ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House

Date of Hearing: 28 January – 1 February 2008

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Storey
Senior Immigration Judge Grubb

Between

HH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr M. Symes, instructed by IAS
For the Respondent: Mr P Saini QC, Mr S Wordsworth and Mr A Palmer instructed by the Treasury Solicitor

(1) Given the impact of data protection legislation a claimant would have difficulty in establishing a risk on return arising from communications between the British government and the receiving state relating to his criminal record. (2) The Secretary of State regarded those who would be returned to an 'active war zone' as exempt from deportation by a policy revoked on 14 January 2008. Decisions to deport nationals of countries that were at the relevant time active war zones, made during the currency of that policy, appear to have been made not in accordance with the law. The same applies probably to decisions to remove overstayers under s 10, but not decisions to remove illegal entrants.

DETERMINATION AND REASONS

1. The appellant is a citizen of Iraq. This determination follows a reconsideration of his appeal to this Tribunal. The hearing was combined with that of another appellant, the determination of which is now reported as KH (Article 15(c)

Qualification Directive) [2008] UKAIT 00023. The reconsideration hearings were combined because common issues arose in both appeals in relation to the interpretation of Article 15(c) of the Refugee Qualification Directive 2004/83/EC. As the issues relating to the present appellant unfolded, however, it became apparent that the determination of this appellant's appeal depended on the resolution of rather different issues. The submissions of Mr. Symes, who represented this appellant, however, were of considerable assistance to the Tribunal in reaching its determination in KH and that determination forms part of the background to the determination of the different issues which arise in the present appeal. We indicated at the hearing what the outcome of this appellant's appeal would be: we have awaited the publication of KH so that we could refer to it in this determination.

2. The appellant came to the United Kingdom on 22 August 2001 and claimed asylum upon arrival. His application was refused but he was granted exceptional leave to enter until 7 October 2005. He made an out of time application for leave to remain, but that application was refused. Before the expiry of his leave to enter, in fact on 12 September 2005 he was convicted after a trial on three counts of sexual activity with a child, contrary to ss 9(1) and 9(2) of the Sexual Offences Act 2003. He was sentenced to three and a half years imprisonment. Following correspondence between the respondent and the appellant, on 30 January 2007 the respondent decided to make a deportation order against the appellant on the ground that his deportation was conducive to the public good. The appellant appealed against that decision. The grounds of appeal raise a number of issues, which may be summarised as follows. (1) the appellant is Kurdish but cannot be returned to the Kurdish area of northern Iraq because he has no family ties there; (2) the situation in Iraq is "too dangerous"; "one in forty Iraqis have died since March 2003 ... as a result of violence", and the situation has been described by the UN Secretary General as "much worse than civil war"; (3) if the appellant were returned to Iraq there would be a serious and individual threat to his life or person by reason of indiscriminate violence in a situation of international or internal armed conflict; he is thus entitled to subsidiary or humanitarian protection under the provisions of para 339C(iv) of the Statement of Changes in Immigration Rules, HC 395 implementing the Qualification Directive; (4) there would be a risk to the appellant in Iraq arising from any knowledge in Iraq of the offences of which he had been convicted; (5) paragraph 364 of HC 395 is flawed in that it is not compliant with the European Convention on Human Rights.

3. When the matter came before the Tribunal, an application was made on the appellant's behalf for an adjournment in order to obtain expert evidence on what the appellant's position would be in Iraq if his history of offending were known. But on behalf of the respondent the Presenting Officer stated to the Tribunal that "the general position was that the Home Office did not disclose to the receiving State information as to the offence committed: the criminal record is not disclosed". On that basis the Tribunal took the view that it did not need to know what the

position would be if the criminal record were disclosed and refused the adjournment. It went on to hear the appeal and dismissed it on all grounds.

4. The appellant then sought and obtained an order for reconsideration. The grounds of challenge asserted that information obtained from an intelligence officer at Interpol Department NCIS suggested that there was a real likelihood that details of the appellant's offences would indeed be communicated to the government of any country receiving the appellant. It was submitted that the Tribunal were aware that that was the appellant's position and in the circumstances erred in relying on the assurance given by the Presenting Officer. Secondly, the grounds pointed out that the Tribunal had been referred to the respondent's Operational Enforcement Manual, chapter 12, para 12.3, indicating that enforcement action should not be taken against nationals originating from countries which are "currently active war zones". It was submitted that the Tribunal erred in failing to take account of this policy when dismissing an appeal against a decision to deport the appellant to Iraq. Thirdly, the grounds asserted that the Tribunal erred in failing to take into account the fact that the sentencing judge had made no recommendation for the appellant's deportation. Fourthly, the Tribunal erred in applying to the appellant's case the test of "exceptionality" in relation to Article 8 of the European Convention on Human Rights, as set out in the decision of the Court of Appeal in Huang v SSHD [2005] EWCA Civ 105. Fifthly, the ground relating to the alleged illegality of para 364 of HC 395 was repeated.

5. An order for reconsideration was made. The Senior Immigration Judge who made the order thought there might be merit in the first, second and fourth grounds, but not in the third or fifth. In his order, however, he expresses himself as giving leave to argue the fifth ground also "although it is difficult to see that ground being made out".

6. The reconsideration first came before the Tribunal on 10 July 2007. Attention was directed to the question of whether the Iraqi authorities would have notice of the appellant's criminal record. Mr. Omere, who appeared for the appellant on that occasion, reminded the Tribunal that although the Presenting Officer had said what was recorded in the determination, he had supported the application for an adjournment to obtain further evidence on the Iraqis' attitude toward a person with a record such as the appellant's. Mr. Hutchinson, the Home Office Presenting Officer, agreed that the Presenting Officer before the original Tribunal had appeared to support the application, but nobody acting on behalf of the Secretary of State had then or subsequently made any further investigations as to what the position was until he (Mr. Hutchinson) had spoken to somebody the previous day. As he understood it, the position was that the BIA, the agency of the Home Office dealing with immigration matters would not reveal any details to the authorities of the country to which a removal was taking place, but that the SSOU, the unit of the Home Office dealing with serious sexual offences, might well regard itself as obliged to warn the receiving country of the dangers posed by a person being returned to it. Mr. Hutchinson was unable to give an assurance that details would

not be given in the appellant's case, nor was he able to give a complete account of all applicable policies and practices as they would affect the appellant.

7. It appeared to the Tribunal that if the appellant was at risk in Iraq because of what some agency of the respondent was going to tell the Iraqis about the appellant, it might be that little else mattered for the purposes for this appeal. The Secretary of State was therefore directed to indicate with clarity what his position was.

8. In response to that direction the Treasury Solicitor wrote on behalf of the respondent to the Tribunal on 28 September 2007. The letter is of general interest in cases of this type and it is for that reason that we set it out, with its enclosures, below.

> "**Disclosure of Criminal Convictions to Foreign Governments**
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> The Immigration Directorates' Instructions Chapter 24, Section 9 (attached) give guidance on the disclosure of criminal convictions to foreign governments. Any disclosure to the Iraqi authorities would be made in accordance with those provisions and the IDI makes it clear that disclosures are not to be made unless permitted by the Data Protection Act and the Human Rights Act.
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> The Eighth Data Protection Principle provides that "*Personal data shall not be transferred to a country of territory outside the European Economic Area unless that country of territory ensures an adequate level of protection for the rights and freedoms of data subject in relation to the processing of personal data*". The European Commission is empowered to make a decision on whether a country ensures an adequate level of protection but no such decision has been made on Iraq and the IDI makes clear that in such circumstances the Border and Immigration Agency must be satisfied that an adequate level of protection can be ensured.
>
> Exceptions to the Eighth data protection principle are contained in Schedule 4 to the Data Protection Act. These circumstances include the situation where the transfer is necessary for reasons of substantial public interest. Section 1.3 of the IDI makes it clear that this exemption is relevant in relation to transfers of data that are necessary for the prevention of crime. Paragraph 3.3 of the IDI refers to proactive disclosures and uses the example of someone who has committed a serious crime e.g. a paedophile.
>
> It is clear from the IDI that if disclosure of information is necessary for reasons of substantial public interest then such a disclosure can be made, even if the country does not ensure an adequate level of data protection, provided that such disclosure is compatible with the Human Rights Act. Section 3.2 of the IDI states that "*If disclosure of an individual's criminal history will/may lead to that individual being subjected to treatment which would breach the HRA then that disclosure will be unlawful.*"
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> **Disclosure of the Appellant's Convictions**

Disclosures of convictions of foreign nationals to foreign governments are made by the Police in conjunction with Interpol. Interpol's current policy is that it does not pass on criminal record information to Iraq. This does not mean that Interpol considers such disclosures would place the subjects of the disclosure at risk, but is due to practicalities based on the current situation in Iraq, particularly because Interpol does not at present have a presence in Iraq. Until this situation changes disclosure of the Appellant's convictions to the Iraqi authorities by the SSHD will not be practical.

As the current situation renders the disclosure of convictions impractical the Secretary of State has not made an assessment of whether the disclosure of the Appellant's convictions to the Iraqi authorities might lead to him being subjected to treatment which would breach the Human Rights Act. Such an assessment can only meaningfully be made at the time of potential disclosure as it depends on the situation prevailing in the country at the time. The Secretary of State has no way of knowing when Interpol may begin disclosures of criminal record information to Iraq and conditions in Iraq at that time could be very different from current conditions".

The enclosure is as follows:

" 1. **THE DATA PROTECTION ACT 1998**

When requested by a foreign government or authority outside the European Economic Area to provide personal data about a living individual either currently or previously resident within the United Kingdom, in addition to the legal considerations (HRA, DPA, law of confidence, powers) which apply in relation to disclosures to UK public authorities [see sections 1 and 3], the eighth data protection principle of the DPA must be considered. Disclosures of personal data to foreign governments are only likely to be lawful under the DPA if necessary for the identification or apprehension of immigration or criminal offenders, for the purpose of legal proceedings, if sanctioned by international agreements such as the Dublin Convention, or with the individual's consent.

1.1. **The Eighth Data Protection Principle**

The eighth Data Protection principle states:

"*Personal data shall not be transferred to a country or territory outside the European Economic Area (EEA) unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data*"

The EEA consists of the 25 European Union (EU) Member States together with Iceland, Liechtenstein and Norway. It excludes the

Channel Islands. The European Commission is empowered to make decisions that particular countries or territories ensure an adequate level of protection for these purposes. So far such decisions have been made in relation to Argentina, Canada, Guernsey, Hungary, Isle of Man, Switzerland, and a set of non-statutory arrangements in the USA known as "safe harbour".
Where no decision has been made in respect of a particular country or territory, and unless an exemption to the eighth principle applies (see below), the Border and Immigration Agency must be satisfied that an adequate level of protection is ensured for these purposes before transferring personal data to the foreign government or authority.

An adequate level of protection is one which is adequate in all the circumstances of the case, having regard to matters such as the nature of the personal data, the country or territory to which the data are to be transferred, the purposes for which and the period during which the data are intended to be processed, the law in force in the country or territory in question, its international obligations, any relevant codes of conduct or other rules which are enforceable there, and any security measures taken in respect of the data there. If it is considered necessary to assess whether a particular country offers an adequate level of data protection, contact the Border and Immigration Agency Information Access Policy Team (IAPT) for advice.

1.2. **Exemptions to the Eighth Principle**

Schedule 4 of the DPA sets out circumstances in which the eighth principle does not apply to a transfer. The circumstances that are most likely to be relevant to the transfer of personal data by the Border and Immigration Agency to a foreign government or authority are:

- The data subject has given their consent to the transfer.

- The transfer is necessary for reasons of substantial public interest (e.g. section 13 of the Immigration and Asylum Act 1999).

- The transfer:-
  (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
  (b) is necessary for the purpose of obtaining legal advice, or
  (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

- The transfer is necessary in order to protect the vital interests of the data subject.

- The transfer is made on terms that are of a kind approved by the Information Commissioner as ensuring adequate safeguards for the rights and freedoms of data subjects. This is a reference to

standard form contracts which the European Commission has published and which must be used in unamended form.

- The transfer has been authorised by the Information Commissioner as being made in such a manner as to ensure adequate safeguards for the rights and freedoms of data subjects.

1.3. **Reasons of Substantial Public Interest.**

This exemption to the eighth data protection principle may be relevant in relation to transfers which are necessary for the prevention or investigation of crime, or the detection and identification of immigration offenders. Each case must be considered on its merits and staff should consult with the IAPT if considering such a disclosure.

2. REQUESTS FROM WITHIN THE EEA

As mentioned above, the EEA consists of the 25 European Union (EU) Member States together with Iceland, Liechtenstein and Norway. It excludes the Channel Islands.

If a request is received from a country from within the EEA then the eighth principle would not apply and the usual considerations, which apply to disclosures to UK public authorities, would apply (see part 3). All requests for information should be put in writing and the purpose of the disclosure fully explained.

3. REQUESTS BY A FOREIGN GOVERNMENT FOR DETAILS OF CONVICTIONS OF ITS NATIONALS

Foreign governments usually make requests for details of criminal convictions of their nationals when that individual is being removed or deported to their country. In some cases the Prison Service will alert the authorities of a country to the fact that one of their nationals has been convicted of a criminal offence and is being returned to that country. The fact that the majority of court cases are open to the public and criminal convictions are therefore a matter of public record does not mean that disclosure of the details of a conviction to a foreign government is lawful. Staff should follow the guidance below and contact the IAPT if in doubt.

3.1. **Requests from governments within the EEA**

Where the Border and Immigration Agency holds the information which the another government has requested, staff may disclose information about the conviction provided the usual provisions of the DPA and Human Rights Act 1998 (HRA) are met i.e. the disclosure is

fair, lawful, necessary and proportionate [see section 1 of this IDI chapter for further details].

If the information which the foreign government has requested is not held by the Border and Immigration Agency, staff should refer the requestor to the clerk of the court where the individual was convicted.

3.2. **Requests from governments outside the EEA**

Where the requesting government is from a country outside the EEA, the 8th Data Protection principle and the HRA must be borne in mind in addition to the usual DPA and HRA considerations. If disclosure of an individual's criminal history will/may lead to that individual being subjected to treatment which would breach the HRA then that disclosure will be unlawful. Similarly, unless we have the consent of the data subject or disclosure of their criminal conviction to the foreign government is in the substantial public interest disclosure will probably be unlawful.

As mentioned above (in 1.1), some countries outside the EEA have suitable safeguards in place to protect personal data and therefore the 8th Data Protection principle will not apply. However, staff must still consider whether the disclosure would breach the HRA prior to disclosing the details of an individual's criminal conviction to one of these countries.

3.3. **Proactive disclosures to foreign governments**

Staff may come across individuals being returned or deported to their country of origin and that individual has committed a serious crime in the UK e.g. a paedophile. Where it is clear that the authorities of that individual's country of origin are not aware of the individual's criminal history staff may consider that disclosure of that information is prudent. However, staff must be aware of the need to consider the implications of such a disclosure in terms of the DPA (8th principle) and the HRA (see 3.2 above). A disclosure should not be made unless the disclosure is permitted within the provisions of the DPA and HRA. Staff should always seek guidance from the IAPT if considering a proactive disclosure to a foreign government.

4. REQUESTS FOR CERTIFICATES OF CHARACTER

Certain foreign governments require individual overseas nationals to produce certificates of character before they will issue visas or consider the grant of naturalisation etc. As a general rule the UK Government neither possesses nor wishes to possess information enabling it to certify that a particular individual is of good or bad character for this purpose. Therefore, all requests for certificates of character or criminal records are to be refused.

4.1. **Standard Reply**

> A standard reply, which may be used in these circumstances, is as follows:
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> "I am writing in reply to your letter of..... in which you requested a character reference for.....
>
> The Immigration and Nationality Directorate's records relating to individual overseas nationals do not contain details which would enable me to assess [INSERT NAME OF INDIVIDUAL]'s character. I am afraid therefore that I am unable to provide you with the information that you request."

9. Following receipt of this information, it has been accepted on the appellant's behalf that the danger to him envisaged by grounds relating to the Iraqis' knowledge of his record was not a matter that ought to be pursued on his behalf. Further, in the light of the decision of the Tribunal in EO [2007] UKAIT 00062, Mr. Symes indicated to us that he did not propose to pursue the last of the grounds set out in para 2 from above.

10. The focus of the reconsideration therefore turns to issues relating to questions of conflict in Iraq. Two such questions are particularly relevant to the appellant's claim. The first is whether is he is entitled to the benefit of Article 15(c) of the Directive, as implemented by para 339C of the Immigration Rules. The second flows in a sense from that: the appellant claims he was entitled to be regarded as exempt from deportation because his country is an "active war zone".

11. At the hearing, Mr. Saini QC indicated to us that it was the Secretary of State's position that there is (and has at all relevant times been) in Iraq, throughout the whole of its territory, a situation of internal armed conflict within the meaning of international humanitarian law. In our determination in KH we rejected his submission that the relevant phrases in Article 15(c) and para 339C were to be interpreted other than in accordance with the dialectic of international humanitarian law. We therefore found that at all relevant times the situation in Iraq had been one of internal armed conflict within the meaning of Article 15(c) and para 339C. So far as the present appellant is concerned, that means, as it did for KH, that he is a person who is potentially covered by those provisions. As the determination in KH explains, however, those provisions are not of general or universal scope: it is for a claimant to establish that he as an individual comes within the terms there set out. In view of the conclusion we have reached on other issues in this case we do not need to decide whether the appellant could have succeeded, in an appeal against a valid immigration decision, on the basis of Art 15(c) and para 339C.

12. The present appellant, however, has, as we have indicated, a further line of argument. He points to the Secretary of State's Operational Enforcement Manual, chapter 12: "persons liable to deportation". After setting out the general principles

of deportation, at para 12.2 there is a list of those liable for deportation, which is followed by these words:

> "Enforcement action against those liable to deportation under section 35A or section 36 is initiated in the Criminal Casework Team (CCT) but officers may encounter offenders in the field against whom such action has already begun, or they may be asked to undertake further work or serve papers in such a case.
>
> Before a decision to deport is reached the Secretary of State must take into account all relevant factors known to him. It is imperative, therefore, that all the person's circumstances are reported."

The next division, 12.3, is headed "those exempt from deportation"

> "The following are exempt from deportation:
> [There is then a list beginning British citizens and those with a Right of Abode and continuing with others who are formally exempt from deportation: and then]
> Enforcement action should not be taken against Nationals who originate from countries which are currently active war zones. Country Information Policy Unit (CIPU) or Enforcement Policy Unit (EPU) will provide advice on this."

13. The origin of the policy here set out is not clear, but Mr. Symes pointed out that it appears in the sixth addition of Macdonald's Immigration Law and Practice, which was published in June 2005. The policy was withdrawn very shortly before the hearing of the reconsideration of these appeals on 14 January 2008. We do not know, and we need not speculate, on the reasons for either the introduction or the withdrawal of the policy. It clearly was in force on 30 January 2007, the date of the decision against which the appellant appeals, and it was not in force at the date of the hearing before us, just over a year later.

14. We need to consider first, whether the policy applied to the appellant, secondly, whether it was applied to the appellant, and thirdly, if it was not, the consequences.

15. Two issues arise in relation to the question whether the policy applied to the appellant. First, is Iraq, and was Iraq at all relevant times, a "currently active war zone"? Mr. Symes, making his submissions in his written skeleton before the hearing of the reconsideration, and orally without the benefit of the Tribunal's determination in KH, argued that the words of that phrase were ordinary English words and should be given their ordinary English meaning, following Brutus v Cozens [1973] AC 854. He drew our attention to the description of Iraq as a place where a war is continuing and to various dictionary definitions of "war" and "zone". We think there is considerable force in those submissions. They are, however, to an extent superseded by the Secretary of State's indication at the hearing that her view is that for the purposes of international humanitarian law the

situation in Iraq is one of internal armed conflict. Even if we are wrong in KH to have held that Article 15(c) and para 339C are to be interpreted in accordance with the vocabulary of international humanitarian law, it would be extraordinary if the Secretary of State were able to say that she and her predecessors intended the phrase "currently active war zone" not to apply to a country which they regarded as being in a situation of internal armed conflict for the purposes of international humanitarian law. For this reason, whatever the true meaning of the phrase in the Operational Enforcement Manual, we have come to the conclusion that the Secretary of State is not entitled to say that Iraq is not amongst the countries included.

16. The other question relating to the applicability of the policy to the appellant is whether, at the time the policy was in force, there was any attempt to take "enforcement action" against him. The Secretary of State's position is that enforcement action has not yet been taken against the appellant: as he appealed against the decision to deport him, no deportation order was signed and he remained in the United Kingdom. This is a submission, effectively, that "enforcement action" should be given an ordinary language interpretation, and means the process of ejection from the United Kingdom. Unfortunately for the Secretary of State, however, both statute and the Immigration Rules show that the policy would not be unique in clearly treating "enforcement action" as a process beginning well before actual ejection.

17. Section 24A of the Immigration Act 1971 makes it an offence for a person by deception to secure or seek to secure the avoidance, postponement or revocation of enforcement action against him. Enforcement action is defined as meaning the giving of removal directions, the making of a deportation order or the person's removal in consequence of directions or a deportation order. None of these events are, if we may so put it, as early in the story as the decision to make a deportation order: but for the purposes of s 24A, "enforcement action" nevertheless begins before actual ejection.

18. Paragraph 276B of the Immigration Rules, to which Mr. Symes also made reference, lists a number of immigration decisions (including a notice of intention to make a deportation order) as events following which time spent in the United Kingdom does not count towards a period of long residence for the purposes of that Rule. We do not find para 276B helpful in interpreting "enforcement action" for the purposes of the Operational Enforcement Manual. That is not merely because it contains no definition of "enforcement action". It is because the purpose of that part of the Rule is to set out the events which, whether or not they eventually result in any further action, draw formally to an individual's attention the Secretary of State's view that he is not entitled to remain in the United Kingdom.

19. As we have shown, however, the policy itself indicates that "enforcement action" is "initiated" by those involved with following up offenders, the Criminal Casework Team, and that those in the part of the Home Office concerned with immigration to

whom the Operational Enforcement Manual is directed, take part at a later stage: "officers may encounter offenders in the field against whom such action has already begun, or they may be asked to undertake further work or serve papers in such a case". That part of the Operation Enforcement Manual makes it clear to us that "enforcement action" within the terms of that document is not limited to the process of ejection from the United Kingdom. It is clear that the service of a notice of intention to deport is to be regarded as "enforcement action".

20. We therefore conclude that the policy set out in the Operational Enforcement Manual applied to the appellant at the date of the decision against which he appeals and continued to apply to him until the policy was withdrawn on 14 January 2008.

21. The next question is whether the policy applicable to the appellant was applied to him. We have no hesitation in saying that it was not. The appellant originates from a country which was and is a "currently active war zone". It does not appear that any advice was ever taken from CIPU or EPU, but in any event under the terms of the Operational Enforcement Manual enforcement action should not have been taken against him. The making of the decision against which he appeals was enforcement action. It accordingly follows that the policy was not applied to him.

22. It follows further from that that the decision against which the appellant appeals was one which in the Abdi (DS Abdi v SSHD [1996] Imm AR I48) sense was not in accordance with the law. What is the consequence of that today? Mr. Saini's submission was that any conclusion by us that the decision was not, at the time it was made, in accordance with the law does not assist the appellant. He points out that there has at no time been any promise or indication not to change or withdraw the policy. The appellant does not have the benefit of the policy at the date of the hearing, because it has been withdrawn. The appellant is accordingly at the date of the hearing liable to such enforcement action as may be appropriate, subject, of course, to any other objections to his removal that may be sustained. Accordingly, in Mr. Saini's submission, the Tribunal should reject the appellant's arguments against the legality of the decision and proceed on the basis that, at the date of the hearing, the decision should be treated as one which was made lawfully.

23. Mr. Symes, on behalf of the appellant, takes a diametrically opposed view. He asserts not merely that the decision was made unlawfully, but that the consequences of the decision are such that the appellant should now be granted leave to remain without further investigation of his circumstances. Mr. Symes accepts that he cannot point in this case to a solemn statement of government obligations, and perhaps not to a real abuse of power (see R(Rashid) v SSHD [2005] EWCA Civ 744). The policy, as expressed in the Operational Enforcement Manual, however, is not subject to any discretion and is apparently not capable of being overridden. Instead of being given the benefit of it, the appellant was subjected to a decision to make a deportation order, which he has had to fight, in circumstances where that decision should not have been made. To order the grant of leave to him

would, in Mr. Symes submission, be the only appropriate outcome in the circumstances.

24. We are unable to accept Mr. Symes submissions. If the policy had still been in force at the date of the hearing, we might, following AG [2007] UKAIT 00082, have found that, given the lack of discretion inherent in it, this was a case where in allowing an appeal on "not in accordance with the law" grounds the Tribunal ought to direct a particular course of action. Even if the policy had been in force at the date of the hearing, the particular course of action the Tribunal might have directed would not have been the granting of leave. That is because the policy itself does not indicate that leave should be granted, it merely indicates that enforcement action should not be taken. The appropriate direction would therefore have been that enforcement action be not taken. We do not think that we have the power apparently exercised by the Court of Appeal in Rashid to grant or direct the grant of leave to remain purely as a reward for tribulation.

25. We also reject Mr. Saini's submissions. For the reasons we have given, the decision when made was a decision which was not in accordance with the law. A decision to make a deportation order is always discretionary, and in order to exercise the discretion properly and lawfully the person making the decision must take into account all relevant circumstances as they are when the decision is made. The first time the decision to deport the appellant could lawfully have been made was on the day the policy was withdrawn, 14 January 2008. The decision was in fact made a year before that, and cannot have taken into account the events of the subsequent year, during which the appellant was in the United Kingdom. We cannot imagine that nothing that happened in that subsequent year was relevant to the exercise of the discretion. For that reason the withdrawal of the policy cannot, in our view, save a decision which was made unlawfully during its currency. If enforcement action is to be taken against the appellant, the discretions involved in that action must be exercised lawfully on the basis on taking into account all relevant information. That has not yet been done.

26. We are aware that this determination may affect a substantial number of other cases. We cannot help that: the position is that in an official statement of instructions the Secretary of State treated a group of people as exempt from deportation and immune from enforcement action in connexion with proposed deportation. That statement then appears to have been forgotten by those who had the job of applying it. The consequence may be that a number of deportation decisions made before the withdrawal of this policy on 14 January 2008 will have to be held to have been made otherwise than in accordance with the law. As well as chapter 12 of the Operational Enforcement Manual, Mr Symes showed us chapter 10, which appears to indicate that the same considerations will apply to decisions to remove taken under s 10 of the 1999 Act. We have, however, seen no material suggesting that the same will apply to illegal entrants like KH. The process (under Schedule 2 to the Immigration Act 1971) for the removal of illegal entrants is different from that for deportation and removals under s 10 (normally of

overstayers); and there may well be reasons why those who have had some leave should be more generously treated than those who have never had any. This determination applies to those served during the relevant period with notice of intention to make a deportation order and apparently also to those served with notice of intention to remove under s 10; but it does not apply to those served with notice of intention to remove as an illegal entrant.

27. At the beginning of this determination we set out the Tribunal's conclusion that the Immigration Judge had materially erred in law. For the reasons we have given the decision against which he appeals cannot stand. He awaits a lawful decision from the Secretary of State. For that reason we substitute a determination allowing his appeal.

C M G OCKELTON
DEPUTY PRESIDENT