CO/4987/2005

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

Royal Courts of Justice
Strand
London WC2

Wednesday, 10th May 2006

B E F O R E:

MR JUSTICE SULLIVAN

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THE QUEEN ON THE APPLICATIONS OF S; S; M; S; A; S; K AND G
Claimants

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

MR RABINDER SINGH QC and **MR D SEDDON** (instructed by Hammersmith & Fulham Community Law Centre, London W6 0QU) appeared on behalf of the Claimant
MR ROBERT JAY QC and **MS CAROLINE NEENAN** (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Defendant

J U D G M E N T

MR JUSTICE SULLIVAN:

Introduction

1. In this application for judicial review the claimants challenge the lawfulness of the defendant's decision on 3rd November 2005 that it was inappropriate to grant them Discretionary Leave to enter the United Kingdom, and that they should remain on temporary admission.

Factual background

2. The nine claimants are all citizens of Afghanistan. They arrived together in the United Kingdom on 7th February 2000 on board an aircraft that they had hijacked whilst it was on an internal flight in Afghanistan. They hijacked the plane in order to escape from the Taliban regime in Afghanistan. On 10th February 2000 they disembarked from the aircraft and claimed asylum. They were subsequently charged with various offences relating to the hijacking. In the criminal proceedings it was not disputed that the claimants had taken control of the aircraft, detained the passengers and crew as alleged in the charges and had done so in order to leave Afghanistan, which at that time was ruled by the Taliban. The main issue raised by the claimants in their defence was duress: they claimed that they had acted under an imminent threat of death or serious injury against them or those for whom it was reasonable for them to accept responsibility. At the first trial before Butterfield J, the jury was unable to agree. After a retrial before Sir Edwin Jowitt, who gave the jury a different direction as to duress, the claimants were convicted on all counts. Two of the claimants were sentenced to five years' imprisonment, the remaining claimants were sentenced to 30 months or in one case to 27 months' imprisonment. The claimants appealed, and in a reserved judgment which was handed down on 6th June 2003, the Court of Appeal allowed their appeals and quashed their convictions on all counts, having concluded that the jury had been misdirected as to the law relating to duress and that the judge's "crucial misdirection" meant that all the convictions were unsafe: see R v S and others [2003] EWCA Crim 1809, per Longmore LJ at paragraphs 29-33. No retrial was ordered. By that time, making allowance for time spent in prison on remand, and eligibility for parole, all but two of the claimants had served their full sentences in any event.

3. In "Reasons for Refusal" letters dated 25th June 2003 addressed to the individual claimants, the defendant considered whether they were entitled to asylum under the 1951 Geneva Convention relating to the status of refugees ("the Refugee Convention"), whether they qualified for Humanitarian Protection in accordance with the published Home Office Asylum Policy Instruction on Humanitarian Protection, and "whether you may be eligible for a grant of limited leave to enter or remain in the United Kingdom in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave" (see paragraphs 1-3 of the letters). Paragraphs 4 and 5 of the letters summarised the claimants' claims. In paragraph 6 of the letters, the defendant said:

> "6. The Secretary of State has considered your claim but for the reasons given below has concluded that you do not qualify for asylum or Humanitarian Protection. The Secretary of State has also concluded for the reasons given below that you do not qualify for limited leave to enter or remain in the United Kingdom in accordance with the published Home

Office Asylum Policy Instruction on Discretionary Leave."

4. The remaining paragraphs in the letters set out the defendant's reasoning. The letters did not refer to Article 1F of the Refugee Convention, which provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

5. The letters stated that the claimants did not qualify for Humanitarian Protection (see paragraph 23) or Discretionary Leave (see paragraph 25). Paragraphs 27-29 said this:

> "27. In light of all the evidence available to him and for the reasons given above, the Secretary of State is not satisfied that you have established a well-founded fear of persecution. Your application is therefore refused under paragraph 336 of HC 395 (as amended) and has been recorded as determined on 25/06/2003.
>
> 28. Furthermore, the Secretary of State has given careful consideration to whether you should be allowed to remain in the United Kingdom as a result of our obligations under the ECHR, but he is not satisfied on the information available that your removal would be contrary to our obligations.
> 29. You are now required to state any reasons for staying in the United Kingdom which were not previously disclosed. Please read the enclosed **One-Stop Notice** carefully. The reasons must be stated on the **Statement of Additional Grounds** attached to the **Notice of Appeal** and these should be returned together (with a copy of the **Reasons for Refusal Letter** and the **Notice of Decision**) to the address given on the Notice of Appeal."

6. The letters were followed on 26th June 2000 by Notices of Refusal of Leave to Enter and proposed Removal Directions. The notices drew attention to the right of appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002, enclosed a Notice of Appeal and stated that "Notice of Appeal on all grounds must be received by 14th July 2003". The appellants appealed by notices dated 10th July 2003. Part 3 of the Notice of Appeal required each claimant to set out the:

> "**GROUNDS on which you are appealing**

> Please explain why you are appealing and why you think the decision was wrong.
> You need to tell us all of the grounds for your appeal. If you do not do this now, then you may not be allowed to mention any further grounds at a later time."

7. Under the heading "STATEMENT OF ADDITIONAL GROUNDS", the notice said:

> "If there are any OTHER reasons why you wish to stay in the United Kingdom, including any OTHER grounds on which you should be allowed to stay, or should not be removed or required to leave, please explain them here.
>
> Please do not repeat reasons or grounds you have already given.
> If you do not disclose all your reasons and grounds now, you may not be able to make any other applications to appeal, if this application is refused."

8. Unusually, the claimants' appeals were heard not by a single adjudicator but by a panel of three adjudicators ("the Panel"). The hearing took place over a period of eight days between 26th April and 10th May 2004. Both the claimants and the defendant were represented by solicitors and counsel. Each of the claimants gave oral evidence and was cross-examined. The claimants also called two expert witnesses who gave oral evidence and were cross-examined. The scope of the appeals was described by the Panel in paragraph 3 of its determination as follows:

> "The appellants now appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) against the decisions of the respondent on 26 June 2003 to refuse each of the appellants' claims for asylum under the Refugee Convention and for humanitarian protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) <u>and to refuse each of them leave to enter</u>. Further, the respondent has made or proposes to make directions for the removal of each of the appellants to Afghanistan." (emphasis added)

9. At the outset of the hearing counsel for the defendant requested an adjournment in order to adduce evidence obtained during the course of the criminal trials on the issue of duress. It was submitted that such evidence would be relevant to the issue whether the claimants were excluded the protection of the Refugee Convention by reason of Article 1F(b) (above).

10. In refusing the application the Panel noted that:

> "No mention had been made by the respondent of the contention that he considered the exclusion clauses of Article 1F(b) applied until the respondent's skeleton argument was received by the Immigration Appellate Authority some two working days before the hearing. We noted that Rule 48(5) of the Immigration and Asylum Appeals (Procedure) Rules 2003 (the Rules) provides that an Adjudicator must not

consider any evidence not filed or served in accordance with the time limits set out unless satisfied that there are good reasons so to do. We considered that there was sufficient evidence already before us to enable us to consider the contentions relating to Article 1F(b), noting that the statements submitted by the appellants dealt in some detail with the hijacking and the reasons for it. Whilst such evidence as the respondent was seeking additional time to submit might produce a more complete picture, that was not sufficient to constitute a good enough reason for an adjournment, ..."

11. In an immensely detailed and comprehensive determination promulgated on 8th June 2004, which extended to 414 paragraphs over 117 pages, the Panel dismissed the claimants' appeals on asylum grounds but allowed them on human rights grounds. The appeals on asylum grounds were dismissed upon the basis that the claimants were excluded from the protection of the Refugee Convention by Article 1F(b): see paragraphs 62-93 of the determination. In paragraphs 91-93 the Panel said:

"91. Having heard the evidence of the appellants and the experts, and having read the objective evidence, we are satisfied that the borders of Afghanistan are and were at the relevant time porous relative to many countries. We find that these appellants could have attempted an alternative means of escape to a neighbouring country. There were routes through the mountains and unmanned border posts. We find that despite all of the appellants' statements to the contrary there was not such an immediacy of danger of arrest or lack of opportunity to move away from the Kabul area such that they could not have found an alternative to the hijacking. The appellants could have chosen to travel to Pakistan, although there was a strong Taliban and radical Islamic Movement presence there. If they had gone to Pakistan, it was most unlikely they would have experienced any particular difficulties moving on from there. The further they travelled away from Afghanistan and the Peshawar area the less likely they would have been in danger. They could have remained elsewhere in Pakistan or if they still felt in danger of persecution they could have travelled on to claim asylum in another country. They could have claimed asylum in Tashkent or in Moscow but chose not to do so.

92. For the reasons set out above we find that there were some mitigating circumstances leading to the decision to hijack the aircraft. However, we find also that there are no serious grounds for concluding that the appellants were placed in such a position that they were compelled to carry out the hijacking nor were they under such pressure as to justify the hijacking. Thus there is insufficient reason to counter our finding that there are serious grounds for considering that all of these appellants have prior to their arrival and claim to refugee status committed a serious non-political crime outside the United Kingdom, namely the hijacking of the Ariana Afghan Airways Boeing 727.

93. Accordingly all the appellants are excluded from the protection of the

Refugee Convention."

12. The claimants' appeals on human rights grounds were allowed because the Panel concluded that there was for each of the claimants a real risk that they would suffer violations of their rights under Article 3 of the European Convention on Human Rights ("the Human Rights Convention") if they were returned to Afghanistan: see paragraphs 169-220 of the determination. In paragraphs 219 and 220 the Panel said:

> "219. To summarise, we find that the appellants are in a unique position because of their role in the hijacking and the very high level of notoriety and publicity which the hijacking was given in Afghanistan and the level of interest it still generates. We accept that the Taliban condemned the appellants to death and that in principle they see them as enemies of Islam. This is supported by their numerous utterances at the time and by the terms in which they convicted the appellants. We also accept the evidence that the Taliban have the capacity to carry out targetted attacks. Although their attacks have primary been in the south-east they have clearly been able to carry out a number of high profile attacks in Kabul and have been re-grouping with a view to carrying out more attacks and have uttered many threats. We also accept the evidence of the experts that although the Taliban's efforts to date have been directed against foreign aid workers and those associated with the TA, the unique position of the appellants would make them of interest to the Taliban because of the damage they did to the Taliban regime at the time of the hijack. We also take into account that because of the appellants' high profile it would be an enormous public relations coup for the Taliban to show that they could still take revenge against their enemies. For all these reasons we find that there is a real risk that the appellants would be targetted for assassination by the Taliban which clearly would be treatment contrary to Article 3.
>
> 220. We also wish to make it clear that our view that the Taliban would target individuals whom they consider to be enemies is not a precedent applicable to the generality of Afghans who left Afghanistan in fear of the Taliban regime. We specifically point out that the reason why we find these appellants are at risk is because of their particularly high profile and their unique position as the main actors in the hijacking who have been convicted and sentenced to death [in] their absence."

13. In response to the defendant's submissions that there would be a sufficiency of protection available to the claimants if they returned to Kabul, the Panel concluded in paragraphs 240 and 241:

> "240. Taking all this into account, and bearing in mind our findings about the risk on return to the appellants from the Taliban who have the capacity to carry out attacks in Kabul, we conclude that on return the appellants' connection with the hijacking and all that it stands for in the Taliban conscience, if not in the national Afghan conscience, will place them at risk of being killed or seriously injured or ill-treated by the Taliban. On the evidence before us, there is little, if any, likelihood that

> the system of protection currently or in the foreseeable future likely to be in place in Kabul or elsewhere in Afghanistan could offer any of the appellants a reasonable sufficiency of protection given their notoriety. We therefore find that there would be no sufficiency of protection in accordance with the principles enunciated in the cases of Horvath [2000] Imm AR 552 and Bagdanavicius available to the appellants in Kabul.
>
> 241. The rights protected by Article 3 are unqualified or absolute so that the assessment of risk in an Article 3 claim is not restricted by reference to the appellants' conduct. In the light of our findings that there is a real risk that the appellants' rights under Article 3 would be violated on return and that there is an insufficiency of protection, the appeals of all the appellants under the European Convention are allowed."

14. On 14th July 2004 it was reported that the defendant intended to appeal against the decision. The Times of that date reported that:

> "David Blunkett, the Home Secretary, immediately announced he will be appealing yesterday's verdict which one senior Home Office official described as 'mind boggling'."

15. By a determination promulgated on 22nd July 2004, the Deputy President of the Immigration Appeal Tribunal, in a carefully reasoned decision addressing each of the defendant's proposed grounds of appeal, refused permission to appeal. Under the statutory provisions then in force, it was open to the defendant to apply to the High Court for a statutory review of the Tribunal's decision upon the ground that there was an error of law in the Panel's determination. In a letter dated 12th August 2004, the Treasury Solicitor informed the claimants' solicitor that:

> "My client has decided not to apply for statutory review of the Tribunal's decision. Accordingly this litigation is at an end and my involvement has ceased. However, I understand that my clients will be writing to you shortly."

That last sentence proved to be unduly optimistic.

16. The published policies on Humanitarian Protection and Discretionary Leave, referred to in the Reasons for Refusal letter, applied to any case decided after 1st April 2003. So far as relevant the Humanitarian Protection policy said:

> "The system of granting leave exceptionally outside the Rules (ELE/R) has been changed. In any case decided on or after 1 April, where asylum is refused consideration should be given to granting Humanitarian Protection, details of which are set out in this instruction. There will, in addition, be a limited number of cases which do not qualify for Humanitarian Protection but for which a period of discretionary leave is merited. For these cases see the **API on Discretionary Leave**."

17. Under the heading "Key points", the policy said this:

> "When considering whether to grant leave to a person refused asylum caseworkers will need to be familiar with this policy instruction and the **API on Discretionary Leave**. The **API on the European Convention on Human Rights** is also very important as Humanitarian Protection will be granted to some of those who are successful in their ECHR claims.
>
> • Humanitarian Protection is leave granted to a person who would, if removed, face in the country of return a serious risk to life or person arising from:
>
> a) death penalty;
>
> b) unlawful killing;
>
> c) torture or inhuman or degrading treatment or punishment."

18. The policy then sets out the eligibility criteria, and in paragraph 2.5 deals with exclusion criteria:

> "A person who falls under the eligibility criteria listed above should not be granted Humanitarian Protection if there are serious reasons for considering that the person:
>
> • has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes
> • has committed a serious crime in the United Kingdom or overseas
> • has been guilty of acts contrary to the purposes and principles of the United Nations ...
> Where a person is excluded from Humanitarian Protection, consideration should be given to whether they qualify for Discretionary Leave (see the API on Discretionary Leave)."

19. Paragraph 2.6 of the Discretionary Leave policy said, under the heading "Applicants excluded from Humanitarian Protection":

> "Where a person would have qualified for Humanitarian Protection but for the fact that they were excluded from such protection (see paragraph 2.5 of the **API on Humanitarian Protection**) they should be granted Discretionary Leave."

The exclusion criteria in relation to Discretionary Leave cases are then set out, and the policy continues:

> "Although the same exclusion criteria are to be used in considering Discretionary Leave cases their application is necessarily different. In particular, a person whose removal, not withstanding their actions, would breach the ECHR and who does not qualify for any other form of leave should normally (unless the option of deferred removal is taken - see paragraph 5.4) be granted a limited period of Discretionary Leave even if they fall within the exclusion criteria."

20. Paragraph 5 deals with the duration of grants of Discretionary Leave and says this:

> "**Subject to paragraphs 5.2, 5.3, 5.4 and 5.5,** it will normally be appropriate to grant the following period of Discretionary Leave to those qualifying under the categories set out in paragraph 2. ...
>
> **Paragraph 2.6 (excluded from HP)** - 6 months."

21. Those with Discretionary Leave would normally be eligible for consideration for settlement in the United Kingdom after six years' continuous Discretionary Leave. However, those in the excluded categories were not eligible for consideration for settlement until they had completed ten years of Discretionary Leave: see paragraph 8 of the Discretionary Leave policy. After 10 years Ministers could still decide that it would be "conducive to the public good" to deny settlement: see paragraph 8.2 of the policy.

22. Following the Treasury Solicitor's letter dated 12th December 2004, the claimants therefore awaited their grants of Discretionary Leave under the above policies. When nothing had been heard from the defendant for over three months, the claimants' solicitors left a message with the Treasury Solicitor enquiring when Discretionary Leave would be granted. Having taken the defendant's instructions, the Treasury Solicitor replied:

> "I have been informed that my client is undertaking further enquiries and until these are completed they are unable to take action on your clients' case. They regret that it is not possible to say how long their enquiries will take to complete."

23. The claimants would have to wait for nearly a year for an answer to the question: why were they not being granted Discretionary Leave? The nature of the "further enquiries" has never been explained.

24. In a letter dated 24th March 2005, the claimants' solicitors made detailed representations "regarding the inordinate delay in the granting of leave to our clients following their successful appeal." The letter set out the disadvantages to which the claimants were subjected as a result of the delay: they were not permitted to work, were subject to reporting restrictions and residence requirements, were unable to apply for travel documents to enable them to travel to meet their families in a safe third country, etc. Having referred to the Humanitarian Protection and Discretionary Leave policies in some detail, the claimants' solicitors' letter concluded by saying:

> "We simply cannot understand what it is that is delaying the grant of leave to our clients. Nine months have elapsed since the date on which the Panel allowed their appeals and seven months since the date on which the deadlines for challenging the decision of the Panel expired and our clients have still not received their grant of leave. They, as the Courts have recognised in a raft of other cases, are undergoing severe prejudice as a result.

We appreciate that the Secretary of State opposed the appeal and we appreciate that significant publicity has been given to these cases, although it has been the Secretary of State and *not* our clients who have participated in that publicity. We note that a spokesman for your client, speaking to the media, expressed disagreement with the decision of the Panel and stated that an appeal was proposed. An appeal was attempted and leave to appeal was refused by the Immigration Appeal Tribunal. The rule of law requires that the decisions of the Immigration Appellate Authority are respected and implemented. We would hesitate greatly before drawing the conclusion that political considerations were preventing the Secretary of State from implementing the decision of the courts but we are at a loss to understand why it is that our clients still have not had their status regularised as they are entitled.

Can we please hear from you as soon as possible."

25. On 31st March 2005 the Treasury Solicitor replied that this letter had been forwarded to the defendant and said that he would "revert to you when I hear from them."

The letter before claim

26. It would seem that the Treasury Solicitor heard nothing further from the defendant, so on 17th June 2005, over a year after the Panel's decision allowing the claimants' appeals, the claimants' solicitors sent a detailed letter before claim to the Treasury Solicitor. The letter contended that the delay in granting Discretionary Leave was unlawful. Detailed reasons were set out, and the letter said:

"We have no idea what the cause of the delay is in this case. We had thought that the worst excesses of delays in circumstances such as this have been addressed by the Secretary of State following the litigation referred to above. Perhaps we are wrong. Following our enquiries as long ago as November 2004, we received a short letter from yourselves stating that your client was 'undertaking further enquiries'. We have no idea what those enquiries are, or indeed could be, about - your client has a duty to regularise our client's status.

We are driven to search for other reasons for the delay. We appreciate that this is a case in which the Secretary of State strongly resisted our clients' appeal and we note that, at the time of the decision of the Panel, spokesmen on behalf of your client, speaking to the media, expressed their severe dissatisfaction with the decision. That disagreement notwithstanding, it is the duty of the parties to respect the final decisions of the Court. If a party such as the Secretary of State acts in defiance of such decisions, this of course substantially undermines confidence in the rule of law. We concluded our previous letter by saying that we would hesitate greatly before drawing the conclusion that political considerations were preventing the Secretary of State from implementing the decision in this case but that we were at a loss to understand why our clients' status had not been regularised. We have to say that a lack of a substantive response to that letter from either yourselves or your client has done nothing to allay that concern. Our clients further perceive this

> treatment as further moral punishment above and beyond the sanctions they have already incurred."

The letter concluded by saying that judicial review proceedings would be commenced if the claimants were not in receipt of formal grants of leave by Friday 1st July.

27. In accordance with the pre-action protocol for judicial review claims, a substantive response should have been given by the defendant within 14 days (i.e. by 1st July). In a letter dated 28th June the Treasury Solicitor said that the defendant "will not be able to reach a decision by 1st July, but expects to be able to do so by 1st August." On 1st July the claimants' solicitors replied:

> "We thank you for your letter of 28th June 2005. We do not consider that it constitutes a proper response to the issues raised in our letter before action and in our earlier correspondence and we consider that we are at liberty to issue proceedings. Please confirm:
>
> 1. that your clients accept that, following the decision of the Panel, they have a duty to grant our clients leave - this has not so far been disputed in your responses;
> 2. the reasons for the excessive delay (since August last year) in granting our clients leave;
> 3. in the light of (1), precisely what it is that your clients are considering which requires a 'decision' which cannot be taken until 1 August."

28. The Treasury Solicitor responded on 5th July, saying:

> "I am afraid that I am not in a position to comment further, save to confirm that my clients expect to be in a position to make a decision by 1 August."

29. The claimants' solicitors tried again by telephone, and then again by letter to obtain answers to their perfectly reasonable questions before filing the claim form. In a letter dated 18th July, they said:

> "We write further to our correspondence in the above matter. Following your inadequate response to our letter before claim, on 1 July we wrote again to ask you three very simple questions. On 5 July, you stated that you could not comment. On 12 July, I telephoned and spoke to your Mr Huggett. We were informed that you were under strict instructions from your client not to comment on this case. Your client seems unwilling to deal with this matter in a reasonable way. We confirm that we are in the course of preparing proceedings which will be issued shortly."

That the defendant had instructed the Treasury Solicitor not to comment has not been denied by either the Treasury Solicitor or the defendant.

<u>The judicial review proceedings</u>

30. The proceedings were commenced on 20th July 2005. The claim form challenged the "Failure and delay of the defendant to grant the claimant leave to enter the United Kingdom", and sought the following remedies:

"1. Declaration that failure and delay in granting leave to enter is unlawful;

2. Mandatory order directed to defendant and requiring the same to grant the claimant leave to enter within seven days of the date of order;
3. Costs ..."

31. The Claim Form was accompanied by a Detailed Statement of Grounds setting out the reasons why the defendant's conduct was said to be unlawful, and why each claimant had "a right or at least a legitimate expectation, having had his appeal against the decision to refuse him leave to enter allowed (without successful further challenge) on the ground that the decision was unlawful, to be granted leave to enter" (see paragraph 17 of the Detailed Grounds).

32. In accordance with CPR 54.8(2)(a) the defendant's acknowledgement of service should have been filed within 21 days. On the last day for service, 12th August, the Treasury Solicitor wrote to the Administrative Court Office saying:

> "The Acknowledgements of Service in the above matters should be filed by SSHD today. However, I have been informed that a decision will be made on the subject matter of the Claimants' judicial review on Monday 15 August. I therefore seek an extension until 4 p.m. on Monday to file the Acknowledgements of Service. I am copying this to the representatives of the Claimants. I should tell you, as an officer of the Court, that the Claimants' solicitor specifically informed me some time ago that she would not be willing to grant any extension of time for such filing. However, it does seem to me that in view of the amount of time requested, such an extension would not be unreasonable."

33. On 15th August the defendant filed an acknowledgement of service out of time. In section A of the form a cross was placed in the box "I do not intend to contest the claim". Sections B, C and D of the form were left blank. Unsurprisingly, the claimants' solicitors responded by saying that, since the defendant was not contesting the claims, the claimants should be granted leave to enter the United Kingdom within seven days. The Treasury Solicitor replied on 17th August:

> "I write to clarify SSHD's position following the filing of the [Acknowledgements of Service] in the above matters on 15th August:-
>
> 1. The Home Secretary does not contest the fact of the delay in reaching a decision which can be notified to the Claimants;
> 2. He is not conceding that such a decision should be to grant Discretionary Leave; and
> 3. Whilst he concedes permission to proceed with the substantive [judicial review], he will wish to contest vigorously at the substantive hearing the supposition that the decision will be to grant Discretionary Leave."

34. Pausing there, this letter is not properly described as a "clarification" of the defendant's position as it had been set out in the acknowledgement of service filed on his behalf. The "clarification" resiles from the defendant's position as set out in the

acknowledgement of service. The acknowledgement of service was unambiguous: the defendant did not intend to contest the claim. On its face, that claim included not merely declaratory relief but also an application for a mandatory order requiring the grant of leave within seven days. The grounds for seeking that relief were set out in detail in the Claim Form. If the Treasury Solicitor had intended to indicate that the defendant merely conceded that permission should be granted to apply for judicial review but that he would be contesting the substantive application, then a cross should have been placed in box 1 "I intend to contest all of the claim" (or box 2 "I intend to contest part of the claim", if the claimants' entitlement to declaratory relief in respect of past delay was being conceded, but their entitlement to mandatory relief for the future was to be disputed) and sections C and D of the form should then have been completed as appropriate, including a statement that the defendant did not oppose the grant of permission to apply for judicial review, but would be contesting the substantive application. This is not a procedural quibble. If the defendant was intending to contest the claim or any part of it, then he was required to set out a summary of his grounds for doing so: see CPR 54.8(4)(a)(i). No summary grounds explaining why the defendant was "not conceding that [his] decision should be to grant Discretionary Leave" were filed. In answer to my questions, the Treasury Solicitor has explained that as at 15th August he had no instructions as to the defendant's position, apart from the fact that the claim was not to be contested as regards the fact of delay. It was thought better to file an acknowledgement of service on 15th August, "notwithstanding the unclearness of the defendant's position." On 17th August the Treasury Solicitor received instructions that the defendant would wish to contest at the substantive hearing "that any decision would be to grant Discretionary Leave." It would appear that when the acknowledgement of service was filed the claim for mandatory relief was simply overlooked by the defendant.

35. On 30th August 2005 revised Humanitarian Protection and Discretionary Leave policy instructions were issued by the defendant. For present purposes the new Humanitarian Protection policy does not differ materially from the April 2003 policy (see above). Where a person has been excluded from Humanitarian Protection, for example because of Article 1F(b) of the Refugee Convention, then consideration is to be given to whether they qualify for Discretionary Leave. For present purposes the new Discretionary Leave policy differs from the April 2003 policy in only one material respect: paragraph 2.6 of the new policy is in these terms:

> "**2.6 Applicants excluded from Humanitarian Protection**
>
> Where a person would have qualified for Humanitarian Protection but for the fact that they were excluded from such protection, they should be granted Discretionary Leave [unless Ministers decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted, the individual will be kept or placed on temporary admission or temporary release.]
>
> ...
>
> Although the same exclusion criteria are to be used in considering Discretionary Leave cases, their application is necessarily different. In particular, a person whose removal, notwithstanding their actions, would

breach the ECHR and who does not qualify for any other form of leave should normally (unless the option of deferred removal is taken - see section 5.3) be granted a limited period of Discretionary Leave even if they fall within the exclusion criteria. [However Ministers may decide that it is inappropriate to grant any leave to a person falling within the excluded category in the light of all the circumstances of the case. Where it is decided that leave should not be granted the individual will be kept or placed on temporary admission or temporary release.] (parentheses added)

36. The words in square brackets are new. The duration of leave is dealt with in paragraph 5.1 of the new policy, as follows:

> "**5.1. Standard period for different categories of Discretionary Leave**
>
> **Subject to sections 5.2 and 5.3**, it will normally be appropriate to grant the following period of Discretionary Leave to those qualifying under the categories set out in section 2. All categories will need to complete at least six years in total, or at least ten years in excluded cases, before being eligible to apply for ILR.
>
> ...
>
> Excluded from Humanitarian Protection - six months (unless Ministers decide in the light of all the circumstances of the case that it is inappropriate to grant any leave and instead keep or place the person on temporary release or temporary admission). This period applies to the first grant and any subsequent grants following an active review."
>
> (Parenthesis as in original. The words in brackets are new.)

37. On 15th September 2005 Collins J granted the claimants permission to apply for judicial review. Under CPR 54.14(1) the defendant's detailed grounds for contesting the claim and any written evidence in support should have been filed within 35 days. No detailed grounds were filed and no evidence was filed on behalf of the defendant. On 19th October (the day before the 35-day period expired) the Treasury Solicitor asked for an extension of time until 4th November. The claimants' solicitors objected. It does not appear that any extension of time was granted by the Administrative Court. Nevertheless on 3rd November the Treasury Solicitor wrote to the Administrative Court Office saying that:

> "My client will be serving later today a detailed and comprehensive decision letter. I am expecting that this will result in the Claimants having to amend their grounds of claim for judicial review, and that detailed grounds from the Defendant ought to be deferred until those amended grounds are received. ..."

38. On the same day the Home Office Immigration & Nationality Directorate wrote to the claimants' solicitors. It is necessary to set out that letter ("the decision letter") in full:

> "I am writing in response to your correspondence requesting that the Secretary of State make a decision as to whether to grant your clients Humanitarian Protection or Discretionary Leave. I am aware that you

have issued an application for judicial review (CO/4999/2005) challenging the absence of a decision on these matters.

Factual background

As you are aware, in February 2000, your clients arrived in the UK in a passenger jet aircraft of the Afghan national airline, Ariana, which they hijacked while it was on an internal flight from Kabul to Mazar-i-Sharif. On 7th February 2000 they landed at Stansted Airport after stops in Tashkent, Kazakstan and Moscow. On 10th February 2000 your clients surrendered to the British authorities and claimed asylum.

All of your clients were charged with offences relating to the hijacking. Count 1 charged your clients with hijacking the aircraft, using various weapons to threaten those on board and making threats to blow it up, and covered the period from taking over the plane shortly after take-off, to the time of its landing at Stansted.

Counts 2 to 5 arose from events after the plane landed at Stansted, when passengers and members of the crew continued to be detained on board against their will. (Some of the passengers were your clients' relatives or colleagues, but about a hundred were not). Count 2 charged your clients with false imprisonment of four members of the crew, between the time of landing and their escape in the early hours of 9th February 2000. Count 3 charged them with false imprisonment of other members of the crew and the passengers, between the time of landing and their eventual release on 10th February 2000. Count 4 charged them with possessing firearms with intent to cause fear of violence, there having been four firearms on the plane, which the prosecution claimed had been used threateningly as part of the means of keeping the crew and passengers on board. Count 5 charged them with possession of explosives, namely two loaded hand grenades which were left behind on the plane. Your clients were charged on the basis that they were each party to all the offences.

At the first trial the jury failed to agree. At the retrial your clients were convicted on all counts. On 6th June 2003 the convictions were quashed as the Court of Appeal found that the jury had been misdirected on the defence of duress and the convictions were therefore unsafe. No retrial was ordered.

On 26th June 2003 the Secretary of State refused your clients' claims for asylum, Humanitarian Protection and Discretionary Leave to remain in the UK.

The appeals came before a panel of Adjudicators in April-May 2004. In a determination, promulgated on 8th June 2004, the appeal against the refusal of asylum was dismissed on the basis that your clients were excluded from the protection of the Refugee Convention under Article 1F(b). Article 1F(b) refers to serious reasons for considering that any person has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. However, the appeals were allowed under Article 3 of the ECHR, the prohibition against torture and inhuman and degrading treatment.

The Secretary of State applied for permission to appeal. The IAT refused

permission to appeal in a determination promulgated on 23rd July 2004. In a letter dated 12th August 2004 you were notified that the Secretary of State had decided not to apply for statutory review.

Humanitarian Protection

On 30th August 2005, the policy on Humanitarian Protection was revised in line with new policies on the granting of refugee leave. Although the eligibility criteria have not changed, people who are granted leave on Humanitarian Protection grounds on or after 30th August 2005 (whether after initial consideration or following an allowed appeal) should be granted five years' limited leave in the first instance, rather than three years as previously.

The eligibility criteria are set out in an Asylum Policy Instruction dated 30th August 2005.

In the light of the Adjudicators' finding that to remove your clients to Afghanistan would (at least at present) amount to a breach of Article 3, it is accepted, that your clients fall within the eligibility criteria at §2.4 of the API.

However, §2.5 of the API refers to "Exclusion Criteria" and provides:

'A person who falls under the eligibility criteria listed above should not be granted leave on Humanitarian Protection grounds if there are serious reasons for considering that the person:

has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes

has committed a serious crime in the United Kingdom or overseas

has been guilty of acts contrary to the purposes and principles of the United Nations'.

A 'serious crime' includes a crime considered serious enough to exclude the person from being a refugee in accordance with Article 1F(b) of the Refugee Convention.

Your clients hijacked the Ariana Afghan Airways Boeing 727. Accordingly, the Adjudicators considered that pursuant to Article 1F(b) your clients fell to be excluded from the protection of the Refugee Convention (§93 of the determination).

Your clients should not therefore be granted leave on Humanitarian Protection grounds. However, where a person is excluded from Humanitarian Protection, consideration should be given to whether they qualify for Discretionary Leave. This is considered below.

Discretionary Leave

On 30th August 2005, the policy on Discretionary Leave was also revised. The current version of the policy reflects the Government's commitment to deterring terrorists and others who pose a threat to national security, public safety and the lives of innocent people.

The eligibility criteria are set out in an Asylum Policy Instruction dated 30th August 2005. Discretionary Leave is to be granted only if a case falls within the limited categories set out in section 2 of the API. It is intended to be used sparingly.

§2.6 of the API provides as follows:
'2.6 Applicants excluded from Humanitarian Protection
Where a person would have qualified for Humanitarian Protection but for the fact that they were excluded from such protection, they should be granted Discretionary Leave, unless Ministers decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted, the individual will be kept or placed on temporary admission or temporary release.
The API on Humanitarian Protection provides that a person should normally be excluded from Humanitarian Protection where there are serious reasons for considering that they:
• have committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes;
• have committed a serious crime in the United Kingdom or overseas;
• are guilty of acts contrary to the purposes and principles of the United Nations.
Although the same exclusion criteria are to be used in considering Discretionary Leave cases, their application is necessarily different. In particular, a person whose removal, notwithstanding their actions, would reach the ECHR and who does not qualify for any other form of leave should normally (unless the option of deferred removal is taken - see section 5.3) be granted a limited period of Discretionary Leave even if they fall within the exclusion criteria. However Ministers may decide that it is inappropriate to grant any leave to a person falling within the excluded category in the light of all the circumstances of the case. Where it is decided that leave should not be granted the individual will be kept or placed on temporary admission or temporary release.
Article 3 claims (section 2.2): Discretionary Leave should be granted as Article 3 is absolute unless Ministers decide this is not appropriate (see above).
Excluded from HP (section 2.6): by definition, persons in this category would get Discretionary Leave, unless Ministers decide, in view of all the circumstances of the case, that it is inappropriate to grant any leave and instead place or keep the person on temporary admission or temporary release'.
The revised policy on the grant of Discretionary Leave forms part of the Government's commitment to deterring terrorists and others who pose a threat to national security, public safety and the lives of innocent people. The Secretary of State considers that it is self-evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew and that there is an overwhelming public interest in deterring such activities. The Secretary of State also notes the Adjudicators' findings that your clients could have attempted an alternative means of escape to a neighbouring country; that if they had gone to Pakistan that it was most unlikely that they would have experienced any difficulties moving on from there; that they could have claimed asylum in Tashkent or Moscow

but chose not to do so (§91 of the determination). The Adjudicators concluded that your clients were not compelled to carry out the hijacking nor were they under such pressure as to justify the hijacking (§91 of the determination).

For the avoidance of doubt, it should be noted that the Secretary of State considers that your clients' cases fall to be considered under the current policy on Discretionary Leave. It is accepted that you were notified on 12th August 2004 that the Secretary of State had decided not to apply for statutory review and that the appeals process was therefore exhausted.

The Secretary of State has given careful consideration to all the circumstances of your clients' cases. In making his decision, he has had regard (amongst others) to the following factors:

a. The Adjudicators' analysis of the application of Article 1F(b) at paragraphs 40 to 93 of the determination;

b. The judgment of the Court of Appeal of 6th June 2003;

c. The matters raised on behalf of your clients in the Detailed Statement of Grounds and accompanying documentation;

d. The public interest in deterring acts such as hijacking.

In view of all the circumstances of your case the Secretary of State has decided that Discretionary Leave is not appropriate and that your clients should remain on temporary admission."

39. Although the Treasury Solicitor has explained his belief that there was an informal understanding between himself and the claimants' solicitors that service of the defendant's Detailed Grounds should await the claimants' Amended Grounds in response to this decision letter, it will be noted that neither the revised policies nor the decision letter itself contain any explanation of the legal basis upon which the defendant was contending that he was entitled to decide that it was "not appropriate" to grant the claimants Discretionary Leave and that they should remain on temporary admission. Thus, the claimants would be preparing their Amended Grounds in ignorance of the legal justification for the decision under challenge.

40. On 2nd March 2006 the case was listed for 27th April. On 27th March 2006 the claimants filed a skeleton argument and Amended Grounds challenging the lawfulness of the decision letter, 21 working days before the hearing in accordance with the CPR. The defendant's skeleton argument should have been filed and served 14 working days before the hearing: see paragraph 15.2 of the practice direction to Part 54. On 28th March the Treasury Solicitor wrote to the claimants' solicitors explaining that leading counsel originally instructed to act on behalf of the defendant was unavailable and that new leading counsel would have to be instructed at very short notice. The letter continued:

" ... I was rather concerned, and surprised to receive from you at this late stage the amended grounds. As you know this shifts the whole emphasis of the case away from the delay alleged in making the decision, to the

> decision itself and raises completely new and complex arguments. These grounds were expected several months ago. Normally my client would be expecting yours to seek permission to amend grounds (although I am sure that my client would have agreed to the amendment) and that after receiving same, my client would respond by filing amended summary or at any rate amended detailed grounds, whereupon yours would file a skeleton and mine a counter-skeleton. This could not possibly be achieved in the period remaining."

After further explanation, the letter concluded by seeking the claimants' solicitors' agreement to an adjournment. The claimants' solicitor was concerned that the case (which had already been delayed) should proceed and it was agreed that, in the circumstances, the defendant's skeleton argument could be served on 20th April.

41. In the event, the defendant's skeleton argument was served on 20th April, five working days before the hearing commenced on 27th April. More than 22 months had elapsed since the Panel had allowed the claimants' appeals. For the first time in his skeleton argument the defendant explained the legal basis upon which he claimed to be entitled to decide that it was not appropriate to grant the claimants Discretionary Leave and that they should remain on temporary admission. In summary, the defendant relied upon paragraph 16(1) of Schedule 2 to the Immigration Act 1971 (as amended) ("the 1971 Act").

42. Before turning to the rival submissions it is helpful to place paragraph 16(1) in the relevant statutory context.

<u>Statutory context</u>

43. Under the 1971 Act, those such as the claimants who do not have the right of abode in the United Kingdom need leave to enter or remain in the United Kingdom, either for a limited or an indefinite period. Section 3(2) provides that:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; ..."

The Rules are subject to the negative resolution procedure.

44. Under section 3A of the Act, the Secretary of State "may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom." Subsection (7) provides that "the Secretary of State may, in such circumstances as may be prescribed in an order made by him [which must be laid before Parliament and approved by resolution of each House, see subsection (13)] give or refuse leave to enter the United Kingdom."

45. Section 4 deals with the "Administration of Control". The power to grant or refuse leave to enter the United Kingdom is normally exercised by immigration officers, see section 4(1), but in certain circumstances that power is exercised either at the direction of or by the Secretary of State. Section 4(2) explains the purpose of Schedule 2 to the 1971 Act:

> "The provisions of Schedule 2 to this Act shall have effect with respect to -
>
> (a) the appointment and powers of immigration officers ... for purposes of this Act;
>
> (b) the examination of persons arriving in or leaving the United Kingdom by ship or aircraft ...
>
> (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and
>
> (d) the detention of persons pending examination or pending removal from the United Kingdom;
>
> and for other purposes supplementary to the foregoing provisions of this Act."

46. Section 11(1) provides that:

> "A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act ..."

47. Schedule 2 is headed "Administrative Provisions as to control on entry etc". Paragraph 2(1) gives an immigration officer power to examine any persons who have arrived in the United Kingdom:

> "For the purpose of determining -
>
> (a) whether any of them is or is not a British citizen; and
>
> (b) whether, if he is not, he may or may not enter the United Kingdom without leave; and
>
> (c) whether, if he may not -

(i) he has been given leave which is still in force,

(ii) he should be given leave and for what period or on what conditions (if any), or

(iii) he should be refused leave."

48. Where a person is refused leave to enter an immigration officer may give directions for his removal from the United Kingdom: see paragraphs 8-10A. So far as relevant for present purposes paragraph 16 is in these terms:

> "(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter."

49. It is also necessary to read sub-paragraph (2):

> "(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending -
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions."

50. By paragraph 17(1):

> "A person liable to be detained under paragraph 16 above may be arrested without warrant by a constable or by an immigration officer."

51. Temporary admission is dealt with in paragraph 21:

> "(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

52. Paragraph 22 enables an immigration officer not below the rank of Chief Immigration Officer to grant bail to a person detained under paragraph 16(1).

53. The Immigration (Leave to Enter) Order 2001 ("the Order") was made under section 3A of the 1971 Act. Article 2 provides:

> "(1) Where this article applies to a person, the Secretary of State may give or refuse him leave to enter the United Kingdom.
>
> (2) This article applies to a person who seeks leave to enter the United Kingdom and who -
>
> (a) has made a claim for asylum; or
>
> (b) has made a claim that it would be contrary to the United Kingdom's obligations under the Human Rights Convention for him to be removed from, or required to leave, the United Kingdom.
>
> ...
>
> (4) In deciding whether to give or refuse leave under this article the Secretary of State may take into account any additional grounds which a person has for seeking leave to enter the United Kingdom.
>
> (5) The power to give or refuse leave to enter the United Kingdom under this article shall be exercised by notice in writing to the person affected or in such manner as is permitted by the Immigration (Leave to Enter and Remain) Order 2000."

54. Article 3 in effect substitutes the Secretary of State for references to the immigration officer in (*inter alia*) paragraphs 2, 8 and 21 of Schedule 2 to the 1971 Act.

55. Before leaving the statutory framework, it is necessary to refer to the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") for two purposes. First, section 67 which deals with the construction of references to "person liable to detention":

> "(1) This section applies to the construction of a provision which -
>
> (a) does not confer power to detain a person, but
>
> (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.
>
> (2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that -
>
> (a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,
>
> (b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or
>
> (c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a

decision in respect of him.

(3) This section shall be treated as always having had effect."

56. Second, to outline the statutory scheme for appealing against immigration decisions. The following extracts from the 2002 Act are set out as subsequently amended (by the substitution of unified appeal to the Asylum and Immigration Tribunal ("the AIT")).

57. Section 82(1):

"(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.

(2) In this Part 'immigration decision' means -
(a) refusal of leave to enter the United Kingdom, ...

84(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds -

(a) ...

(b) ...

(c) that the decision is unlawful under section 6 of the Human Rights Act 1988 (c 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) ...

(e) ...

(f) ...

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

...

85(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

...

86(1) This section applies on an appeal under section 82(1) or 83.

(2) The Tribunal must determine -
(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1), and

(b) any matter which section 85 requires it to consider.

(3) The Tribunal must allow the appeal in so far as it thinks that -
(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

(4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.
(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal."

58. By section 103A the High Court may review the Tribunal's decision only upon the basis that it has made a material error of law. A further appeal on the merits is not possible.

The grounds of challenge

59. Mr Rabinder Singh QC, who appeared with Mr Duran Seddon on behalf of the claimants, submitted that the defendant's decision that it was not appropriate to grant the claimants Discretionary Leave and that they should remain on temporary admission was unlawful on the following six grounds:

(1) The decision was in defiance of the Panel's decision allowing the claimants' appeals against the defendant's decision to refuse them leave to enter.
(2) Both the decision, and the words in parenthesis in the 2005 Discretionary Leave policy ("the policy") upon which the decision was based were inconsistent with the scheme of the 1971 Act and therefore unlawful.
(3) Both the decision and the policy were unlawful, because if there was to be such a policy the scheme of the 1971 Act required that it should be contained in the Immigration Rules.
(4) Assuming that the policy was not unlawful on all or any of the grounds in (1)-(3) (above), the decision was unlawful because it was unfair and an abuse of power for the defendant to deliberately delay making a decision and to prevaricate until such time as he had in place a policy which would enable him to reach a decision refusing the claimants Discretionary Leave.
(5) If the application of the policy was not unlawful on grounds (1)-(4), then the decision itself was irrational, disproportionate and insufficiently reasoned.
(6) In any event, the decision was an unlawful interference with the claimants' rights under Article 8(1) of the European Convention on Human Rights because it was neither in accordance with the law, nor

was it proportionate under Article 8(2).

I will deal with these grounds of challenge in turn.

Submissions and conclusions

Ground (1)

60. The principles to be applied are not in dispute between the parties. In R v Secretary of State for the Home Department *ex parte* Deniz Mersin [2000] INLR 511, the applicant had claimed asylum on arrival in the United Kingdom in 1992. The Secretary of State refused the claim in 1997, but the applicant's appeal against that decision was allowed by a special adjudicator on 29th March 1999. As the headnote explains:

> "Thereafter, under the procedure for regularising the applicant's presence in the UK, and absent any change of circumstances or exceptional factors, the Secretary of State was required to grant refugee status following which an immigration officer was required to grant leave to enter. The applicant commenced judicial review proceedings on 9 November 1999 for mandamus to require the respondent to grant refugee status and for damages for loss occasioned by the delay. On 13 November 1999 the applicant was granted refugee status and was later granted indefinite leave to remain. Permission to seek judicial review was granted in view of the general importance of the issues. At the full hearing, the applicant abandoned the damages claim and sought a declaration that the Secretary of State had unlawfully delayed in granting refugee status and indefinite leave, and an injunction requiring the Secretary of State to remedy the delays in his system for regularising the presence of asylum-seekers who had succeeded in their asylum appeals and to report to the court periodically as to the action he had taken in this regard."

61. The application was allowed and declaratory relief was granted, but the injunction was refused. At pages 518G-519C Elias J said this:

> "In my opinion there is a clear duty on the Secretary of State to give effect to the special adjudicator's decision. Even if he can refuse to do so in the event of changed circumstances or because there is another country to which the applicant can be sent, there is still a duty unless and until that situation arises. It would wholly undermine the rule of law if he could simply ignore the ruling of the special adjudicator without appealing it, and indeed Mr Catchpole [who appeared on behalf of the Secretary of State] does not suggest that he can. Nor in my opinion could he deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it. In my judgment, once the adjudicator had determined the application in the applicant's favour, the applicant had a right to be granted refugee status, at least unless and until there was a change in the position. In this connection it is material to note that the decision of the special adjudicator determines the position at the date of the determination itself. I should add that even if the applicant does not, properly analysed, have a right in the strict sense, in my view his position is sufficiently akin to a right (whether described as a

legitimate expectation or not) for the same public law principles to apply.

> The crucial question, therefore, is whether the delays in this case constituted a breach of that duty. I accept Mr Catchpole's submission that there is plainly no fixed period within which the special adjudicator's determination has to be implemented. I also accept that it is not legitimate to read in such a fixed period by reference to subsequent social security legislation, which was one of the arguments advanced by the applicant. The later statute cannot affect the proper construction of the earlier one. Mr Drabble [who appeared on behalf of the applicant] contends that it is none the less necessary for the Secretary of State to act within such period as is reasonable in all the circumstances, and that in any event the delays in this case - 7½ months for what were in essence ministerial acts - were outside the bands of *Wednesbury* reasonableness."

That submission was in due course accepted upon the facts of that case.

62. The fact that the appeal in that case against the Secretary of State's refusal of leave to enter was allowed on "refugee" rather than "human rights" grounds, can make no difference to the underlying principle: that once an appeal against a refusal of leave has been allowed, in the absence of any successful legal challenge, there is a clear duty upon the Secretary of State to give effect to [what is now] the immigration judge's decision.

63. In R (Boafo) v Secretary of State for the Home Department [2002] 1 WLR 1919, [2002] EWCA Civ 44, the Secretary of State refused the claimant's application for indefinite leave to remain in the United Kingdom. Her appeal from that decision was allowed by the adjudicator, but he failed to give directions to the Secretary of State for giving effect to his determination. The Secretary of State did not appeal against the adjudicator's decision, but instead reconsidered the claimant's application in the light of new information and as a result ordered that she leave the United Kingdom immediately. The claimant's application for judicial review was refused at first instance. Allowing her appeal, Auld LJ (with whom Ward and Robert Walker LJJ agreed) said this in paragraphs 26 and 27 of his judgment:

> "26. On the question whether, as a matter of law, the Secretary of State was entitled to disregard the adjudicator's determination and to consider the matter afresh because it was not accompanied by directions, I take the first two propositions of the judge as starting points. First, this appellate machinery is one of review, not rehearing, and both an adjudicator and the Tribunal are normally bound to determine appeals on the facts as they were at the date of the decision under challenge. And, second, an unappealed decision of an adjudicator is binding on the parties. However, I disagree with the judge in his decision that an adjudicator's decision without directions is, *by reason of their absence*, not binding on the Secretary of State and that he may, in consequence consider the matter afresh in the light of new information.
>
> 27. As a matter of construction of section 19(3) and of the

statutory machinery of which it forms part, the absence of directions from the adjudicator does not, in my view, deprive his determination of binding force in cases such as those of indefinite leave to remain which are concerned with the validity of a decision affecting existing immigration status."

64. In paragraph 28 he said:

> "28. There may be circumstances in which the executive may reopen a decision without appealing a determination of an adjudicator, for example, because there is fresh evidence, say of deception of the adjudicator about the facts on which the challenged decision was based, or where, as in the entry clearance case of *Ex p Yousuf* [1989] Imm AR 554 the very nature of the second decision calls for decision on contemporaneous facts. But even in such cases, it would be wrong, in my view, for the Secretary of State, as a generality, to regard the matter as hinging on the presence or absence of directions."

The court quashed the Secretary of State's decision and directed him to grant the claimant indefinite leave to remain.

65. In R (Saribal) v Secretary of State for the Home Department [2002] INLR 596, [2002] EWHC 1542 (Admin), the claimant's asylum claim had been dismissed by a special adjudicator but allowed on appeal by the Immigration Appeal Tribunal. The Secretary of State did not appeal to the Court of Appeal. The claimant's case was then referred to in a television programme which suggested that his asylum claim was false. Having asked for comments from the claimant's solicitors, the Secretary of State decided that the claim had been fabricated, refused to grant the claimant refugee status or indefinite leave to remain, and issued the claimant with a notice of intention to deport. The claimant's application for judicial review was allowed. Moses J (as he then was) dealt with the "legal effect of the determination of the IAT" between paragraphs 14 and 18. Having cited Mersin and Boafo in paragraphs 15 and 16, he continued in paragraph 17:

> "[17] The decision in *The Queen on the application of Linda Boafo v Secretary of State for the Home Department* [2002] 1 WLR 1919 demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence.
>
> [18] The principles by which a Secretary of State may do so were not in dispute. It was his approach to those principles in the instant case which gave rise to controversy."

He then dealt with the facts of that particular case.

66. Mr Robert Jay QC, who appeared with Ms Caroline Neenan on behalf of the defendant, very properly accepted in his submissions that the defendant would have been defying the Panel's determination if, in the absence of any change of circumstances, he had said

to the claimants "I refuse you (discretionary) leave to enter". He explained that the defendant relied on the power to detain contained in paragraph 16(1) in Schedule 2 to the 1971 Act (when coupled with the power to grant temporary admission under paragraph 21 to those liable to detention under paragraph 16) to justify keeping the claimants on temporary admission, and not the power contained in paragraph 16(2), because the latter applied only to someone in respect of whom removal directions could be given, and no such directions could be given in respect of the claimants because no decision had been made to refuse them leave to enter (because to have done so would have been to defy the Panel's decision allowing the claimants' appeals against the defendant's decision to refuse them leave). In the defendant's skeleton argument it was submitted that:

> "17. ... Paragraph 2.6 of the August 2005 [Discretionary Leave] policy does not refer to the refusal of leave. Rather, Ministers may decide in view of all the circumstances of the case that it is inappropriate to grant any leave. On 3rd November 2005 the Claimants were not served with a notice refusing them leave to enter. They were not granted leave to enter, and were maintained on temporary admission."

67. When I asked Mr Jay what was the difference between deciding that it was "inappropriate to grant" the claimants leave and refusing them leave, Mr Jay replied that the former was a "purely administrative decision" which did not "formally refuse leave". In response to the further question whether there was any difference in substance between the two decisions, he pointed to the practical consequences which flow from a decision to grant temporary admission, as opposed to a grant of Discretionary Leave to enter. Some of these practical consequences have been referred to above, for example the claimants are not allowed to work, and are subject to reporting restrictions etc. So far as removal from the United Kingdom is concerned, there is no difference in practical terms for these claimants. If they had been granted Discretionary Leave for an initial period of six months in accordance with the 2003 policy, then that leave could have been extended for further periods of six months, or longer if it was thought appropriate. If a decision was taken at some future date not to grant a further period of Discretionary Leave (because, for example, it was considered that there had been a material change of circumstances in Afghanistan which meant that there would now be a sufficiency of protection there for the claimants), then the claimants would have had a right of appeal to the AIT.

68. For so long as the claimants are kept on temporary admission "pending a decision to give or refuse them leave to enter", they may not be removed from the United Kingdom. In order to be in a position to remove the claimants, Mr Jay accepted that the Secretary of State would have to take a "formal decision" to refuse Discretionary Leave to enter, in which case the claimants would have a right of appeal to the AIT.

69. The short answer to this application for judicial review is that there is no difference in substance between a decision to refuse the claimants Discretionary Leave to enter and the defendant's decision that it is "inappropriate" to grant them Discretionary Leave to enter. Such consequential differences as there are flow, not from the decision that it is appropriate to refuse/inappropriate to grant leave, but from the further decision to grant

temporary admission. The defendant's decision that it was "inappropriate to grant the claimants leave" was a refusal to grant them leave by any other name. The defendant's attempt to draw a distinction between the two decisions would be described as mere sophistry if it was not such a transparent attempt to find a form of words that would enable the defendant to defy the Panel's determination without having to acknowledge that he was doing so.

70. Judges sitting in the Administrative Court are only too well aware of the fact that very large numbers of unsuccessful appellants against refusals of leave to enter the United Kingdom consider that the AIT's decisions are, to use the words attributed to the Home Office official commenting on the Panel's determination in the present case, "mind boggling". Whether or not such criticisms of the Tribunal are justified (and in the overwhelming majority of cases they are not) is not the point. The "one-stop" appeal system works only if both appellants and the Secretary of State are equally bound (subject to statutory review on a material error of law) to respect the Tribunal's decisions. The Secretary of State repeatedly relies upon conclusions reached by the Tribunal on appeal and the intention underlying the statutory scheme that the one-stop appeal process is intended to result in a decision that is definitive for all purposes when refusing to treat the numerous further representations that are made following unsuccessful appeals as new claims. It would strike at the heart of the independent appeal system set up by the 2002 Act (as amended) if the Secretary of State felt free to deliberately circumvent an adverse decision by the Tribunal simply because he disagreed with the outcome on the merits.

71. It is important to note that, save for the publication of the revised policies in 2005 (as to which see ground (4) below), it is not suggested on behalf of the defendant that there has been any material change of circumstances. In his skeleton argument Mr Jay submitted that:

> "12. The [Secretary of State] is not proposing an indefinite period of temporary admission, but the moment has not yet arrived at which the Court could hold that the [Secretary of State] must now direct the immigration officer to grant (or refuse) leave to enter."

72. The decision letter does not suggest that the claimants will be kept on temporary admission for any particular (finite) period. The period of temporary admission is left entirely open ended. It will be recalled that the Panel concluded that on the evidence before them in June 2004 "there is little if any likelihood that the system of protection currently <u>or in the foreseeable future</u> likely to be in place in Kabul or elsewhere in Afghanistan could offer any of the appellants a reasonable sufficiency of protection given their notoriety" (paragraph 240, with emphasis added).

73. The decision letter does not suggest that there had been any change in that position by November 2005. As mentioned above, the defendant did not submit any evidence under CPR 54.14(1). I indicated to Mr Jay that in the absence of any evidence I would be minded to draw the inference that the Panel's conclusion in paragraph 240 (above) was still valid and that the Secretary of State was in reality proposing temporary admission for the foreseeable future. I offered to adjourn the proceedings if necessary

in order to enable the defendant to put in evidence if he was minded to do so. Having had sufficient time to obtain instructions from the defendant, Mr Jay informed me that the defendant did not intend to put in any evidence. The irresistible inference is therefore that the defendant decided in November 2005 that the claimants should remain on temporary admission for the foreseeable future. Was such a decision within the powers conferred upon him by the statutory scheme?

Ground (2)

74. In his submissions Mr Jay accepted that the defendant's reliance upon paragraph 16(1) in Schedule 2 of the Act was "all or nothing". If retaining the claimants on temporary admission was not authorised by paragraph 16(1) in combination with paragraph 21(1) in Schedule 2, then it was outwith the powers conferred upon the defendant by the statutory scheme. It was common ground that paragraph 16(1) was a "supplementary power", but disagreement as to what that supplementary power permitted. Mr Jay submitted that following the Panel's determination the claimants fell within paragraph 16(1) (and could therefore be given temporary admission under paragraph 21 as persons liable to detention under paragraph 16) because they "may be required to submit to examination" under paragraph 2 of the Schedule, and pending (until) a decision to give or refuse them leave to enter.

75. In support of this submission Mr Jay relied on the speech of Lord Brown in R (Khadir) v Secretary of State for the Home Department [2006] 1 AC 207, [2005] UKHL 39. The claimant in that case was an Iraqi Kurd whose claim for asylum had been refused by the Secretary of State and whose appeal had been dismissed by an adjudicator on 9th August 2001. Following the dismissal of the appeal his solicitors had asked the Secretary of State to grant him ELR (subsequently replaced by the 2003 policies on Humanitarian Protection and Discretionary Leave - see above).

76. The Secretary of State refused and kept the claimant on temporary admission which was periodically extended. The claimant applied for judicial review. Crane J concluded that the claimant's temporary admission was no longer lawful, because he could no longer be detained since removal was not pending and allowed the application. Following Crane J's decision, Parliament enacted section 67 of the 2002 Act (see above).

77. Lord Brown said in paragraphs 31 and 32 of his speech:

> "31. For my part I have no doubt that Mance LJ was right to recognise a distinction between the circumstances in which a person is potentially liable to detention (and can properly be temporarily admitted) and the circumstances in which the power to detain can in any particular case properly be exercised. It surely goes without saying that the longer the delay in effecting someone's removal the more difficult will it be to justify his continued detention meanwhile. But that is by no means to say that he does not remain 'liable to detention'. What I cannot see is how the fact that someone has been temporarily admitted rather than detained can be said to lengthen the period properly to be regarded as 'pending ... his removal'.

> 32. The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be '*im*pending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (i.e. throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under paragraph 21.
>
> 33. To my mind the *Hardial Singh* line of cases says everything about the exercise of the power to detain (when properly it can be exercised and when it cannot); nothing about its *existence*. True it is that in *Tan Te Lam* [1997] AC 97 the Privy Council concluded that the power itself had ceased to exist. But that was because there was simply no possibility of the Vietnamese Government accepting the applicants' repatriation; it was effectively conceded that removal in that case was no longer achievable. Once that prospect had gone, detention could no longer be said to be 'pending removal'."

78. He then considered a submission that the Secretary of State had failed to give proper reasons for refusing ELE. He rejected that submission, saying:

> "ELE means what it says: it is exceptional. The Secretary of State's discretion is a very wide one and it is hardly surprising that he found nothing exceptional about this case when he refused to grant ELE a mere 18 months after the appellant's unlawful entry into this country. Nor should the fact that the appellant has now been here for a further five years occasion any particular optimism for the future: by section 67 Parliament has manifested its clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime."

79. In my view neither these dicta nor section 67 of the 2002 Act avail the defendant on the facts of the present case. Khadir was a paragraph 16(2) case. His appeal against the Secretary of State's refusal of leave to enter had been dismissed and he was therefore liable to be detained pending a decision to give removal directions. The Secretary of State was legally in a position to give such directions because his refusal of leave to enter had been upheld on appeal, but he was prevented from doing so by the difficulties of finding a safe route for the claimant to travel to the Kurdish Autonomous Area of Iraq. In that case the power to detain (or to grant temporary admission instead of detention), was genuinely being used as a supplementary power: to enable the implementation of the Secretary of State's decision to refuse leave to enter which had been upheld on appeal. It was not being used, as it is being used in the present case, as an alternative to taking a "formal decision to refuse leave to enter", because it is recognised that such a decision would be in overt defiance of the Panel's determination. The substantive decision-making power conferred by the 1971 Act upon the defendant

or the immigration officer is the power to grant or refuse leave to enter - see sections 1-3, and the Order (above). There is no freestanding power to grant temporary admission instead of granting leave to enter; as opposed to granting temporary admission while a decision to grant or refuse leave is under consideration, or following a refusal while a decision to make removal directions is under consideration, or attempts are being made to implement those directions once they have been made.

80. In the present case all the claimants were required to submit to examination under paragraph 2 of Schedule 2 long before the hearing before the Panel in 2004. A decision to refuse leave to enter was made by the defendant in the light of that examination. Mr Jay accepted that it was "unlikely in practice that the IO would deem it necessary to serve a notice [under paragraph 2(3)] requiring a further examination" since, following the earlier examination and the defendant's decision to refuse leave, all of the facts were fully investigated by the Panel. But he submitted (per Khadir) that paragraph 16 was concerned not with the mode of the power but with its existence. Khadir does not prevent the court from considering whether, on the facts of the particular case, there is a genuine exercise of this statutory power for the supplementary purpose for which it was conferred by Parliament. There is no suggestion in the decision letter, or elsewhere, that there is any intention to carry out a further examination under paragraph 2(3) of Schedule 2. Nor, if the letter is taken at face value and it is accepted that there has, in substance, been no decision to refuse leave, is there any indication that the defendant has any intention to take a decision to grant or refuse leave for the foreseeable future (see above). Temporary admission is being used instead of a grant of Discretionary Leave because it has been decided that the latter is "inappropriate".

81. This case is clearly distinguishable on its facts from those cases where it might be said to be "inappropriate" to grant or refuse leave because, for example, the examination under paragraph 2, or consideration of the results of that examination, have yet to be completed.

82. In R v Home Secretary *ex parte* Singh [1987] Imm AR 489, Woolf LJ (as he then was) described a person who was temporary admission as being "in an intermediate position" - see pages 495-496. In R (Veli Tum) v Secretary of State for the Home Department [2004] EWCA Civ 788 he considered in paragraph 15 the effect of the deeming provisions in section 11 of the 1971 Act:

> "... it is important to appreciate that under s 11 of the Immigration Act 1971 a person can be admitted into this country while an application is being considered, without being regarded from the legal point of view as having entered into this country. Davis J, not unreasonably in the court below, described this as an 'Alice in Wonderland' situation. Although that description is appropriate, the provisions of s 11 are of value because it enables a person who makes a claim to enter this country not to be detained but to be released temporarily while his position is considered. His position is neither improved nor prejudiced as a result of his being admitted in this way."

83. While this "intermediate" or "Alice in Wonderland" position may last for a considerable period of time (see Khadir above), it is important to bear in mind that the power to grant temporary admission under paragraph 21 is parasitic upon the power to detain under paragraph 16. Any power to detain should be strictly construed and the court should be vigilant to ensure that such a power is used for the statutory purpose for which it was conferred and only for that purpose. Applying these basic principles to the facts of this case, it seems to me that the defendant is impaled upon a Morton's fork. Either (a) there is no real distinction between the defendant's decision that it is inappropriate to grant the claimants leave and to keep them on temporary admission, and a refusal to grant them leave in defiance of the Panel's decision; or (b) there is a real distinction, in which case temporary admission is not being used as a supplementary power, but as a freestanding power as an alternative to deciding whether to grant or refuse leave because the defendant is not prepared to grant leave, but recognises that a refusal would be in defiance of the Panel's determination. Whether (a) or (b) is the correct analysis, the defendant's decision is unlawful.

Ground (3)

84. In the light of these conclusions it is unnecessary to consider Mr Singh's third ground of challenge, which raises the broad question of principle: where Parliament has required the defendant to lay rules before Parliament as to the practice to be followed in regulating leave to enter the United Kingdom and where Parliament may disapprove of such rules (see section 3(2) of the 1971 Act), to what extent is the defendant entitled to supplement those rules by non-statutory statements of policy, such as those issued in 2003 and 2005. It would not be appropriate to consider this wider issue in the context of the present case because, in reality, not merely did the claimants not challenge the lawfulness of the 2003 policies, they actively sought their application without delay. Moreover, their challenge to the lawfulness of the 2005 policies is limited to the passages in parenthesis in paragraphs 2.6 and 5.1 of the Discretionary Leave policy. Insofar as those passages purport to give the defendant power to place individuals on temporary admission as an alternative to deciding whether they should be granted or refused Discretionary Leave (as opposed to a temporary measure to enable him to reach such a decision), then the policy is unlawful for the reasons set out under ground (2) (above).

85. Mr Singh's submission that the passages in parenthesis give the defendant an open-ended discretion not to follow the published policy, because they provide that the policy need not be applied whenever the defendant thinks it inappropriate to do so, is best considered under ground (6) below: whether any interference with the claimants' Article 8 rights is "in accordance with law", bearing in mind the need for the law to be formulated so that it is sufficiently foreseeable.

Ground (4)

86. The starting point for consideration of this submission is the proposition in Mersin (not disputed by Mr Jay) that the Panel's determination having been promulgated, the defendant could not "deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it."

87. The relevant extracts from the 2003 Humanitarian Protection policy are set out above. Paragraph 2.6 provided that persons in the position of the claimants "should be granted Discretionary Leave" and that the duration of that leave would "normally" be for a period of six months (paragraph 5.1). It will be noted that while the policy permitted an element of discretion as to the duration of leave ("normally" six months), there was no such discretion to refuse leave altogether to persons falling within paragraph 2.6 ("should be granted discretionary leave"). In addition to the obligation to give effect to the Panel's determination, the defendant was under an obligation to follow his own published policies: see Nadarajah v Secretary of State for the Home Department [2004] INLR 139, [2003] EWCA Civ 1768, per Lord Phillips MR (as he then was) at paragraph 54. Thus, following the defendant's decision not to seek a statutory review (which was communicated to the claimants' solicitors on 12th August 2004), the claimants were entitled to, and did, expect a decision from the defendant, without undue delay, granting them an initial period of six months Discretionary Leave to enter the United Kingdom.

88. In his skeleton argument the defendant accepted that it was not necessary for the claimants to show detrimental reliance in order to establish the existence of a legitimate expectation: see, for example, R (Bibi) v Newham London Borough Council [2002] 1 WLR 237, per Schiemann LJ at paragraph 30, citing Craig, Administrative Law, 4th ed, at page 619:

> "Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such."

89. However, Mr Jay submitted that the existence or lack of reliance was capable of being a relevant factor, and that the claimants had "not relied to their detriment on the faith of the 2003 policy." That submission is factually incorrect, as explained in a witness statement filed by the claimants' solicitor:

> "4. At the time the [Panel's] decision was made, our clients were advised about and relied on the fact that, having succeeded in their appeal on Article 3 grounds, they would obtain leave pursuant to the Secretary of State's detailed policy on the grant of humanitarian protection or discretionary leave issued in April 2003 and extant at the time. That leave *may* have been restricted in time and they may have had to serve longer before being eligible for settlement. Nevertheless, they understood that they were entitled to a grant of leave and thus the detriment they have suffered as a result of not having leave was not something which they envisaged at the time they decided not to appeal.
>
> 5. Had the Secretary of State appealed and obtained permission from the Immigration Appeal Tribunal, our clients would almost certainly have served a respondent's notice raising the refugee exclusion points, as is permitted under the 2003 Procedure Rules which were in force at the

> time. Of course if our clients had chosen to appeal and obtained permission, the Secretary of State might similarly have cross-appealed.
> 6. Had our clients believed that their choice was between, on the one hand, being left in limbo having succeeded solely on Article 3 grounds, with all the attendant prejudice that that has involved, and, on the other hand, appealing as the only way to achieve any sort of regular immigration status, it is very likely they would have sought to appeal against the decision excluding them from the Refugee Convention."

90. In summary, the claimants, reasonably, took the view that even a small part of a loaf was better than running the risk of ending up with no loaf at all. Mr Jay submitted that an application for permission to appeal against the Panel's conclusions in respect of Article 1F(b) of the Refugee Convention would have had no better prospect of success than the defendant's application for permission to appeal. That may well be the case, but the fact remains that the claimants, entirely understandably, relied upon the 2003 policy in deciding whether or not to exercise their right to apply to the Tribunal for permission to appeal.

91. The length of any delay is clearly a relevant factor. In Mersin Elias J held that a delay of 7½ months in granting the applicant leave to enter following his successful appeal on refugee grounds was Wednesbury unreasonable and therefore unlawful (see page 522). In R (Mambakasa) v Secretary of State for the Home Department [2003] EWHC 319 (Admin), the period of delay in granting the claimant leave to enter as a refugee following the final success of his appeal was six months. In paragraph 65 of his judgment Richards J (as he then was) said:

> "65. In my judgment the delay of about 6 months was unreasonable and did amount to a breach of duty on the part of the Secretary of State. It is not necessary to decide at precisely what point the delay became unlawful, but I take the view that if the matter had come before the court on an application for judicial review during at least the last 2 months or so of the period of delay the court would have been likely to grant declaratory relief (subject to the discretionary withholding of relief once the letter of 2 August indicated that a decision had been taken and that a status letter was about to be issued)."

92. While each delay case is fact-specific, in the present case it is highly significant that there had been an exhaustive examination of all the relevant facts by the Panel, which had produced a comprehensive determination which dealt in very great detail with all of the relevant issues. A decision-taker who wished to respect (rather than defy) that determination, would have had no good reason to delay the grant of leave in accordance with the 2003 Discretionary Leave policy. It is not suggested that the policy itself presented any difficulties of interpretation. The policy was clear, as was the Panel's decision.

93. Instead of a reasonably prompt decision, no decision was taken until nearly 17 months after the Panel's determination had been promulgated. Even if this delay had been due to simple incompetence at the Home Office, it would plainly have been so excessive as to be Wednesbury unreasonable and unlawful. The Court of Appeal had to consider the

implications of delay in Rashid v Secretary of State for the Home Department [2005] INLR 550, [2005] EWCA Civ 744. I take the facts of that case from the headnote:

> "The respondent, an Iraqi Kurd, claimed asylum in December 2001. His claim was refused and an appeal to an adjudicator failed. In March 2003, the respondent's advisors became aware of a Home Office policy to the effect that internal relocation in the Kurdish Autonomous Area of Iraq would not be relied on as a reason to refuse refugee status. They requested reconsideration of the asylum claim, but by the time the decision on reconsideration took place later that year, the situation in Iraq had changed and the policy no longer applied. The respondent successfully sought judicial review. The judge held that the refusal to now grant asylum and indefinite leave to remain was unfair by reason of the unwarranted and justified failure by the Secretary of State to apply his policy at the time of the original asylum claim, when the respondent would have been granted asylum in accordance with the policy. It was also unfair by reason of the different treatment given to others who were granted refugee status and the intervening moral detriment to the respondent. The Secretary of State appealed to the Court of Appeal."

The Secretary of State's appeal was dismissed.

94. Having referred to the authorities dealing with "unfairness amounting to an abuse of power" (in paragraphs 20-24 of his judgment), Pill LJ said in paragraph 25:

> "[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. It would be grossly unfair if the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of a policy, especially one unknown to relevant Home Office officials."

95. Pill LJ then reviewed the authorities relating to legitimate expectation, noted that there had been no explanatory signed statement from the defendant, and concluded in paragraph 36:

> "[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 in the forefront of the respondent's deliberations. I am very far from saying that administrative errors may often lead to a finding of conspicuous unfairness amounting to an abuse."

96. May LJ agreed with Pill LJ. Dyson LJ reviewed the relevant authorities and concluded in paragraphs 50-53:

> "[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 court will not only have regard to whether wide-ranging issues of policy are involved, but also whether holding the public body to its promise or policy has only limited temporal effect and whether the decision has implications for a large class of persons. The degree of unfairness is also material. That is why in *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681, Simon Brown LJ referred to 'conspicuous unfairness' amounting to an abuse of power. The more extreme the unfairness, the more likely it is to be characterised as an abuse of power. If the frustration of a legitimate expectation is made in bad faith, then it is very likely to be regarded as an abuse of power and, therefore, unlawful.
>
> [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, in my judgment it is clear that there has been conspicuous unfairness in this case. It is true that Mr Rabinder Singh QC [who appeared on behalf of the respondent to the appeal] disavowed any allegation of bad faith. He was right to do so, because there is no evidence that the failure to apply or even reveal the existence of the policy between December 2001 and March 2003 was deliberate and the result of bad faith. But it is a remarkable feature of this case that, despite repeated requests for clarification and direct instructions from the interviewing officer, the caseworker and the presenting officer who were party to the original and appellate consideration of the claimant's case as to their state of knowledge of the policy, no response has ever been provided; not even after the grant of permission to apply for judicial review, when the Secretary of State had a duty of full and frank disclosure. As Lord Walker of Gestingthorpe said in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize and Another (Practice Note)* [2003] UKPC 63, [2003] 1 WLR 2839, a respondent authority owes a duty to the court to co-operate and make candid disclosure of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. This the Secretary of State has signally failed to do.
>
> [53] In the absence of any explanation, I consider that 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 that, as explained by Pill LJ, 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."

97. In setting out the factual background and the history of the judicial review proceedings, I have already drawn attention to the lack of any explanation from the defendant for the delay in reaching a decision. The claimants' solicitors were repeatedly asking for an explanation and they were repeatedly rebuffed. It was not that the Treasury Solicitor was unwilling to provide an explanation, he was simply unable to do so because he had been given no instructions by the defendant, apart from strict instructions not to comment on the case (see the letters of 5th and 18th July 2005). After the grant of permission to apply for judicial review, the defendant was under a duty of "full and frank disclosure": see Rashid (above). Far from "co-operation and candid disclosure" (ibid), no evidence was filed on behalf of the defendant and no explanation was given as to why it took until 3rd November 2005 to issue a decision. In the defendant's skeleton argument, Mr Jay submitted that:

> "25. The reason for the delay in this case was that it required consideration at the highest level. The issues were complex and politically-sensitive, and entailed consideration being given to the then current situation in Afghanistan. The [Secretary of State] has decided the Claimants' cases under the [Discretionary Leave] policy of 30th August 2005 rather than under the previous policy of April 2003."

98. I indicated that in the absence of supporting evidence, including full disclosure of contemporaneous records, I would not be prepared to accept that belated explanation, put forward, as it was, by way of counsel's submissions in a skeleton argument that had been filed shortly before the beginning of the hearing.

99. While I am prepared to accept that this case required "consideration at the highest level", the personal involvement of Ministers in the decision-making process could not conceivably justify such a lengthy delay following the Panel's determination. The suggestion that consideration was being given "to the then current situation in Afghanistan" is not supported by any contemporaneous documents, nor is it evident in the decision letter itself. The full decision letter is set out above. It can be seen that most of the letter is concerned with the factual background and the application of the 2005 Humanitarian Protection and Discretionary Leave policies. As mentioned above, for the purposes of this case the only new factor in policy terms was the discretion given to Ministers by the words in parenthesis in the latter policy. There is no other new information and no discussion whatsoever of the then current situation in Afghanistan. Of the four factors referred to in the final paragraph of the decision letter, two, the Panel's determination and the Court of Appeal's judgment, were history, the claimant's Detailed Statement of Grounds dated 20th July 2005 contended, *inter alia*, that the delay was unlawful but did not raise any issues that would not have been readily apparent immediately following the Panel's determination, and while in November 2005 there may well have been a greater appreciation amongst policymakers

and the public of the need to deter acts such as hijacking, the public interest in deterring such acts plainly existed at the time of the Panel's determination in June 2004. Indeed, the claimants had been tried for hijacking offences, even though their convictions had been quashed by the Court of Appeal. In summary, there is nothing on the face of the decision letter to justify any delay, much less the very considerable delay that occurred in the present case, apart from the defendant's wish to consider the claimants' cases under the 2005 and not the 2003 policies: see the "for the avoidance of doubt" passage in the decision letter.

100. Mr Singh submitted that this was not a simple case of delay, the irresistible inference to be drawn from the length of the delay, the lack of any explanation, and the change of policy in 2005, was that the defendant had deliberately delayed reaching any decision because he disagreed with the Panel's determination, had no intention of granting the claimants leave to enter the United Kingdom, and at some stage decided that that objective could be achieved if he was able to apply a revised policy which would enable him to give effect to that intention.

101. Having heard the parties' submissions, I indicated to Mr Jay that in the absence of any explanation for the delay I would be minded to infer that it was deliberate and that it was for the purpose as described by Mr Singh. As mentioned above, I gave the defendant an opportunity to file late evidence in reply, but he decided not to do so. In these circumstances, I am satisfied that the obvious inference is the right one: a decision was deliberately delayed so that the claimants' application for Discretionary Leave could be refused in all but name under a revised policy that was eventually published on 30th August 2005. Mr Jay submitted that the revised policy was not specifically directed at the claimants' cases, on its face it was of general application. I accept that on its face the new policy is of general application, but in the absence of any evidence explaining the genesis of the policy, it is (to put it at its lowest) unlikely that it was not prompted, if not wholly then at least in substantial part, by the claimants' cases. There is, for example, no information as to whether it has been decided that it is "inappropriate to grant" Discretionary Leave to any other applicants, and to keep them on temporary admission instead pursuant to the new policy.

102. In summary, the defendant deliberately delayed giving effect to the Panel's determination allowing the claimants' appeals against refusal of leave to enter, but he did not do so "in the hope that something might turn up to justify not implementing it", he did so in order to give himself time to turn something up (a revised policy) which could then be used to justify not implementing the Panel's determination. It is difficult to conceive of a clearer case of "conspicuous unfairness amounting to an abuse of power" by a public authority. It is particularly disturbing that this was not simply the conduct of a junior official, but that the process was authorised, if not initiated, "at the highest level".

103. Mr Jay submitted that the countervailing public interest in applying the 2005 policy should be taken into consideration when forming a judgment as to whether, in all the circumstances, there had been such conspicuous unfairness as to amount to an abuse of power. That there is a public interest in deterring hijacking is not in dispute. This case is concerned with the means by which hijacking may be deterred, and in a democracy

governed by the rule of law there is an equally powerful public interest in the court ensuring that the means adopted by the executive are within the law. The principal deterrent is, of course, a criminal prosecution, coupled with exclusion from refugee status under Article 1F. The claimants were prosecuted and served all (or most) of their sentences, even though their convictions were quashed by the Court of Appeal. The need for "something more" to be done might have been far more acute if the alternatives lawfully open to the defendant under the 2003 policy had been confined to either refusing leave or granting the claimants indefinite leave to enter. But that was not the case. Persons excluded from Humanitarian Protection by reason of Article 1F(b) were to be given Discretionary Leave for periods of six months at a time, thereby enabling steps to be taken to remove them as soon as the impediment to their removal (for example, the risk of treatment contrary to Article 3 of the Human Rights Convention) was removed. As explained above, keeping the claimants on temporary admission makes no difference in this respect, although it does have practical consequences, for example in terms of the claimants' inability to work and the consequent need to support them at public expense. The power to detain (or to grant temporary admission in lieu of detention) was not granted to the defendant by Parliament to enable him or his immigration officers to impose sanctions on the claimants outwith the criminal law. For these reasons "the public interest" is no answer to the claimants' submission that there was an abuse of power, rather it reinforces that submission.

Ground (5)

104. In view of my conclusions in respect of grounds (1), (2) and (4) above, ground (5) is academic. However, Mr Singh's submissions under this ground set the scene for one of the complaints under ground (6), so it is useful to summarise them at this stage. The starting point is that paragraph 2.6 of the 2005 Discretionary Leave policy (like its predecessor in the 2003 Discretionary Leave policy), is concerned with persons who have been excluded from Humanitarian Protection. A person will have been excluded if there are "serious reasons for considering that the person":

> "• has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes
>
> • has committed a serious crime in the United Kingdom or overseas
> • has been guilty of acts contrary to the purposes and principles of the United Nations."

105. The policy describes a "serious crime" for these purposes as:

> "- one for which a custodial sentence of at least 12 months has been imposed in the United Kingdom; or
>
> - a crime considered serious enough to exclude the person from being a refugee in accordance with Article 1F(b) of the Convention ..."

106. Thus, the fact that a person has committed a serious crime, such as hijacking, is not a bar to the grant of Discretionary Leave for periods of six months at a time under the 2005 policy. The claimants submit that logically it must follow that the kind of conduct

which would justify a decision that it was "inappropriate to grant any leave" would have to be at the most serious end of the spectrum of serious crimes. While not disputing that the hijacking was a serious crime, Mr Singh submitted that this particular hijacking could not rationally be described as being at the most serious end of such a spectrum for the following reasons:

(1) The defendant did not think it appropriate to rely on Article 1F(b) until two working days before the Panel's hearing; it was not relied upon in the Reasons for Refusal Letter.
(2) There was no recommendation for deportation by the criminal court when sentencing.
(3) Although a copy of the judge's sentencing remarks was not available, the sentences themselves (ranging from 27 months to five years) demonstrated that he must have considered that there were significant mitigating factors in this particular hijacking.
(4) The Panel concluded that there were some mitigating circumstances (see paragraph 92 of its determination).

107. If the policy had been lawful, the difficulty with this submission would have been that the policy (i.e. the words in parenthesis) is entirely open ended. The circumstances in which Ministers may decide that it is "inappropriate to grant any leave" are not described in any way, and are not confined, for example, to particularly grave examples of the kinds of serious criminal conduct falling within Article 1F(b). In these circumstances, an individual seeking to advance a rationality or reasons challenge would face an impossible task. This leads into a consideration of the final ground of challenge, ground (6).

Ground (6)

108. In his skeleton argument, Mr Singh submitted that the consequences of the defendant's failure to grant the claimants leave to enter and to retain them on temporary admission interfered with the claimants' right to respect for their private and family life and home, under Article 8(1) of the Human Rights Convention. The nature and the extent of that interference was set out in considerable detail in Mr Singh's skeleton argument and in a supplementary skeleton argument dealing with the particular circumstances of each claimant. It is unnecessary to rehearse the detail, since Mr Jay conceded that Article 8 was engaged, but submitted that the interference under Article 8(1) described by the claimants (which was not disputed) was justified under Article 8(2). It is common ground that this requires that any interference be "in accordance with the law" and "necessary in a democratic society", i.e. proportionate.

109. In view of the fact that the claimants' challenge succeeds on grounds (1), (2) and (4), I will deal briefly with the requirement of proportionality and in a little more detail with the requirement of lawfulness. The former requires the decision-taker to carry out a balancing exercise, weighing the degree of interference under Article 8(1) against the justification for that interference under Article 8(2). Mr Jay submitted that the defendant had carried out such an exercise, and that since he was entitled to a considerable margin of discretion (see Huang v Secretary of State for the Home Department [2006] QB 1, [2005] EWCA Civ 105), the court should not interfere. If the policy had been lawful, and if the defendant had carried out a balancing exercise, then I

would have accorded it a considerable measure of respect. However, I do not accept Mr Jay's submission that the defendant did carry out a balancing exercise. It is true that the decision letter states that the defendant has given "careful consideration to all the circumstances" of the claimants' cases and mentions, among the four factors specifically referred to, the matters raised on behalf of the claimants in their Detailed Statements of Grounds. However, simply listing in "headline" form a number of factors to which regard has been paid does not amount to the carrying out of a balancing exercise for the purposes of Article 8, unless of course each of those factors has been considered in more detail earlier in the decision. Decision letters must be read as a whole and in a common sense way. But common sense tells one that there is a real difference between simply listing in summary form a number of factors and carrying out a balancing exercise. Indeed, the statement in the letter that there is "an overwhelming public interest" in deterring hijacking strongly suggests that the defendant did not consider that it was necessary to carry out a balancing exercise at all.

110. However, the requirement of "lawfulness" presents a more fundamental problem which makes it unnecessary for the court to carry out its own balancing exercise. In section D of his speech in R (Gillan) v Commissioner of Police for the Metropolis [2006] 2 WLR 537, Lord Bingham dealt with the requirement of "lawfulness" as follows:

> "D. *Lawfulness*
>
> 31. The expressions 'prescribed by law' in article 5(1), 5(1)(b), 10(2) and 11(2) and 'in accordance with the law' in article 8(2) are to be understood as bearing the same meaning. What is that meaning?
> 32. The claimants relied on a number of authorities such as *Malone v United Kingdom* (1984) 7 EHRR 14, paras 66-68, *Huvig v France* (1990) 12 EHRR 528, *Hafsteinsdóttir v Iceland* (Application No 40905/98), (unreported), 8 June 2004, paras 51 and 55-56 and *Enhorn v Sweden* (2005) 41 EHRR 633, para 36, to submit that the object of this requirement is to give protection against arbitrary interference by public authorities; that 'law' includes written and unwritten domestic law, but must be more than mere administrative practice; that the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions; that the scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised; and that there must be legal safeguards against abuse."

111. In the remainder of paragraph 32, Lord Bingham considered the facts of that case. He said in paragraph 33 that:

> "33. The defendants did not, I think, challenge the principles advanced by the claimants, which are indeed to be found, with minor differences of expression, in many decisions of the Strasbourg court. But they strongly challenged the claimants' application of those principles to the present

facts."

112. Before dealing with the features of the stop and search regime, Lord Bingham said in paragraph 34 of his speech:

> "34. The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

113. It was common ground that the lawfulness of the policy should be measured against this yardstick. As soon as that is done it is plain that the policy does not give any, or any effective, protection against arbitrary interference by Ministers. By reason of its wholly open-ended nature it is not "foreseeable"; nor does it give any, much less an adequate, indication of the circumstances in which the Minister's power may be exercised. It is a paradigm of an unfettered administrative discretion to depart from a published policy whenever the Minister thinks it appropriate to do so. The only limitation is that the Minister's decision must be taken "in view of all the circumstances of the case". Assuming that the circumstances of other cases (save perhaps as "precedents" to be taken into consideration in the present case) would not be relevant in any event, what kinds of circumstances might be thought to be relevant are not described, even by way of example. In effect, paragraph 2.6 of the 2005 Discretionary Leave policy tells applicants that the published policy will be applied to them unless the Minister decides not to do so in their particular case. It therefore leaves them "vulnerable to interference by [Ministers] acting on any personal whim, caprice, malice, predilection, or purpose other than that for which the power was conferred". This is a further reason why both the policy, and the decision letter which was based upon it, are unlawful.

<u>Conclusion on the claimants' grounds</u>

114. For the reasons set out above, the application succeeds on grounds (1), (2), (4) and (6). It is unnecessary to express any view on grounds (3) and (5).

<u>Costs</u>

115. Mr Singh submitted that the defendant should be ordered to pay the costs of the proceedings on an indemnity basis in any event, regardless of the outcome of the claimants' application for judicial review. In deciding how to exercise its discretion in respect of costs, the court must have regard to all the circumstances including the conduct of the parties: CPR 44.3(4)(a). The following paragraphs in CPR 44.3(5) are of particular relevance in the present case:

> "(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) ...

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; ..."

116. I have set out the procedural history above. In the light of that history an order requiring the defendant to pay the costs of the proceedings on an indemnity basis would have been appropriate even if the claimants had not succeeded in their claim. The defendant's conduct before the proceedings commenced was inexcusable. All the efforts of the claimants' solicitors to obtain an explanation for the delay, and to avoid proceedings, were met with a deliberate wall of silence. The defendant failed to give any substantive response to the letter before claim, and indeed instructed the Treasury Solicitor not to comment in answer to the claimants' solicitors' perfectly reasonable queries. There was either an egregious error in the acknowledgement of service, or the defendant having conceded the claim then resiled from that concession.

117. Following the grant of permission to apply for judicial review the defendant, as a public authority, had a duty "to co-operate and make candid disclosure". Instead of co-operation and disclosure there were no Detailed Grounds, no evidence and yet further delay. The legal justification for the defendant's decision was not explained until days before the hearing. That delay is not explained by the need to change leading counsel at a late stage. Either the defendant knew the legal basis for his decision when it was taken in November 2005 and chose not to disclose it, or he did not and the legal arguments contained in the defendant's skeleton argument were devised as a last-minute justification for the decision. Whichever explanation is correct, neither is acceptable. Even if the Secretary of State's skeleton submissions had contained any argument of substance, the manner in which the defendant defended this case fell far short of the standards expected of a public authority and was wholly unacceptable. In saying that I am not applying unrealistically high standards. Even Homer nods, and the occasional failure to comply with the CPR is readily understandable. But here there was a complete failure by the defendant to comply with the relevant provisions of the CPR at every stage in the proceedings.

118. In criticising the defendant's conduct of the proceedings I should make it clear that no blame attaches to his leading or junior counsel, or to the Treasury Solicitor. Indeed it is a tribute to Mr Jay's industry that an explanation of the legal justification for the Secretary of State's decision was provided within about a fortnight of his having been instructed. At all relevant times the Treasury Solicitor was doing his best to obtain instructions as to the defendant's position, and to inform the claimants' solicitors and the court. Such instructions were either late, or not forthcoming at all.

119. Advancing a case which is unlikely to succeed is not a sufficient reason for awarding costs on an indemnity basis. There must be "some element of a party's conduct of the case which deserves some mark of disapproval": see the notes in the White Book to

CPR 44.4.2. For all the reasons set out above, the entirety of the defendant's conduct of this case deserves the strongest possible mark of the court's disapproval. It follows that the defendant must pay the claimants' costs on an indemnity basis.

Relief

120. I am prepared to hear submissions as to the detail of the relief to be granted. I am minded to grant the following relief:

(1) a quashing order in respect of the decision letter dated 3rd November 2005;
(2) a declaration that the delay in issuing a decision was unlawful;
(3) a declaration that "the policy" (i.e. the words in parenthesis in the 2005 policies) is unlawful;
(4) a mandatory order requiring the defendant to grant the claimants six months' Discretionary Leave in accordance with either the 2003 policy or the lawful element of the 2005 policy within seven days;
(5) the defendant to pay the claimants' costs on an indemnity basis, such costs to be the subject of a detailed assessment if not agreed.

A final word

121. Bearing in mind some of the newspaper headlines which reported the Panel's determination in 2004, it is important that there is no misunderstanding about the effect of this decision. The issue in this case is not whether the executive should take action to discourage hijacking, but whether the executive should be required to take such action within the law as laid down by Parliament and applied by the courts.

122. That really is the end.

123. Mr Seddon, anything you want to say?

124. MR SEDDON: My Lord, we are grateful for your Lordship's detailed judgment. My Lord, the form of relief which your Lordship suggests is a form which is politically (inaudible). It may be right, because my Lord has come to the conclusion that the defendant's policy issued on 30th August 2005 in respect of Discretionary Leave is unlawful on two bases, namely, firstly, that it enables applicants who have been successful to be maintained on temporary admission, as an alternative to taking a decision on the grounds (inaudible) been successful and, secondly, it is unlawful on the basis that it permits an interference with Article 8 rights otherwise in accordance with the law. It may be that it would be appropriate to spell out in the declaratory relief in respect of the policy that it is unlawful for both those two reasons. That is the only suggestion that I make.

125. MR JUSTICE SULLIVAN: Yes. Whether it is necessary for that refinement or whether that be evident from the reasons in the judgment --

126. MR SEDDON: It may be, my Lord.

127. MR JUSTICE SULLIVAN: Yes.

128. Mr Jay, anything you want to submit on the relief or indeed on any other matter?

129. MR JAY: My Lord, I have no submissions to make, save to ask for clarity in relation to the third declaration.

130. MR JUSTICE SULLIVAN: Yes.

131. MR JAY: My Lord, looking at paragraph 2.6 of the August 2005 policy, I think it must follow from your Lordship's judgment that the clause beginning after the first comma, that will have to be deleted as unlawful. In other words, "unless Ministers decide".

132. MR JUSTICE SULLIVAN: Yes.

133. MR JAY: And the next sentence is unlawful.

134. MR JUSTICE SULLIVAN: Yes.

135. MR JAY: My Lord, I am looking at page 286 of the bundle.

136. MR JUSTICE SULLIVAN: So am I, yes.

137. MR JAY: I am obliged.

138. MR JUSTICE SULLIVAN: It goes down "kept or placed on temporary admission or temporary release", and then that is where my square brackets ended. So that is why I, for convenience, just put round square brackets. But the rest of the policy, anyway for present purposes, there is no reason --

139. MR JAY: I think other bits will have to be looked at. At the bottom of page 286, "However Ministers may decide". So that that goes as well.

140. MR JUSTICE SULLIVAN: Yes, it does. You will see in the judgment that there will be square brackets round that, that is what I said as I went through. Yes, and also there are brackets, but they are original brackets, around paragraph 5.1 which is on 289.

141. MR JAY: Yes.

142. MR JUSTICE SULLIVAN: But they are as original. It does not matter whether the brackets are mine or as original, but that is what I would include in the declaration under (3), the words in parenthesis.

143. MR JAY: My Lord, we are very much in your Lordship's hands whether your Lordship is going to invite Mr Seddon to do a first draft which I can then look at and then we can submit to your Lordship and then the court, or whether we proceed in some different way.

144. MR JUSTICE SULLIVAN: I would have thought, since there has been some discussion, it would be sensible if Mr Seddon does his draft, bearing in mind your concern that the ambit of the unlawfulness of the 2005 policy should be carefully defined.

145. MR JAY: Yes.

146. MR JUSTICE SULLIVAN: I have defined it in a sense for those who are listening to the judgment and who know what I have been talking about for the last two hours. I can see that for public consumption you may want something more precise, but I would have thought between you you can sort how you work that one out. Submit it to me through the usual channels and I will just approve it. There is no need to come back. Is that the sensible way to deal with that?

147. MR JAY: Yes.

148. MR JUSTICE SULLIVAN: Good. Anything else?

149. MR JAY My Lord, may I just check?

150. MR JUSTICE SULLIVAN: Yes, of course. (Pause)

151. MR JAY: My Lord, no.

152. MR JUSTICE SULLIVAN: Thank you very much indeed.

153. Mr Seddon, in Mr Singh's absence I would like to thank him very much for his submissions. Thank you for all your industry, and you too Mr Jay and your junior as well. They were very helpful and very thorough submissions and I sought to do justice to them in the judgment. Thank you very much.