Neutral Citation Number: [2009] EWCA Civ 833

Case Nos: C4/2008/1443
C4/2008/2310

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION , ADMINISTRATIVE COURT

1. MR JAMES GOUDIE QC, sitting as a deputy judge of the High Court
LOWER COURT NO: CO/10390/2006, [2008] EWHC 1915 (Admin)

2. MR JUSTICE BLAIR
LOWER COURT NO: CO/6088/2007, [2008] EWHC 2069 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2009

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE WILSON
and
LORD JUSTICE TOULSON

- -

Between:

1. THE QUEEN ON THE APPLICATION OF AM	**Appellant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

And Between

2. THE QUEEN ON THE APPLICATION OF SS	**Respondent**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -
- -

Mr Mark O'Connor (instructed by **Island Advice Centre**) for **AM**
Ms Galina Ward (Instructed by **Messrs Duncan Lewis & Co**) for **SS**
Mr Robert Palmer (instructed by **Treasury Solicitors**) for the **Secretary of State for the Home Department**

Hearing date: 7 July 2009

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Judgment

Lord Justice Toulson :

Introduction

1. These two appeals have been heard together because they raise a common point to which different judges sitting in the Administrative Court have given different answers. The point concerns the proper interpretation and application of the Home Office's Iraq Policy Bulletin 2/2006 ("the policy bulletin"), which was introduced after the decisions in *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744 and *R (A) (H) and (AH) v Secretary of State for the Home Department* [2006] EWHC 526 (Admin).

Facts

2. The facts of the present cases can be summarised shortly. They concern Iraqi Kurds who came to the UK during the regime of Saddam Hussein and claimed asylum. Both claimed to come from the area of Iraq under governmental control (GCI). The Home Secretary disbelieved their accounts or that they came from the GCI. He did not believe that Mr SS came from Iraq and he believed that Mr AM came from the Kurdish Autonomous Zone (KAZ) rather than the GCI. Both claimants appealed. The adjudicators believed their accounts. However, the claimants' appeals failed because by this time the Saddam Hussein regime had been overthrown. Without doubting the claimants' bona fides, the adjudicators did not accept that they had a well-founded fear of persecution from former supporters of the Saddam Hussein regime or their associates.

3. The dates are important. Mr AM arrived in the UK on 14 December 2000 and claimed asylum on arrival. His application was refused by a decision letter dated 14 January 2003. The adjudicator's decision on his appeal was promulgated on 17 November 2003. Mr SS arrived in the UK on 4 November 2002 and similarly claimed asylum on arrival. His claim was refused by a decision letter dated 30 December 2002. The adjudicator's decision was promulgated on 4 November 2003.

4. For many years until 20 February 2003 it was the practice of the Home Secretary, although it was not always observed, that unsuccessful asylum claimants who came from the GCI would be granted 4 years' Exceptional Leave to Remain (ELR), which would normally lead at the end of that period to Indefinite Leave to Remain (ILR). If the Home Secretary had accepted at the time of his refusal of Mr AM's and Mr SS's applications for asylum that they came from the GCI, as in fact they did, according to that practice they would have been granted 4 years' ELR and they would, by now, have been granted ILR. But that practice was terminated at the time of the military operations which led to the overthrow of Saddam Hussein and no longer applied at the time when the adjudicators found the claimants to have been truthful.

5. The policy bulletin was issued on 1 August 2006. I attach it at the end of our judgments but as an appendix to mine (excluding the annex to the policy bulletin, to which I refer below). Mr AM and Mr SS claim that they fall within paragraph 4.5 of the policy bulletin as persons whom had been from GCI, had been refused asylum between April 1991 and 20 February 2003, and had not been granted 4 years' ELR.

6. They therefore made applications to the Home Secretary for ILR on the basis of the policy bulletin. Their applications were refused by the Home Secretary because, in her view, they did not fall within the policy bulletin. She considered that the relevant date for determining whether they came within the policy bulletin was in each case the date of the adjudicator's determination, because until then the Home Office had not accepted that either of them came from the GCI.

Judicial review proceedings

7. Mr AM and Mr SS applied for judicial review of the Home Secretary's rejection of their applications.

8. Mr AM's application for permission to apply for judicial review was refused after an oral hearing before Mr James Goudie QC sitting as a Judge of the Administrative Court. He rejected the argument advanced on Mr AM's behalf that the Home Secretary had been glossing the policy bulletin by reading the words "have been from the GCI" as if they read "have been in the view of the Secretary of State from the GCI" as a bad point. On 12 September 2008 Sedley LJ on paper granted Mr AM permission to apply for judicial review under CPR 52.15 (3) and, under (4), ordered that the substantive application should proceed in this court.

9. Mr SS's claim came before Blair J, who allowed it, quashed the Home Secretary's decision to refuse Mr SS's application and remitted it to the Home Secretary for further consideration. He said that he had not found the matter easy, but he preferred the arguments on behalf of the claimant. The main points which weighed with him were that the policy bulletin was intended to prevent unnecessary argument about who did or did not fall within the scope of the decisions in *Rashid* and *AH* by laying down a clear policy which could be simply applied, and that this was not a case of the Home Secretary construing ambiguous words in her own published policy bulletin (in which case the question would be whether the interpretation was reasonably open to her) but rather a case where she had put a gloss on the words of the Policy which could not be justified by reference to its terms. The simple fact was that the claimant was from the GCI and therefore fell within paragraph 4.5.

10. In the more recent case of *Amin v Secretary of State for the Home Department* [2009] EWHC 1085 (Admin) Blake J has disagreed with Blair J. He agreed with the Home Secretary that paragraph 4.5 did not apply to a claimant from the GCI who was refused asylum during the relevant period unless his claim to have come from the GCI was accepted or established by 20 February 2003.

11. The appeals were well argued on both sides. On behalf of the claimants it was submitted that Blair J gave the right answer for the right reasons. The primary submission made by Mr Palmer on behalf of the Home Secretary was that Blair J's interpretation of paragraph 4.5 was understandable if the paragraph is read in isolation, but was not the correct interpretation when it is read in the context of the policy bulletin as a whole. Alternatively, he submitted that the paragraph was fairly capable of being understood either way, and that it was not unlawful for the Home Secretary to apply the Policy as she did. If both those submissions failed, Mr Palmer advanced a third argument that the Home Secretary was not manacled by the Policy as properly interpreted but was entitled to depart from it. This submission was advanced somewhat faintly, because it was not a case in which the Home Secretary had

appreciated that her decisions conflicted with her publicly stated policy and had made a conscious decision to depart from the Policy for some particular reason.

The policy bulletin: purpose and background

12. The overall purpose of the policy bulletin is stated in paragraphs 1.1 and 2.2. These paragraphs contain three relevant points. First, the policy bulletin states that it has been produced to provide guidance to decision-makers considering the implications of the judgments in *Rashid* and *R (A) (H) and (AH*). Secondly, it enunciates a policy that:

> "… we should not seek to enforce the removal of failed asylum seekers whose cases have the potential to fall within the scope of the *Rashid* judgment and/or the cases of R (A): (H) and (AH), pending consideration of their cases."

Thirdly, it states that "in practical terms" people should therefore not be removed who satisfy a category within paragraphs 4.1 to 5.

13. Paragraph 3 of the policy bulletin contains a summary of the background to those cases and what they decided, but it is an understandably abbreviated summary and it is right to look at the cases themselves for a fuller understanding of the issues.

Rashid

14. In *Rashid* the claimant was an Iraqi Kurd who sought asylum in the UK on 4 December 2001. His claim was refused by the Home Secretary on 11 December 2001 and that decision was upheld by an adjudicator on 7 June 2002. In refusing the claim for asylum and resisting the claimant's appeal the Home Secretary relied on the availability of internal relocation to the KAZ. Unknown to the claimant's advisers or to the adjudicator, there was at that time within the Home Office a general policy that internal relocation to the KAZ would not be advanced as a reason to refuse a claim for refugee status. The existence of the policy was revealed to the claimant's representatives as a result of another case on 6 March 2003. The Home Secretary then agreed to reconsider the claimant's case in the light of the policy but it took him until 16 January 2004 to do so. In the meantime, in June 2003, hostilities in Iraq had ceased. So on 16 January 2004 the Home Secretary again refused the asylum claim. The claimant applied for judicial review of that decision. In resisting the claim the Home Secretary relied on the principle established by the Court of Appeal in *Ravichandran* [1996] Imm AR 97 that asylum claims are determined in the light of the circumstances prevailing at the latest stage of the decision-making process. In the claimant's case that was on 16 January 2004, by which time the previous policy had been withdrawn because of the change of conditions in Iraq. Counsel for the Home Secretary accepted that the original decision to refuse the claim for asylum had been unlawful, because it breached the Home Secretary's policy at the time, but he submitted that this was past history by the time that the decision-making process came to an end on the reconsideration of the claimant's application.

15. The claimant's application for judicial review succeeded. The Court of Appeal was excoriating in its criticisms of the Home Office's handling of the case. As Dyson LJ said at paragraph 44, the court was faced with a stark question as to which of two

conflicting considerations should prevail. Justice and fairness suggested that the claimant should not be returned to Iraq in circumstances where, if the Home Secretary had followed his own policy or revealed its existence to the claimant, the adjudicator or the IAT during the period from December 2001 to March 2003, the claimant would have been accorded full refugee status. On the other hand, the *Ravichandran* principle suggested that he should be returned to Iraq. The Court resolved the conflict in favour of the claimant on the ground that there had been "conspicuous unfairness" such as to amount to "an abuse of power" (adopting phraseology of Lord Templeman in *In re Preston* [1985] AC 835, 864 and Simon Brown LJ in *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681, 695).

16. It is plainly a fact-sensitive question whether administrative shortcomings merit that description in a particular case.

A, H and *AH*

17. In *R (A) (H)* and *(AH)* the first and second named claimants were in a similar category to *Rashid* in that the Home Secretary had relied on the possibility of internal relocation to the KAZ as a reason for refusing their asylum claims, but it was argued on behalf of the Home Secretary that, on the facts of those cases, there had been nothing worse than poor decisions by individual caseworkers for which the appropriate remedy was an appeal. Rejecting that argument, Collins J said:

> "[33] A poor decision by individual caseworkers will not normally qualify [as an abuse of power]. That can be cured by an appeal and if circumstances have changed (which may in some cases be to the claimant's advantage where developments in the country of his nationality have worsened), his claim will be affected accordingly. But here there was systemic failure which not only affected the decision but also led to the appellate authority being misled. Thus the claimant was deprived of the chance of having a fair decision not only from the administrators but also from the independent appellate body. It is this coupled with the lack of any satisfactory explanation – satisfactory, that is, in the sense that it excuses the conduct – which leads me to reject Mr Tam's argument. In effect, I am doing no more than following the guidance given by the Court of Appeal in *Rashid.*
>
> [34] I recognise that cases such as this which justify relief such as is claimed here will be rare. The court has to decide whether the unfairness is such that it goes beyond that which should attract no relief other than that afforded by a right of appeal. I recognise that it is not possible to define where the line should be drawn with any precision. Inevitably, the circumstances of an individual case will be the deciding factor. It is only if the court is persuaded that the unfairness is so bad that abuse of power is an appropriate label that it will find in a claimant's favour."

18. The case of *AH* revealed a different shortcoming in the Home Office's treatment of asylum seekers from the GCI. AH arrived in the UK in June 2001 and claimed asylum. His claim was rejected largely because it was believed that he was only avoiding military service in Iraq and because he had not attended for interview. However, his failure to attend for interview was not his fault because notice of it was sent to an address from which he had been moved by the Home Office. Since the Home Office appears to have accepted that he came from the GCI, he should have received 4 years' ELR on the refusal of his asylum claim according to the Home Office's practice then in force. But this did not happen and AH remained unaware of the practice when, on 6 August 2001, he lodged an appeal against the refusal of his asylum claim. The Home Office then accepted that his failure to attend an interview had not been his fault and agreed to reconsider his claim following an interview. On 22 February 2003 his claim was again refused, but he was granted 6 months' ELR. By this time there had been a change of practice by which the period of ELR granted to unsuccessful asylum claimants from the GCI was reduced from 4 years to 6 months.

19. Collins J held that since AH should have been granted 4 years' ELR in July 2001, when his asylum claim was first refused, he ought to be permitted to apply for ILR as if he had been granted the necessary 4 years' ELR. Although he was critical of the circumstances leading up to and surrounding the Home Secretary's second decision refusing AH's asylum application, this did not result in any relief.

20. In summary, the relief granted by the Courts in *Rashid* and *AH* arose from maladministration by the Home Office in disregarding its own policy or practice:

    (a) Not to advance the possibility of internal relocation to the KAZ as a reason for rejecting an Iraqi claim for asylum (*Rashid*), and

    (b) to grant him 4 years' ELR for an unsuccessful asylum claimant from the GCI (*AH*),

    in circumstances where the disregard went beyond a matter of mere error by a caseworker and was characterised as amounting to an abuse of power.

***Rashid and AH*: the policy bulletins summary and response**

22. Caseworkers considering applications for ILR on the strength of *Rashid* or *AH* could hardly be expected to make a legal judgment in each case whether a misapplication or non-application of Home Office policy of either of the kinds which led to relief being granted in those cases crossed the grey line separating mere error (of a kind for which the statutory appellate process provided appropriate relief) from conspicuous unfairness amounting to abuse of power.

23. It is therefore readily understandable that the policy bulletin seeks to avoid this problem by laying down a policy for those who "have the potential to fall within the scope of" *Rashid* or *AH* (paragraph 2.2). It seeks to identify those people in paragraphs 4 and 5, which are prefaced by an explanation of the background in paragraph 3.

24. At paragraphs 3.1 -3.2 the policy bulletin recounts that in *Rashid* the court had ruled that the applicant should be granted ILR because of a series of errors in the processing of his asylum application which led to the refusal of asylum, and the dismissal of his

appeal, because of the possibility of relocation to the KAZ, whereas the Home Office's policy at the material time was not to rely on such relocation in cases of Iraqi nationals.

25. At paragraphs 3.4-3.5 the policy bulletin recounts that in the case of *AH* internal relocation to the KAZ was not the basis of the refusal of asylum, but that at the time of the initial decision to refuse the applicant asylum as not credible he should have received 4 years' ELR in line with the normal Home Office practice, as it then was, for claimants from the GCI.

26. Paragraph 4 seeks to identify, as its heading indicates, the "scope of Rashid judgment and High Court judgment in *R(A) (H)* and (*AH*)", omitting reference to considering on an individual basis whether there had been abuse of power. It identifies the scope of *AH* as follows:

> "4.4 For an individual to fall within the scope of (*AH*) the case would need to
>
> (a) have been an Iraqi asylum claim, from an area of Iraq, refused by the Secretary of State between April 1991 and 20 October 2000 (when the practice was to grant 4 years' ELR to all Iraqis who had been unable to establish a valid claim under the refugee convention), and
>
> (b) have not been granted 4 years' ELR.
>
> 4.5 Alternatively:
>
> (I) have been from the government controlled area of Iraq (GCI) and refused by the Secretary of State between April 1991 and 20 February 2003 (when the practice was to grant 4 years' ELR to claimants from GCI), and
>
> (II) have not been granted 4 years' ELR"

27. Paragraph 5 contains additional provisions for dealing with cases where asylum had been refused on non-compliance grounds, that is, for failure to comply with Home Office requirements relating to the processing of the asylum claim.

28. Paragraph 6 deals with dependants. It provides that those accepted as dependants on a main applicant's claim at the time of an initial refusal are now eligible for ILR, but only if they would have been granted leave to remain at the time of the initial decision if the main applicant's claim had been decided in line with Home Office policy as outlined in the preceding paragraphs.

29. Paragraph 9 instructs caseworkers to check the details of each claimant's case against the criteria set out in the policy bulletin, to identify whether the case falls within the scope of *Rashid* or *AH* and, depending on the result, to notify the claimant using appropriate parts of alternative pro forma letters contained in Annex A to the policy bulletin. The result of applying the instructions in Annex A to the facts of the claimants' cases would be that they would be sent a letter refusing their application for ILR. The letter was to include a paragraph summarised in Annex A under the heading "Para B (ELR policy between April 1991 and February 2003 in respect of applicants from GCI)". The paragraph set out in bullet form the following criteria which the applicant had to meet:

- was decided by the Secretary of State between April 1991 and 20 February 2003 and

- that s/he was accepted as being from the part of Iraq formerly controlled by Sadam Hussein and

- that s/he was found to have no well-founded fear of persecution for a convention reason, and

- that s/he was not granted 4 years' ELR.

The case worker was to set these out and state which criteria the applicant met and which they did not meet.

Discussion and conclusion

30. I am not surprised that judges have come to different conclusions about the interpretation of paragraph 4.5. My first reaction coincided with the view formed by Blair J for the reasons which he gave. On a simple grammatical reading of the paragraph, the claimants were from the GCI, they were refused asylum by the Home Secretary between April 1991 and 20 February 2003, they have not been granted 4 years' ELR and so they fall within the language of the paragraph. However, I have come to the conclusion that this argument – cogent thought it appears at first sight – is outweighed by the cumulative force of a number of other factors which support the case advanced by the Home Secretary.

31. First, I think that it is plain that the purpose of the policy bulletin was to make ILR available for those who fell potentially within the scope of *Rashid* or *AH*, that is, those in relation to whom there had been the same type of maladministration as in those cases, but without determining the extra ingredient whether the maladministration had amounted to abuse of power.

32. Secondly, the claimants' cases are different in a respect which goes to the heart of the decision in *AH*. In *AH* there was maladministration because the Home Office did not dispute that he came from the GCI but failed to apply its own policy of granting 4 years' ELR in such circumstances. The critical issue for the court was whether this maladministration constituted abuse of power so as to merit departure from the *Ravichandran* principle. The present cases are different because in each case the Home Secretary did not accept that the claimant came from the GCI and on that basis the claimant was not entitled to refugee status or ELR. That decision was the first stage of an adjudicative process, the next stage being the decision of the adjudicator on appeal from the Home Secretary. The fact that the Home Secretary's initial decision was adverse and that the adjudicator in each case came to a different view does not imply that the Home Office acted in disregard of its own policy, which was the basis of the maladministration in *AH*. Indeed, Blair J said in his judgment in Mr SS's case that no complaint was or could be made of the Home Secretary's refusal letter; it was a perfectly proper decision to make on the information that was available. On his appeal to the adjudicator Mr SS produced an Iraqi identity card, on the basis of which the Home Secretary then accepted his claim as to his origin. To have disapplied the *Ravichandran* principle would have

involved an extension of *AH* to circumstances which were not under consideration in *AH* and for which there would not have been the same logical foundation.

33. This point is reinforced by the decision of this court in *DS (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA 774. The case involved an Afghan asylum seeker whose claim was refused on the ground that he was not in the Home Secretary's view a national of Afghanistan. It was later accepted that this view was wrong, and that if this had been recognised at the time of his application he would have been granted 4 years' ELR. But the court rejected the argument that the failure to grant him 4 years' ELR involved conspicuous unfairness. It contrasted the oversight (whether deliberate or negligent) of a policy which would have protected the claimant and a mistaken belief that he was not of Afghan nationality.

34. Thirdly, the words in parenthesis in paragraph 4.5 "when the practice was to grant 4 years' ELR to claimants from GCI" (and the equivalent words in paragraph 4.4) have an explanatory function. Persons who fall within paragraph 4.5 are persons to whom the practice was not applied. But the practice was itself premised on the Home Secretary accepting that the claimant came from the GCI.

35. Fourthly, the same point is made explicit in the paragraph of the pro forma refusal letter in Annex A to which I have referred.

36. Mr Palmer put forward a number of other arguments in support of the Home Secretary's case, but I regard them as less weighty. I was for a time troubled by paragraph 5 of the policy bulletin which deals with non-compliance decisions. I could not see why the paragraph was needed if Mr Palmer was right in his submissions about paragraph 4, but I was persuaded by Mr Palmer that a non-compliance decision can present particular problems (for example, where it is procedurally flawed because the claimant had not failed to comply with a direction) which needed to be separately addressed, although it is a pity that the language used is convoluted.

37. There was some argument about the proper approach to the interpretation of a policy document such as the present policy bulletin. We were referred to the decision of this court in *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72 but the parties were agreed that the outcome of these appeals was unlikely to turn on that general question, and I do not consider that it does. I have come ultimately to the firm conclusion that when the policy bulletin is read as a whole, against the background of *Rashid* and *AH*, paragraph 4.5 was not intended to cover an asylum seeker who claimed to come from the GC1 and whose claim was refused during the relevant period because it was not accepted that he came from the GCI, notwithstanding that he in fact came from the GCI and that this was accepted or established after the end of the relevant period.

38. I would therefore dismiss Mr AM's application for judicial review and allow the appeal of the Home Secretary in the case of Mr SS.

Lord Justice Wilson:

39. I have had the advantage of considering the judgment of Sedley LJ as well as that of Toulson LJ. In the event I find myself in agreement with Toulson LJ.

40. Mr SS and Mr AM ("the applicants") have not established any objective reason why they cannot now safely return to Iraq or why their compulsory return there would infringe their rights under the ECHR 1950. Their invocation of the Secretary of State's Iraq policy, set out in Bulletin 2/2006, must be seen in that context. I am clear that the purpose behind the policy is to implement that narrow entitlement of certain Iraqis to remain in the UK, notwithstanding the existence of such a context, which was recognised first by this court in *Rashid* and then, following *Rashid*, by Collins J in *A, H and AH*, both cited by Toulson LJ in [1] above.

41. In my view the nub of those two decisions is that, where the Secretary of State has determined a claim for asylum *unlawfully*, in the sense of having failed to apply his policy, extant at the time, to a claimant's circumstances which were objectively governed by it and which he recognised to exist, then, if the failure is so conspicuously unfair as to amount to an abuse of power, the claimant remains entitled to the benefit of the policy notwithstanding that meanwhile, reflective of changed circumstances in his country of origin, the policy has changed. Thus, when his policy was not to reject a claim for asylum made by an Iraqi Kurd from GCI on the basis that he could relocate to KAZ, the Secretary of State's rejection of a claim by a person whom he recognised as an Iraqi Kurd from GCI on the basis that he could relocate to KAZ represented an unlawful failure to apply his policy which was so conspicuously unfair as to amount to an abuse of power: *Rashid*, *A* and *H*. Equally, when his policy was to grant ELR for four years to all Iraqi claimants from GCI, even if not refugees, the Secretary of State's wholesale rejection of a claim by a person whom he recognised as an Iraqi from GCI represented an unlawful failure to apply his policy which was so conspicuously unfair as, again, to amount to an abuse of power: *AH*.

42. In the course of their submissions, particularly attractive because they were consistently realistic, Ms Ward and Mr O'Connor accepted that there was nothing *unlawful* about the Secretary of State's initial refusal to grant their clients' applications for asylum. The Secretary of State accepted that Mr AM was an Iraqi national but did not accept that he came from GCI. He did not accept that Mr SS was an Iraqi national at all, let alone that he came from GCI. Adjudicators were later to be persuaded otherwise. But it is not suggested that the Secretary of State's reaction to the evidence presented to him by the applicants on these matters, whatever its nature and extent, was perverse or for any other reason *unlawful*.

43. There is therefore no doubt that the applicants cannot bring themselves within the principles set out in *Rashid* and, more relevantly, in *AH*. But can they bring themselves within the Iraq policy set out in Bulletin 2/2006? Ms Ward, echoed by Mr O'Connor, suggests an answer which has found favour with Blair J and now also with Sedley LJ. It is that, as Collins J recognised in *A, H and AH*, at [34], it is impossible to define with any precision the ambit of the principle identified in *Rashid* and there applied by Collins J himself; that the purpose of the policy was to free case-workers from the need to struggle with whether a case fell within the principle; and that the simple language of paragraph 4.5 of the policy, similar to that

of paragraph 4.4, introduced a bright-line policy in favour of Iraqis from GCI whose applications were refused no later than 20 February 2003, irrespective of whether their status as such had then been accepted or was to be established only later.

44. But, with respect to those with whom it has found favour, Ms Ward's suggestion cuts no ice with me. I am convinced that the purpose of the bulletin, however poorly drafted, was to identify a policy which recognised and implemented the decisions in *Rashid* and *A, H and AH* but which went no further. In the overarching circumstances of post-war Iraq, why should it have gone further? Indeed does any fair reading of it suggest that it was intended to go further? By paragraph 1.1, the purpose of the bulletin is explained as the provision of guidance to decision-makers considering the implications of *Rashid* and *A, H and AH*; by paragraph 2.2, it is stated that failed asylum-seekers whose cases have the potential to fall "within the scope" of those decisions should not be removed and that "in practical terms this means we should not be removing those who satisfy a category from 4.1 to 5 below"; in paragraphs 3.1 to 3.5 there is extensive discussion of the two decisions; all the paragraphs within 4, thus including 4.5 upon which the applicants centrally rely, are headed "Scope of *Rashid* judgment and High Court judgment in *R (A, H and AH)*"; paragraphs 4.1 and 4.2 purport to explain what falls "within the scope" of *Rashid* and *A and H*; and paragraphs 4.4 and 4.5 purport to explain what falls "within the scope" of *AH*.

45. Paragraph 9.2 of the bulletin provides that, if the case is found to fall outside the scope of the two decisions or if exclusions apply, "any representations should be rejected using the letter at Annex A". We received spirited submissions as to whether Annex A would assist in the proper construction of the bulletin, such being agreed to be a task to be undertaken with a breadth appropriate to its status as policy rather than as statute. Ms Ward suggested that the tail could not wag the dog. Mr Palmer responded that the tail might indicate the breed of the dog. In my view considerable assistance is to be derived from the annexe. It is a presentation of various *pro forma* responses for use by case-workers in writing determinations of applications under the policy. Although the overall presentation is somewhat confusing, three alternative paragraphs, each referable to different periods when different policies towards Iraqi applicants for asylum were in operation, all include the statement that the applicant "was accepted as being from" either "Iraq" or "the part of Iraq formerly controlled by Saddam Hussein". Since the caseworker's letter is the intended culmination of the Secretary of State's consideration of whether the policy in the bulletin applies to the individual applicant, I regard the instruction to use the words "was accepted as being from", in contradistinction to the words "was from", as clear confirmation that the policy in the bulletin goes no further than is required by the decisions in *Rashid* and *A, H and AH*.

Lord Justice Sedley:

46. My first reaction, like that of Toulson LJ, was that Blair J was right. But in considering whether he was, I have found myself much less influenced than Toulson LJ by the backdrop of *Rashid* and *AH*, because I do not consider that we, any more than the caseworkers to whom the policy is addressed, are required (or indeed entitled) to treat the policy as merely exegetic of the caselaw and to apply the two decisions rather than the policy.

47. On the contrary, the point of a policy like this one, even if it keeps unnecessarily explaining its own premises and genesis, is to provide a tick-box decision-making process without reverting repeatedly to the underlying caselaw.

48. If the policy is so regarded, the *Ravichandran* principle does not arise. The question is simply whether, at the time when the decision came to be made, the "Iraqi" box needed to be ticked. In the light of what was known to each decision-maker in the two cases before us, it plainly did. There was no call to traverse the *Rashid* "conspicuous unfairness" terrain or its analogue in *AH*, and no need to inquire whether the case fell instead into the *DS* class. The whole point of the policy, in spite of its discursive and distracting prose, was to set all these difficulties on one side in favour of a straightforward yes or no in relation to ascertained facts.

49. So I think Blair J got this issue right and James Goudie QC got it wrong. I would accordingly allow Mr AM's application for judicial review and dismiss the Home Secretary's appeal in the case of Mr SS.

Appendix to the judgment of Toulson LJ overleaf. (see: *http://www.bailii.org/ew/cases/EWCA/Civ/2009/833(Appendix).pdf* **)**