

43. Fourth, assuming previous illegality, he submits a claimant can succeed without having to show conspicuous unfairness. The decision can be successfully impeached

on simple *Wednesbury* grounds, having regard to the particular facts in the particular case.

The legal position: my conclusion

44. First, the normal principle is plain. If the Secretary of State takes a decision after the policy in question has been withdrawn, the policy does not apply. The rationale is clear. The person is not entitled to asylum. There is no reasonable likelihood of persecution on his return. The justification for the previous policy no longer applies. It is safe for the person to be removed. It is only in exceptional cases that the previous policy has any application.

45. Second, it seems to me, as it did to the court in *(S)*, the court's intervention in *Rashid* was justified by a two stage approach. Firstly, in refusing ILR when he reconsidered the case, the Secretary of State failed to have regard to a legally relevant factor, namely the correction of injustice caused by the previous unlawful failure to apply the policy. Secondly, the "extreme" nature of the injustice in that case, meant that there was only one way in which the Secretary of State could reasonably have exercised his discretion. He was bound to grant ILR. I agree with the submissions of Mr. Jay QC on behalf of the Secretary of State in that regard.

46. Third, I do not accept Mr. Gill's submission that it would be sufficient effectively to oblige the Secretary of State to apply the policy after it has been withdrawn where the failure to apply it during its currency was lawful; where, for example, there was historically administrative delay or (possibly very serious and widespread) administrative inefficiency which did not amount to unlawfulness in the way I have defined it. The whole basis of applications such as the present is a previous unlawful failure to apply the policy. I cannot see how a previous lawful failure to apply the policy can give rise to a subsequent intervention by the court on the basis that the policy having been withdrawn, the Secretary of State should have taken it into account and having done so, was bound to grant ILR. There can moreover be no question of intervention by the court on the basis of a generalised and unfocussed idea of fairness; or by consideration of what subsequently may have happened to the individual in question and categorised in broad terms such as prejudice, loss and detriment. In other words, I do not accept Mr. Gill's submission that Carnwath LJ was wrong in this regard.

47. Fourth, there can too be no question of the court trying to dictate to the Secretary of State how she should administer the immigration system. The court's role must be very limited.

48. Fifth, where the Secretary of State has sufficiently had regard to that past illegality and any injustice, she will be entitled in the exercise of her discretion to refuse ILR. The court will only intervene in the extreme case, where fairness dictates that no reasonable Secretary of State could have done other than grant ILR. It follows the court will not intervene unless the decision of the Secretary of State was conspicuously unfair.

49. Sixth, I accept Mr. Jay's submission that in each case two questions fall to be answered. Firstly, was the benefit of the policy unlawfully withheld when the initial asylum claim was considered? If not, (wholly exceptional circumstances possibly

apart), no question of the court's intervention arises. Secondly, if so, did it give rise to such conspicuous unfairness that it may be said 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)?

50. Seventh, 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. Whether such proceedings may be categorised as an abuse of process does not seem to me to matter.

51. Finally, nothing I say is intended to apply to those cases in which there has been deliberate bad faith by the Secretary of State. In such a case different considerations may apply. That is not however a feature in any of the present cases.

The relevant facts: S

52. S arrived in the United Kingdom on 9 January 2000 and claimed asylum. On 30 May 2000 S was issued with a Statement of Evidence Form ("SEF"). Asylum seekers are required to complete such a form. It sets out the factual basis for their claim. He completed and returned it to the Secretary of State within the required 21 days. Due to administrative confusion in the Immigration and Nationality Directorate, the SEF was not linked to S's file. There was further confusion. On 26 June 2000, two letters were drafted at the Directorate but not, it is plain, sent. In one, it was said that S had failed to return his SEF and that his claim for asylum:

> "...has been recorded as determined on 26/6/00 and has been refused."

53. That letter wrongly suggested there was a right of appeal.

54. In the second unsent letter it is said:

> "The implications for this decision for your immigration status…are being considered separately within the Immigration and Nationality Directorate. When that process is complete, you will receive a further letter from your port of entry."

55. On 6 September 2001 the end of the ELR Policy was announced. At the time, S did not know his application had been refused.

56. 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.

57. In January 2002 the Immigration Service told S's solicitors for the first time that the claim had been refused because of the failure to return the SEF. That was confirmed by a letter of 2 February 2002. However that letter also said that the claim was under consideration. There was a dispute as to how many chasing letters had been written before then by the solicitors.

58. In a letter of 26 June 2003 the Secretary of State notified S that it was accepted his SEF had been returned in time: that the (unsent) non-compliance refusal of 26 June 2000 would be withdrawn. A fresh decision would be taken after an interview.

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

60. On 25 February 2004 S was interviewed. His claim for asylum was considered. It was refused by letter dated 1 March 2004.

61. In a determination promulgated on 24 June 2004 S's appeal against that refusal was dismissed. As part of an argument that his Article 8 ECHR rights had been infringed, S submitted that if his claim had been decided when it should have been he would have been granted 4 years' ELR and would now have been in a position to apply for ILR.

62. On 9 December 2004 the Immigration Appeal Tribunal refused permission to appeal. On 27 January 2005 Richards J rejected his application for statutory review of that decision. He 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 …"

63. By letter dated 25 January 2005, S for the first time 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. On 22 February 2005 the Secretary of State refused S's application. On 20 May 2005 the claim form was filed in which judicial review of that decision was sought.

64. Mr. Gill submitted to the judge that 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, amounted to an error of law. He submitted that the non-compliance refusal was in law a substantive refusal of asylum (albeit the Secretary of State did not in fact consider the claim in a substantive manner). It carried a full right of appeal at which an immigration adjudicator would have been required to assess the claim on its merits. The error in failing to link up the SEF to S's file directly led to the loss of the right of appeal and the loss of 4 years' ELR. It was further submitted that the error was not a one-off mistake with short-lived consequences. It was symptomatic of a systemic failure in that very many SEFs were not linked up, leading to a breakdown of lawful decision-making.

65. The judge rejected Mr. Gill's submissions. He decided that the refusal of asylum on the basis of non-compliance was not a determination on whether or not the applicant did "qualify for asylum"; that decision could only be made upon the full appeal. As the policy was only engaged in respect of someone whom the Secretary of State has concluded did not qualify for asylum, there was no deliberate or negligent failure to apply it on the erroneous non-compliance refusal. While in theory had the decision been served and appealed, there could have been a full appeal hearing, 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. No error of law had therefore been disclosed in the handling of S's claim.

66. He also decided there had been no conspicuous unfairness. Among other things, the claim was very considerably out of time.

67. I have tried to distil what I understand to be Mr. Gill's present submissions to their essence.

68. Mr. Gill's first submission is that it was not necessary for the judge to find an error of law. As I have already said, I disagree.

69. Secondly, there was an error of law. The decision in June 2000 to refuse asylum on the grounds of non-compliance was unlawful. In taking it, the Secretary of State failed to have regard to material evidence, namely the statement. The fact he did not have the statement due to systemic, administrative confusion provides no answer. It was a further error of law not to serve the decision on S.

70. Thirdly, the judge was wrong to find that no substantive decision was taken on whether S qualified for asylum. S applied for asylum in January 2000. He could reasonably have expected his case to be dealt with within 12 months, by January 2001. In June 2000 the Secretary of State decided that he did not qualify. That refusal amounted to a substantive refusal and was an error of law in the application of the policy to S. The fact that the underlying merits were not considered is irrelevant. Had S been informed of the decision, he would have appealed on the basis that there had been compliance. That appeal would have opened up all the facts. Once that happened, absent qualification for refugee status, S had a legitimate expectation that the policy would be applied.

71. Fourthly, the judge was wrong about delay and conspicuous unfairness. The present judicial review was in time. The issue of the non-application of the policy was raised as far as the appeal procedure would permit it within the article 8 claim. S was right to exhaust his avenues of appeal before bring the judicial review. Delay cannot excuse the Secretary of State's unlawful conduct. The Secretary of State too was guilty of delay.

72. Fifthly, the judge's decision on conspicuous unfairness on the facts was perverse. A very long list of features is relied on. I have read the list with care, but shall only refer to a few topics. There was a "dismal," systemic systems failure in the immigration service. It was more than a one-off error. It affected very many people. Chasing letters were ignored. S was not told what was happening. In the appeal, the adjudicator was not told of the policy and how it should be applied. The Tribunal and Richards J were wrong in their approach to Article 8. There was inconsistency.

Other people from Sierra Leone had the policy applied to them. S has been unemployed and has been for years in a state of uncertainty.

73. Sixthly, there is no countervailing public interest.

74. Seventhly, the Secretary of State's decision and the judge's approach were not proportionate. They do not enhance confidence and respect for the executive.

75. Eighthly, the Secretary of State's departures from expected practice were so serious and long lasting that they ought to result in relief.

76. Mr. Jay submits there was no error of law. There was an erroneous factual decision in respect of the application. It was thought S had not complied when he had. He goes on to submit, although for somewhat different reasons than he did below, that the non-compliance refusal did not amount to a determination either way as to whether S qualified for asylum. The policy can only be engaged once the Secretary of State has concluded that the applicant does not qualify for asylum. That never happened. Given the conclusions I have reached, it is unnecessary further to analyse Mr. Jay's submissions.

My conclusion: **error of law**

77. As it seems to me, on proper analysis, the position was this.

78. The policy only applied to those who came from Sierra Leone and were not in need of international protection. Whether S was in need of such protection depended upon the facts of his case. Those facts were never considered. The stage for them to be considered was never reached. Had there not been what appears to have been a wholly unsatisfactory administrative system, the merits of S's application for asylum would have been determined on the basis of the SEF he had submitted. If the claim for asylum failed (as later events suggest would have been the case) and assuming by then the policy was still in force, he would have been eligible for ELR.

79. I agree with Mr. Jay that the decision to refuse asylum on the non-compliance grounds was taken on the basis of an error of fact. However, as it seems to me, that error of fact led to an error of law. The decision to refuse asylum on the basis of non-compliance was not legally sustainable. It would have been quashed on any review. To adopt the wording of Sedley LJ in *DS*, it amounted "to no decision at all."

80. That decision subsisted for a long time. It encompassed the withdrawal of the policy. Because S was never told of the decision, he lost the opportunity of appealing it or having it reconsidered during the currency of the policy. Had he had such an opportunity, the benefit of the policy might have been applied to him. Whether, had the Secretary of State informed him of the decision promptly, the application would have been disposed of before the withdrawal of the policy is far from clear. However, I am prepared, in S's favour, to assume it would have been.

81. In short, as a result of the illegality, S lost the opportunity of advancing a possible claim for ELR. That, as it seems to me, is enough to bring him within the first limb of the test set out above.

Conspicuous unfairness

82. That having been said, the illegality did not in my view give rise to such conspicuous unfairness that it might be said the Secretary of State erred in failing to take it into account as effectively determining the later application of ILR.

83. I summarise. On 26 June 2003 the Secretary of State informed S that he accepted the SEF had been returned in time. On 7 August 2003 S submitted a further SEF. On 25 February 2004 S was interviewed. His claim for asylum was refused on 1 March 2004. From then on S could have advanced the claim he now makes. It is not an answer to say that he wished to pursue the asylum route. The nature of his Article 8 claim makes it clear he was aware of the policy. On 9 December 2004 he was refused permission to appeal by the Immigration Appeal Tribunal. On 27 January 2005 his application for reconsideration was rejected by Richards J. Only on 25 January 2005 did he apply for leave to remain on the grounds that, as at the date of the original non-compliance refusal, he should have been granted ELR.

84. As the judge said, the present claim is very considerably out of time. That is sufficient to dispose of S's appeal. It is unnecessary to deal with the other submissions made by Mr. Gill.

The relevant facts: H

85. H arrived in the United Kingdom on 25 February 2000 on a BA flight from Santiago, Chile. An immigration officer recorded that a BA representative in Santiago had said that a group of 5 passengers had checked in for the flight with Pakistani passports. That immigration officer witnessed a group of 5 individuals from that flight arrive at Gatwick Airport with no passports. One of them was H.

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

87. Two Pakistani passports were found near where H and another passenger had been sitting on the plane. 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.

88. On 4 July 2000 H was sent an SEF to complete and return before 25 July 2000. By a letter dated 13 July 2000 H's representatives sent 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 (as opposed to arriving on 25 February 2000 on a flight from Santiago to Pakistan via Dubai).

89. There was similar administrative confusion as in the case of S. By a letter dated 30 August 2000 the Secretary of State refused H's application for asylum on the basis of non-compliance. It was said:

> "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".

90. It is unclear whether this letter was sent to H or to his representatives. However, on 5 October 2000 fresh solicitors sent to the Secretary of State the previously completed and sent SEF form. On 19 February 2001 a decision was taken that there should be substantive consideration of H's application. Between February and October 2001 H's claim was part of the enormous backlog of asylum applications, owing, it was said, to the very high number of claims in that and previous years. Between October 2001 and May 2002 further efforts were made to clarify whether H was in fact a national of Pakistan. The judge found there was no satisfactory explanation for the delay between May 2002 and the end of July 2003, despite numerous chasing letters from solicitors during that period. On 31 July 2003 the non-compliance decision was formally recorded as having been withdrawn.

91. H was interviewed on 26 August 2003. His claim was refused on 27 August 2003. The refusal letter referred, among other things, to H's nationality as Afghan. On 1 December 2003 H's appeal to an Adjudicator was dismissed. There was no further appeal. All appeal rights were exhausted as at 15 December 2003.

92. On 26 February 2004 further submissions were made by yet another firm of solicitors on H's behalf. Their detail does not matter. On 30 November 2004 the Secretary of State rejected them. On 16 February 2005 yet more submissions were made, this time by H's current solicitors. They were rejected on 25 May 2005. On 23 January 2006 further representations were made. For the first time it was argued that he should have been granted 4 years' ELR when he first applied for asylum: that he would now be entitled to ILR if he had received the benefit of the policy. On 25 April 2006 the Secretary of State rejected those representations and declined to treat them as a fresh claim.

93. It was submitted to the judge that the refusal letter of 30 August 2000, together with an unfounded allegation of disputed nationality and the unreasonable delay in dealing with H's application for asylum, gave rise to an expectation or entitlement under the policy that H would be granted indefinite leave to remain.

94. A number of criticisms of the Secretary of State's handling of H's asylum application were made. As they form part of Mr. Gill's submissions to this court, I will summarise them.

95. There was a failure to link the submitted SEF with his file. No non-compliance refusal letter or notice of appeal in respect of it was sent to H. He was informed by letter dated 30 August 2000 that he did not "qualify for asylum". Only on 14 February 2001 was it noticed that there was a SEF form on file and also a non-compliance refusal letter. H and his representatives were first told about the non-compliance in July 2003. No indication that his nationality was in issue was raised until the Acknowledgement of Service in June 2006.

96. The judge said it was clear from the nationality interview on 26 February 2000 that his account as to country of origin and details of his journey to the UK were the

subject of consideration. He said it was plainly reasonable for the Secretary of State to entertain doubts as to his nationality having regard to the facts I have set out above. He accepted Mr Jay's submission that at no time during the currency of the 4 year ELR policy was H believed by the Secretary of State to be an Afghan national: that the Secretary of State's suspicions were ultimately demonstrated to be unfounded was not relevant to the lawfulness of his inquiries. It was only on 29 April 2002, after the expiration of the policy on 18 April 2002, that the British High Commission in Islamabad supplied information that the Pakistani passports connected with H's flight from Santiago did not appear to be related to H. The delay caused by the initial error in treating the case as one of non-compliance was short-lived in its effect. The delay that occurred until October 2001 and the delay up to 18 April 2002 did not provide the basis for a remedy.

97. The judge further decided that 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. H had delayed too long.

98. Mr. Gill repeats his criticisms of the administrative system.

99. Secondly, he submits that the investigation by the Secretary of State into H's nationality was unjustified, unfair and, if necessary, should have begun and been determined before 18 April 2002. The Secretary of State's doubts about H's nationality should have been put to him.

100. Further, the conduct of the investigation was unfair. Mr. Stovold, the immigration officer, had a closed mind and acted with bias. He had made up his mind in advance that H was not Afghani. The correspondence is littered with language such as:

> "The obvious conclusion is that they are Pakistani seeking to hide the fact…Two Pakistanis flew into Gatwick…from Santiago without passports…With regard to these two Pakistanis posing as Afghans…This man is certainly not Afghani."

101. The judge should have had regard to the whole of the delay up to 18 April. It is wrong to regard the effect of delay as short-lived. There was unlawfulness which deprived H of the benefit of the policy.

102. Thirdly, he submits that ELR was granted by the Secretary of State to someone else on the flight. That person was in no different position from H. There has been inconsistency, which is conspicuously unfair.

103. Finally, the judge was wrong to blame H for not bringing the present case sooner. He was entitled to rely on his legal advisors. The applicable law was not clear. He was entitled to expect the Home Office to act properly and remedy the situation. The single factor of delay cannot explain away the Secretary of State's conduct.

My conclusion: error of law

104. Although, for reasons given in the case of S, the decision to refuse asylum on the grounds of non-compliance was erroneous and resulted in an error of law, that error was short-lived and in the event, irrelevant. It led to no injustice. By October 2000 the Secretary of State was concentrating on the substance of the asylum claim. The

concern was not non-compliance, but H's nationality. That there was no formal retraction regarding the non-compliance decision was irrelevant. On 9 November 2001 the inquiries began. The delay of a year before substantive consideration does not provide a basis for a remedy.

105. It seems to me quite plain that an enquiry was justified. How the investigation was carried out was a matter for the Secretary of State. Whether or not H was told was also a matter for him. Although Mr. Stovold's observations might have been better expressed, he was doing no more than expressing in robust terms what his view was on the basis of the evidence he had.

106. Moreover, it seems to me almost inconceivable, as it did to the judge, that but for the erroneous non-compliance refusal, H would have been recognised as an Afghan national and granted ELR before 18 April 2002.

107. As the judge said, there was no inconsistency between the treatment of H and other Afghan nationals on his flight from Santiago. One person was seemingly granted ELR, but an investigation was then pursued with the aim of depriving him of that status by reason of his deception.

108. In short, in my view it cannot be said on the above facts that the Secretary of State unlawfully withheld the benefit of the policy from H.

109. I agree too with the judge's conclusion that assuming unlawfulness by the Secretary of State in considering the asylum claim, there was not conspicuous unfairness. Such periods of delay as there were, were comparatively short. The Secretary of State was entitled to complete the nationality enquiries. There was no inconsistency between H and anyone else. The one person on the flight to whom ELR was granted was investigated for procuring that leave by deception.

110. Finally, it seems to me the judge was right regarding H's delay in bringing this claim. He knew of the policy of granting of ELR in 2000. Asylum was refused on 27 August 2003. His appeal rights were exhausted on 15 December 2003. He first sought to raise this claim on 23 January 2006.

111. I would dismiss H's appeal.

The relevant facts: Q

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

113. He submitted an 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."

114. 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. Q produced some copies of Afghanistan identity documents which the Home Office had not had an opportunity to look at. The Adjudicator adjourned the appeal until 28 May 2002 and made directions that the Home Office should reconsider if nationality was still in dispute in light of documents the appellant had served. He gave the Home Office at least 8 weeks.

115. On 18 April 2002 the policy changed.

116. On 30 April 2002 Q's solicitors wrote to the Secretary of State providing further evidence of Q's nationality.

117. 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.

118. 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. Q's rights of appeal were exhausted.

119. Q was detained on 8 May 2006. 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.

120. 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.

121. Mr. Gill primarily attempted before the judge to impugn the decision of the Secretary of State dated 3 May 2001 as being irrational and therefore unlawful, on the basis of a report of Dr. Ballard, an expert Social Anthropologist, dated 6 February 2008. Following a detailed analysis of Q's interview of 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."

122. Dr Ballard went on to make two specific criticisms of the interviewing process. 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 [and]…the 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".

123. As the judge found, in the light of Dr Ballard's report specific deficiencies and inaccuracies in relation to the interviewing process had been identified. Some of the answers said to be wrong were not. In the judge's view however, the evidence fell far short of establishing that the decision of the Secretary of State was irrational. He said he bore in mind three points made by Mr Jay. First, no concern as to the language of the interview was raised at the time. Second, whatever disputes experts may have on the question of the numbers of Dari speakers in Pakistan (as opposed to Afghanistan), it could not 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 had to be viewed against the background of the availability of an appeal process to correct errors.

124. The judge further decided that even if there was any unlawfulness in the decision of 3 May 2001, the claim was defeated by the very considerable delay that occurred before it was pursued.

125. The judge further found 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.

126. Mr. Gill repeats the submission made below. He submits that in the light of Dr. Ballard's report, the judge was wrong. The procedure for identifying the nationality of those claiming to be from Afghanistan was unfair and inadequate. The interviewer knew nothing of Afghanistan. He did not understand the context of the questions and answers. There was no chance to ask follow up questions. There was no attempt to

build in corrective features. The interview was not considered as a whole. There were no cross checks with the Foreign Office staff as Dr. Ballard suggested there should have been. There was blind reliance on a "crib-sheet" of supposedly model answers which, it is now agreed, contained errors and was of dubious reliability in assessing nationality.

127. Mr. Gill made some additional points. Some of Q's answers showed knowledge of Afghanistan. An Iranian Farsi speaker should not have been used as interpreter. The failure to use a Dari speaking Afghani interpreter meant there was a real risk of an error occurring in the assessment of nationality. While the fact that Q spoke Dari was not itself determinative of Afghani nationality, it was something which should have been taken into account when assessing his nationality. The failure to take that into account was unfair and irrational. A minister in the Home Office, Angela Eagle, announced on 30 October 2001 that there would be a language analysis pilot to help identifying the place of origin of asylum speakers from, among other countries, Afghanistan. Language analysis by an expert, she suggested, would help identifying the nationality of the speaker. Had that happened in Q's case, his nationality would have been identified.

128. In short, submits Mr. Gill, the failure by the Secretary of State to identify Q as coming from Afghanistan was flawed and unlawful. Had that decision not been taken, he would have been granted 4 years' ELR. That unlawfulness resulted in conspicuous unfairness.

My conclusion: error of law

129. While it is clear the process for identifying nationality in Q's case was not without error, I am not persuaded it was unlawful. It is wholly unrealistic to expect from an immigration caseworker the sort of standard reasonably to be expected from a social anthropologist of 40 years standing such as Dr. Ballard. The obligation on the case-worker was to come to a decision on the evidence before him in a fair-minded manner and to reach reasonable conclusions based upon that evidence. If he is wrong, there can be an appeal in which expert evidence is called to correct the error.

130. It does not seem to me helpful to set out in this already lengthy judgment, examples of questions and answers which can be said to go one way or the other. Suffice it to say that the judge examined with care the questions and answers. I agree with the conclusions he reached.

131. I also agree with what he said regarding Dari. Whatever Dr. Ballard had to say about it, there was clear evidence that a million people from Pakistan spoke Dari. The use of Dari by Q was plainly not determinative. The Secretary of State was entitled to place such reliance upon it as he did.

132. Although not of any relevance to the outcome, I would not have placed any value on the absence of complaint regarding the Iranian interpreter.

Conspicuous unfairness

133. This case was hopelessly out of time.

134. I highlight the significant dates. The Secretary of State accepted Q’s Afghani nationality shortly after the reduction from 4 to 1 year’s ELR on 18 April 2002. On 28 May 2002 Q accepted agreed that he should be granted 1 year’s ELR. He did not suggest that the Secretary of State had failed properly to apply his policy and he was entitled to 4 years’ ELR. It was only on 8 May 2006, a day before he was due to be removed, that he sought for the first time to put forward his present claim.

135. I make it clear that I have considered the most recent skeleton argument submitted in Q’s case. I need not refer to it.

136. I would dismiss Q’s appeal.

A final observation

137. The circumstances in which claims such as the present will succeed are very rare indeed. The facts must be exceptional. Delay in advancing the case will be fatal. Those who advise claimants should be aware of that before embarking on proceedings, often at public expense.

Lady Justice Arden: I agree.

Lord Justice Laws: I also agree.