Case No: CO/3623/06 & CO/2900/05

Neutral Citation Number: [2007] EWHC 60 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 26th January 2007

Before :

MR JUSTICE OUSELEY

- -

Between :

MIFAIL RUDI	**Claimants**
and	
TASMIM IBRAHIMI	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Mark Henderson (instructed by **Howe & Co**) for the **Mr Rudi**
Mr Jonathan Adler (instructed by **Gupta & Partners)** for **Mr Ibrahimi**
Mr John-Paul Waite (instructed by **the Treasury Solicitor**) for the **Secretary of State for the Home Department**

- -

Judgment

Ouseley J :

1. These two applications for judicial review raised the common question as to whether the SSHD's Family ILR Exercise, to "clear the decks" as he put it, discriminated unlawfully against those who arrived in this country as unaccompanied minors. Mr Ibrahimi raised an additional fresh claim point.

2. Mifail Rudi was born on 24 January 1983 in Kosovo, of Albanian ethnicity. In 1999, he and his family were forced to flee to Macedonia by Serb ethnic cleansing. They became separated and he does not know what has become of his parents, despite his efforts to find out. He arrived in the UK with a cousin in August 1999 and claimed asylum on 10 August 1999, aged 16. He was not granted ELR until his 18th birthday. His application for asylum was refused on 19 July 2000 and his appeal was dismissed on 9 April 2001, because of the extent to which circumstances had changed in Kosovo since his departure. His separate human rights claim made in June 2001, was dismissed in July 2001, and his appeal was dismissed in July 2002.

3. Mr Rudi was cared for by local social services until he was 18. He has obtained fulltime work as a bricklayer, accommodation and self-sufficiency. In February 2005, he asked to be considered under the Family ILR Exercise, but before an answer was given, he was detained with a view to removal on 15 April 2005. The application was refused on 1 May 2005, and that is the decision under challenge. Removal directions were again set, but are deferred pending the resolution of these proceedings. He was released in May 2005 but tagged and so was unable to resume employment. The tag has now been removed but he has been unable to find work, as the Defendant reinstate his permission to do so.

4. Mr Ibrahimi is also a Kosovan of Albanian ethnicity, born on 5 March 1985. He fled to Macedonia with cousins after a Serb attack on his village, after which he did not see his parents or sibling again, despite his endeavours to trace them. He arrived in the UK with a cousin on 12 July 2000, aged 15 and claimed asylum that day. There was no grant of ELR until his 18th birthday. He was brought up in the care of local social services. Asylum was refused on 14 October 2003, following four requests in the preceding 6 months from his solicitors for an answer. His appeal on both asylum and human rights grounds was dismissed by an Adjudicator on 12 February 2004 on the basis that he would no longer be at risk in Kosovo, and that he had not established a private life in the UK. There was no further appeal. He made a claim under the Family ILR Exercise in March 2006, which was refused. He now lives with his Slovakian girlfriend. He has had various cash in hand jobs intermittently.

5. He challenges the refusal of leave dated 20 March 2006 under the Family ILR policy. The SSHD also considered whether the representations in the judicial review claim form lodged to challenge that decision amounted to a fresh claim, because it raised points which had not been canvassed in the application for leave to remain. These relate to delay in decision–making and impact of that on Article 8 rights. He refused to treat it as a fresh claim and that refusal dated 12 July 2006 is now challenged by amendment to the claim.

6. Mr Rudi has no right to remain after the dismissal of his appeal in July 2002 and does not contend that removal would breach the Immigration Rules or any international obligations, save to the extent that his claim under the Exercise engages ECHR rights, which it could not have done until its extension in August 2004. He has made no fresh claim under Article 8 alone and despite some suggestions at times to the contrary in Mr Henderson's submissions, his only claim relates to the Exercise. Mr Ibrahimi was in that same position after the dismissal of his appeal in February 2004, save that he now alleges that rights under Article 8 would be violated by his removal other than because of the extension in August 2004. I make that point because some of Mr Henderson's advocacy, and he led the argument for the Claimants on this issue, elaborating on the hardships awaiting them in Kosovo, suggested that a wider breach of international obligations would be involved in their return than was justifiable.

The Family ILR Exercise

7. On 24 October 2003, the SSHD announced what has become known variously as the Family ILR Exercise or concession or the one-off or back log clearing exercise, less aptly as the family amnesty. As originally formulated, a family would be granted ILR outside the Immigration Rules if the application for asylum was made before 2 October 2000 and the applicant for asylum at the date of the application for asylum *"has"* at least one dependant *"currently"* aged under 18 who *"has been living"* in the UK since 2 October 2000. A family did not cease to be eligible even if the asylum application had been refused and all avenues of appeal had been exhausted provided that they were still present, nor did the grant of limited leave remove eligibility. In order for the family to qualify, the dependant, since 2 October 2000 and on 24 October 2003, had to be a child of the applicant or of the applicant's spouse, aged under 18 and financially or emotionally dependant on the applicant, and part of the family unit. Once the applicant for asylum met the criteria, leave would be granted in line with that grant to all dependants who met the basic criteria; a dependant for these purposes was the spouse, or child of the applicant or spouse, who was dependant on

and formed part of the family unit on 24 October 2003. There were exclusions in respect of a number of factors including criminal convictions.

8. Both Claimants, whatever their parental position, would have been excluded from the Exercise as originally formulated because they turned 18 between 2 October 2000 and 24 October 2003. This was common ground.

9. In August 2004, the Exercise was extended. It would now apply to someone who *"had"* a dependant under 18 in the UK either on 2 October 2000 or on 24 October 2003. Qualifying dependency could be shown by dependency, living as part of the family unit, on either of those two dates. Leave would be granted to dependants of a qualifying applicant who formed part of the family unit on 24 October 2003. Accordingly, the cases were argued by all parties on the basis that the two Claimants would have been eligible now for a grant of leave if they had arrived in the UK with their parents or one of them and had been part of the family unit on 24 October 2003. Those who turned eighteen between 2 October 2000 and October 2003 were no longer necessarily excluded either from qualifying the family or from being granted leave in line with the applicant.

10. A closing date of 31 December 2004 for applications under the Exercise, imposed with the August 2004 extension, has been abandoned and there is now no cut off date for applications under it. The Exercise has continued to develop. The SSHD issued revised criteria on 21 June 2006 which have the effect of removing the exclusion of those who have only minor i.e. "non-recordable" convictions. Those previously refused can re-apply. The SSHD will also consider cases which fall outside the scope of the Exercise *"in truly exceptional circumstances"*, (2005), or *"only in the most exceptional compassionate circumstances"*, (2006).

11. In brief, Mr Henderson submitted that the operation or terms of the Exercise were unlawful because they offended the common law principle of equality, treating like cases alike, because no rational distinction could be drawn between the accompanied and unaccompanied child when deciding to whom to grant indefinite leave to remain. The effect was to breach Articles 8 and 14 ECHR, taken together, through discrimination affecting private and personal lives as between children because of their status, for which no rational or proportionate justification had been provided. This made it necessary to examine the rationale and background to the Exercise. In circumstances to which I shall come, his submissions became considerably more complex.

12. The original Exercise was introduced by the Home Secretary as *"Clearing the Decks for Tough New Asylum Measures,"* in the Press Notice of 24 October 2000 which with a broadcast interview contain the announcement and rationale for the Exercise. It said:

> *"Prior to the introduction of tough new rules to build on the tremendous progress already made in halving the number of asylum seekers entering Britain this year, longstanding and highly expensive family asylum claims will be eligible for leave to remain, Home Secretary David Blunkett announced today.*
>
> *Up to fifteen thousand families who sought asylum in the UK more than three years ago, the majority of whom are being supported by the taxpayer, will be considered for permission to live and work here.*
>
> *The move comes ahead of the final stages of the Government's reforms of the asylum system which will ensure it is not open to delays and abuse in the future."*

13. The Notice then quoted Mr Blunkett who, having spoken of *"enormous improvements to the asylum system"* and *"the difficult decisions"* which he had *"not been afraid to take"*, continued:

> *"However, the legacy of the historic inadequacies of the system is still with us. This does not manifest itself only in statistics but in the lives of real families in our communities. As the Chief Inspector of Schools said earlier this week, children from asylum-seeking families are especially motivated and doing well in schools. MPs from all sides appeal to me for such families to be allowed to stay in the UK every week.*
>
> *"Granting this group indefinite leave to remain and enabling them to work is the most cost-effective way of dealing with the situation and will save taxpayer's money on support and legal aid. These are difficult decisions but I do not believe it is the best use of taxpayer's money to take these expensive longstanding individual appeals through the courts. I want to ensure our relentless focus is on steadily increasing the proportion of failed asylum seekers removed from now on."*

14. Various statistics were cited in the Notice which are of relevance to the arguments. 12000 families who applied for asylum before 2 October 2000 were still being supported by the HO, the vast majority of whom were thought likely to qualify. Savings of £15m "*would*" be made for every 1000 families moved off support, plus legal aid savings. Up to 3000 self-supporting families might also qualify. ILR meant that they could live and work without restrictions.

15. In his radio interview on "The World at One" on 24 October 2003, Mr Blunkett spoke of *"up to 15000 families"* benefiting, and because the number of children was unknown, the precise number of those who might be granted ILR could not be known but was probably around 30000 in total. *"We…want to draw a line under those cases which either haven't been dealt with through the system or where it is impossible to remove. And there is no point trying to drag children out of school and people out of communities that they have built a life in."* 2 October 2000 had been taken as the cut-off date for asylum applicants to benefit, because of the possible second right of appeal on human rights grounds, elongating the process *"beyond belief"*. Some of those who would benefit would be illegal immigrants and not genuine refugees but removing those who had been here for years required disproportionate effort. The beneficiaries would be able to work, although some already were able to do so. He emphasised that they were dealing with people who had multiple rights of appeal, had been here for many years, were families and who could only be removed with difficulty.

16. Mr Blunkett said in another radio interview on 27 October 2003, in the context of the signals which the Exercise might send to those abroad, that the Exercise *"was about saying these people are already embedded in our country and it would not only be disproportionate but wrong to uproot these children from school and the community….we need to draw a line under that."*

17. The contemporaneous evidence for the thinking behind the August 2004 extension to the Exercise was contained in a letter from Mr Browne, a HO Minister, to all MPs. The aim of the Exercise was *"to help eligible families become integrated into the communities where they have settled, by enabling them to sustain themselves through permanent paid employment"*. The eligibility criteria had been updated *"to remove a number of anomalies, identified during the exercise itself and in the course of ongoing consultation"* with MPs and NGOs. That is as far as it went.

18. Mr Ponsford, a senior policy officer in the Asylum and Appeals Policy Directorate of the Immigration and Nationality Directorate, gave further evidence about the rationale for the Exercise in his witness statement for these proceedings. Its primary purpose had been to relieve the administrative and financial burden on the HO caused by the rapid growth in asylum applications and a backlog in the removal of those whose claims had failed. The exercise was directed at families with children for the following reasons.

19. (1) Public money could be saved directly by enabling the families concerned, who were largely supported at public expense thorough local authorities or NASS, to find work and support themselves; savings *"could"* amount to £15m per 1000 families.

20. (2) Removal of families placed a particularly heavy burden on the HO, administratively and financially, and was generally considerably more difficult to achieve than in the case of an individual. Individual family members, who had previously been considered as dependant on another's claim, would often later make a separate claim, sometimes on the brink of removal. Removals would be aborted. The new one-stop appeal system would put an end to that for the future but serial claims and appeals had been a substantial hurdle to the removal of family groups with pre-October 2000 asylum claims.

21. (3) Pre-removal detention of families created problems. If detained close to removal, there might be insufficient time for them to take advice; if sufficient time were given, that could lead to unduly long periods of detention for children. There were difficulties in finding detention facilities for families.

22. (4) Compassionate reasons applied to families because some would have started to develop ties to communities and children were likely to have settled at school. Mr Ponsford was at pains to explain that the Exercise was not intended to cover all those in the backlog who might have a compassionate claim. Unaccompanied children, when adults, could make a claim on compassionate grounds.

23. Mr Ponsford said that in the light of this and other claims the SSHD had considered carefully whether the terms of the Exercise should be widened to include asylum seekers who arrived as unaccompanied minors. He thought that no change was now or had originally been warranted, for the following reasons.

24. (1) There were a significant number of asylum claims from unaccompanied minors, 2990 in 2004, 9% of the total. Comprehensive measures were in place to protect such minors on arrival who had different needs from accompanied minors.

25. (2) They were not removed on the failure of any claim until they reached 18, in the absence of suitable reception place in their country of return. They were then returned as individual adults, normally.

26. (3) An unaccompanied minor had to look to the state for support, and so the grant of leave to him could not relieve the state of the need to provide for him. The grant of leave to a parent with a child, in contrast, could enable the parent to work and relieve the state of the burden of caring for that child.

27. No additional explanation for the purpose of the August 2004 extension was given nor of how the changes which it introduced related to the rationale for sustaining the distinction between accompanied and unaccompanied children.

28. Another official made a further brief statement to confirm that the relevant parts of Mr Waite's skeleton argument for the SSHD represented the SSHD's position, and were not simply the product of Mr Waite's advocacy. They responded to criticisms in the Claimant's skeleton argument of the rationale set out above. He elaborated the problem of family removals where a family member had claimed before 2 October 2000. All members of a family could make an asylum claim at any time and hold up the removals of family members; the certification of further asylum claims by those already considered as dependants was not introduced until 2000. Most of the members of those families eligible for the Exercise were in a position also to make further individual human rights claims, covering the same ground perhaps as in the asylum appeal or in a dependant's case. Delay increased the difficulty of removal.

29. Accompanied children were removed with their parents but unaccompanied children were not removed until they were adults, in the absence of reception facilities for them on return. The position of adult children was discussed: there was no legal obligation not to remove an adult child unless his parents were being removed at the same time. But, if that did not happen, and they all lived together, there was always a risk of Article 8 claims in respect of the split to the family, and that a dependant, now an adult, would make an Article 8 claim shortly before departure.

30. In 2005, the SSHD published a comprehensive Family Removals Policy for the first time, broadly reflecting practices existing in 2003 when the Exercise was introduced. There is now a March 2006 version. As Mr Henderson pointed out it states that it deals with the removal of families with children aged under 18. However, much of its language is apt to cover the position of all adults who are part of the same family unit living at the same address. This is the practice which the HO says it follows in relation to such families. Mr Henderson said that the HO frequently tried to remove adult members of a family, leaving others behind, on the basis that the adult enjoyed no family life with that unit.

31. It is not necessary to set out the policy. It bears out what was said by the SSHD that there could be situations in which an adult family member, but not all other family members, might be removed ; there was, however, a clear emphasis on special internal procedures if it were proposed to split an existing family unit which had arrived and remained together. I accept that there will be some circumstances in which the HO will seek to remove young adults who are no longer living with their parents and with whom the degree of family life will be debateable.

32. To the Claimants' suggestion that not all principal family applicants benefiting from the Exercise had needed ILR in order to work lawfully and provide for their families instead of the state doing so, the SSHD responded that the concession for asylum seekers whose claim was outstanding for more than 6 months enabling them to work had been removed in July 2002, save for exceptional circumstances. From April 2000, it had only been available to those whose initial decisions had been delayed more than 6 months, and no longer applied to those whose claims had been dismissed but who were appealing. Those awaiting removal could not work. It was accepted that there always had been some eligible families who were entitled to work and did so.

33. I was provided with information about the numbers of those who had benefited from the Exercise so far. By September 2005, 16870 families had been granted ILR under the Exercise, and as of June 2006 that figure had risen to 24030, with another 7860 granted on another Family ILR application. Some 28000 were refused or ineligible. 475 applications were being considered. In the three years 1998-2000, an average of roughly 3000 asylum claims were made each year by unaccompanied minors.

34. The SSHD's decision of 1 May 2005 on Mr Rudi's application under the Exercise simply said that he fell outside its scope but this was elaborated in response to the claim in a letter of 15 June 2005. It emphasised that its purpose was *"clearing the decks"*. But in a sentence characterised as showing that the SSHD's reasoning was flawed, it added that unaccompanied children had their own separate policy and so could not seek to benefit from the Exercise. There is nothing more in the refusal letter sent to Mr Ibrahimi.

35. I raised at the outset of the hearing why the focus of the Claimants' argument was on the unlawfulness of the different treatment afforded to accompanied and unaccompanied children, in view of the fact that their claim under the Exercise could only be made at all as a result of the August 2004 extension, by which time the Claimants were adults. I suggested that the only difference which required to be

examined was that arising as between adults, albeit as a result of their parental position on arrival, and an assumed continuing membership of a family unit at 24 October 2003. This was capable of affecting the whole way in which Article 14 was arguably engaged.

36. Mr Henderson countered this by saying that the position which the Claimants were in was the result of their position on arrival as minors, unaccompanied; the justification put forward by the SSHD for their treatment under the August 2004 extension related to the policy considerations which underlay the Exercise in its original form. The justification did not derive from any separate or explicitly identified different rationale for the August 2004 extension. There was no explanation of the type of anomaly which the change was intended to eliminate, which might have borne upon the making of the distinction complained of, as between adults who had or had not arrived as minors with parents. Had the Claimants arrived as minors accompanied by a parent in a qualifying family, they would have received ILR in August 2004 as adults in line with the parent if they had remained part of the family unit as at 24 October 2003**.**

37. Mr Waite accepted that the focus of his arguments was on the rationale for the original policy and that he was not in a position to put forward any relevant separate rationale for the August 2004 extension in a way which brought in different factors. Essentially the rationale remained the same. The rationale included the difficulty of removal and his submissions referred to the difficulties of removing adults who were part of a family.

The submissions

38. It appeared to me that the principal bases upon which Mr Henderson put his case were in essence the same, whether analysed as the common law principle of equality, treating like cases alike, regardless of whether that was truly a separate principle of review from rationality, or as an argument that Articles 8 and 14 ECHR were offended by the alleged discrimination against the two adults Claimants here. No distinction could be justifiably or rationally drawn for the purposes of the Family Exercise between those who arrived as children with their parents and those who arrived unaccompanied and remained without their parents. The different treatment was irrational, or discriminatory in a way which breached the ECHR.

39. Following a request from me for further submissions about the proper application of the Exercise to dependant adults, it became apparent that judgment could not be delivered before the Court of Appeal had heard argument in *AL (Serbia) v SSHD* [2006] EWCA Civ 1619 at the start of November 2006 and little point in doing so before the delivery of its judgment on 28 November 2006. That decision was to deal with the ECHR discrimination issue on appeal from the AIT. AL was a Kosovan in the same position as these Claimants: he had arrived as an unaccompanied minor, but he had been granted ELR until his eighteenth birthday which fell between 2 October 2000 and 24 October 2003; his asylum claim had failed and was not pursued. The Court of Appeal concluded that although he might be a member of a comparator group essentially consisting of unaccompanied minors, he was better seen as a member of a different comparator group with "other status" within Article 14 because the different treatment was occasioned by membership or otherwise of a family. Either way however the discrimination was justified by the evidence presented on behalf of the SSHD as to the rationale for the Family Exercise. This I have set out above, although it appears that not all the material eventually before me was before the Court of Appeal, including the further submissions from the SSHD explaining how the Exercise worked in practice.

40. I invited further submissions on the impact of that decision on this case. Suffice it to say at present that neither Claimants advocate saw that decision as determinative of their cases under the Family Exercise. Their further submissions related to the extension of the Exercise in August 2004 when they were both adults and upon which the Claimants would rely, were they otherwise within its terms.

41. These further submissions involved consideration of those previously made in response to my request and it is convenient to turn to those earlier written submissions here. Perhaps ill-advisedly, I had sought submissions on whether a distinction was drawn within the terms of the Exercise between the dependency which enabled a family to qualify and the dependency which enabled a person to receive leave in line with the applicant in a qualifying family. There are two definitions of "*dependant*"; one for the purpose of deciding whether a family qualified and a second for the purpose of deciding which members of the family should receive ILR in line with the applicant. They are set out in two places and are different. The latter alone does not include those dependants who were part of the family unit in October 2000 but had ceased to be so by October 2003. It would not be sufficient simply now to come of age between the two dates in order to benefit individually from a qualifying family applicant being granted ILR; a relationship was still required with the family. This could mean that even though a child had arrived with his parents and the parent-applicant for asylum successfully relied on him as the qualifying dependant for the application under the Exercise, if that child, now an adult, ceased to form part of the family unit on 24 October 2003, he personally would not be able to rely on the Exercise.

42. The reason why this might matter in relation to an adult who sought to rely on the August 2004 extension was that the comparator for the discrimination issue would not be an accompanied minor, nor an accompanied minor who was now an adult, but an accompanied minor, now an adult, who had been a member of the family unit as at 24 October 2003. The measure of any discrimination could involve consideration of the degree of dependency which an unaccompanied minor now an adult might have, whether on social services or another agency as at that date. If he could show no dependency at all at that date, he might not be able to show that he was treated differently from another adult also no longer part of a family unit. The discrimination issue would disappear or would have to be considerably reformulated.

43. Mr Waite said that the Exercise simply required that the applicant have a dependant under eighteen on either of 2 October 2000 or 24 October 2003, who remained part of the family unit on the latter date. The SSHD had taken a broad view of those who might be part of the family unit; "*the fact that an individual might have left the family home did not exclude that dependant, provided that the family remained living in the UK.*" However the SSHD could "*confidently assert*" that the vast majority of those families granted leave were living in the same household in the conventional sense. I add that it is not difficult to envisage young adults away from home who are still dependants or part of the family unit, for example students, or those in early and uncertain employment.

44. Mr Henderson submitted that it would be a perverse reading of the Exercise or application of the policy to hold that the dependant who enabled the applicant to qualify might himself not qualify for a grant of leave in line. He then went further, seizing on what Mr Waite had written, to assert that the SSHD's position in substance was that it was only necessary for an individual to be under eighteen and with his parent on 2 October 2000 in order to qualify the family and to benefit from the Exercise personally. There was in reality no requirement that the former minor remain part of the family unit or household or be a dependant at all, at the later date of 24 October 2003; he could have left home completely save that he had to remain in the UK. I have italicised above the passage from Mr Waite's submissions which engendered Mr Henderson's submission.

45. Mr Henderson then developed at some length a written submission, scarcely foreshadowed in his oral submissions, to the effect that the SSHD's new position, as he saw it to be, meant that there was no longer any rational connection between the justification for the original Exercise and the August 2004 extension from which the Claimants hoped to benefit. There was no rational justification for distinguishing

between young adults depending on whether they had been accompanied or unaccompanied minors upon entry, as they were not required to be part of a family as at 24 October 2003. Mr Adler adopted those submissions. The focus of the discrimination argument could no longer be, as the SSHD had suggested that it was, upon the unaccompanied on arrival versus the accompanied on arrival who as adults remained part of the family unit on 24 October 2003. The SSHD had removed that latter requirement in his submissions to the Court.

46. The further submissions from Mr Henderson on *AL (Serbia)* were lengthy and elaborate. He recognised that he could not now pursue his Article 14 claim but said that the Court of Appeal had not been able to consider his common law challenge to the 2004 extension, an extension which the Court of Appeal in any event had not considered separately from the original Exercise. I point out at this stage that the essence of Mr Henderson's rationality challenge before me had been that the distinction between accompanied and unaccompanied minors infringed the common law principle of equality. However, this was but a further guise for the discrimination challenge and as that now must fail, so too must his common law rationality challenge to the extent that it reflected the same arguments. As I have said, the case was argued before me essentially on the basis that the August 2004 extension had no separate or distinctive rationale, and the challenge to it was made on the basis that it reflected and continued the distinction between accompanied and unaccompanied minors which Mr Henderson said was unlawful. That was the determinative issue which has now been decided clearly against the Claimants here.

47. What his later written arguments did was to bring to the fore a contention which had not really emerged in oral argument. Mr Henderson, picking up traces of his earlier argument, and seizing on what Mr Waite had submitted in writing about the way in which the extension was applied in practice in certain circumstances, developed a very different argument about the rationality of the extension as separate from that which animated the original Exercise.

48. Mr Henderson had argued orally, in response to my question about the impact of the extension, that the justification for the original Exercise, could not apply to the extension and there was no further justification explicitly offered for the distinction which the extension now drew between adults based upon their original status upon arrival. The mention of anomalies told nothing of what they were. He said that he therefore had to succeed on the rationality challenge to the application of that policy. *"Constructing elaborate and exhaustive comparators is unnecessary for the common law rationality challenge*", he now submitted. The one stop provisions, the employment arguments, the difficulty of detention of children or families did not

apply to the distinction between adults based upon their childhood circumstances which the extension introduced. Those previous rationales had ceased to be relevant.

49. He then suggested that the SSHD's contention that it normally only removed families together was flawed. The purpose of the SSHD's observations had been to reinforce his justification for confining the Exercise to families, in part because of the difficulties in removing families as a whole. The Removals policy published in 2005, and reflecting practice in 2003, applied to families with children under eighteen. It did not apply on its terms to those who were adult members of that family, principally young adults, who lacked dependants. The SSHD's assertion that in fact he applied the removals policy to families with adults who were dependants or living with the family was a response to a challenge and could not sensibly be relied on in fact. If there had been such a policy or practice it would have been produced. Even less could he assert that that was his policy or practice in view of what Mr Waite had said about the fact that a former child could stay in line with the applicant under the family Exercise even though he had now left the family unit.

50. Mr Henderson then submitted that I was not compelled by the Court of Appeal decision to reject the rationality claims. It had not decided them. The August 2004 extension had been treated as just a letter sent a few weeks after the initial Exercise. The rationale for the extension had not been addressed by the Court. The witness statement which supported Mr Waite's skeleton argument had not been supplied to the Court, and was wrong anyway. The Court had not been told of what Mr Waite had said in written submissions about how the SSHD did not remove those who were no longer living with the family unit; nor had it been told that the SSHD only removed a family when it could remove the adult members together; nor had it had any justification for treating adults differently depending on the location of their parents, in or outside the UK. The Court of Appeal had approached the case as if it depended on discrimination between children of different status; its consideration of the removal of families was based on the removal of families with children and not those with adults, dependant or not. Mr Adler adopted those submissions and what he added seems to me to be no more than an invitation to treat the Court of Appeal decision as flawed because of what appeared to Mr Adler to be its simplistic reasoning; he did not address its binding force.

51. Mr Waite regarded Mr Henderson's submissions as simply not open to him, for Mr Henderson had previously accepted in correspondence that the decision in *AL* would bind his client in this case. Although disputed by Mr Henderson, there is force in the contention that the Claimants changed their position in response to a combination of my question about how their contentions about discrimination against children related to the fact that the extension upon which they had to rely applied only to adults, and

in response to what Mr Waite said in written submissions; their responses to the Court of Appeal's decision in *AL* elaborated on that same process. But that cannot of itself be determinative of whether they are right or not. Mr Waite had sufficient opportunity to put in further material demonstrating what separate justification in detail there was for the August extension if that were thought to be illuminating.

Conclusions on the Family Exercise

52. The Claimants' contentions are now in my judgment untenable. They pay insufficient attention to the ratio of the Court of Appeal's decision in *AL* and to its necessary implications. The Court considered an individual in the same position as these Claimants. It had the original and extended Exercise before it. The issue as to discrimination was only a live issue in that case, as in this one, because of that extension. It concluded that there was no unlawful discrimination against those former minors, now adults, to whom the extension would have applied but for their missing parents. That conclusion cannot be challenged before me nor was it. Neither Mr Henderson nor Mr Adler in all the plenitude of their submissions contended that there was an Article 14 issue which the Court had not considered and which remained open to them, arising out of their contention that there was no rationale for the distinction between adults depending on the whereabouts of their parents which it was said that the extension of August 2004 embodied. If any discrimination for Article 14 purposes is justified on the evidence which the Court of Appeal had before it, it is to my mind impossible to contend that that self same distinction is irrational. The common law ground stands or falls with the Article 14 justification, just as it did on the primary arguments addressed to me relating to the position of children. The Claimants' submissions simply ignored the true import of the decision of the Court of Appeal.

53. In any event, even if, which I can accept, there was an argument which Mr Henderson would have put before the Court of Appeal but which the advocate for AL did not, that does not alter the binding nature of the decision on the issue which it decided, nor the import of that decision for the kindred common law rationality issues.

54. I note in passing that it is a fallacy for the Claimants to suppose that the absence of an explicitly developed separate rationale for the extension shows that it lacked a rationale. Their notion that the absence of detail to explain the anomalies which lay behind the extensions showed it to lack rationale is incorrect. But even if that had been right, the conclusion which they then drew is questionable at least. Their consistent submission was that the extension lacked rationale and so was irrational. If that were so, their case must fail. The very policy upon which they rely to assert an

unreasonable distinction would be unlawful. Altering the policy in the way contended for by the claimants would not provide it with a rationale. Moreover, their assumption that it is for the Court to correct any such unlawfulness by altering the policy to favour just this group of Claimants, and then holding to be unlawful those decisions which failed to respect that policy as reformulated by the Court, is problematic. Any such alterations are capable of giving rise to their own anomalies and irrational distinctions in practice, of which a court may know nothing.

55. The Claimants' case that there was a separate issue which had not been considered was also based on a misunderstanding of the SSHD's position and indeed a misrepresentation of it. The SSHD's position was that there was no need to provide separately a rationale for the position of adults as it emerged under the extension because it was simply an adjustment to the existing policy which was designed to deal with families which now included young adults as time moved on, for reasons now held to be lawful. The different treatment of these young adults stems from their different position as members of a family on arrival and continuing at 24 October 2003. It reflects the original purpose of the Exercise, and that is why the Court of Appeal treated the extension in the way it did. The different treatment accorded to the unaccompanied minor, now an adult, and the accompanied minor, now an adult is essentially a consequence of their original status. There is no further issue not before the Court of Appeal.

56. I also have no difficulty in envisaging how NGOs and MPs were involved in removal decisions of young adult family members which gave rise to a repetition of the difficulties which the Exercise had been designed to avoid: repeat claims, splitting families, anomalous distinction between family members, young adults supporting other family members and so on. I have no difficulty in seeing how on a broad brush basis, the August 2004 extension removed some of those problems arising from the perhaps unforeseen consequences of the way in which the Exercise had been formulated in the first place and the time which its implementation had taken. This extension would not have departed from its original rationale.

57. Moreover, the general position of the SSHD as explained by Mr Waite is not as submitted by Mr Henderson. The SSHD did not suggest that ILR under the Exercise as extended was routinely granted to young adults who no longer formed part of the family unit. That misrepresentation was the foundation for much of the argument. I return to what Mr Waite wrote. First, he said, the vast majority of the benefiting families were living in the same household as a family unit. I see no reason not to accept that; the Claimants do not reject what the SSHD said; they accept it but rely upon their misunderstanding or misrepresentation of it. So the general position is quite opposite to what they say. There is no general anomaly. The Claimants are not

in a parallel position to those who are living with a family in a family unit when it comes to the application of the various factors which animated the Exercise.

58. Second, the mere fact that the dependant has left the family home would not exclude them; a broad view was taken. I assume that the SSHD did not intend to draw a distinction between those who had left the family home and those who were part of the family unit. But it is not difficult to envisage ways in which young adults might have a relationship of dependency either way with parents without being clearly part of the same household, in ways which would warrant a broad view being taken for the purposes of the family exercise, and in particular in ways which might make removal arguably difficult under Article 8. It could apply to students who lived away and were largely self supporting through employment, or to those starting out on a career, essentially with their own base, but maintaining a foothold in the family home; or those who provided filial support to ageing parents who were not wholly dependant on them. Their removal could give rise to problems of alternative public care, loss of sibling connection or support, arguable Article 8 issues. The question for the SSHD at this stage was not whether if he really pushed the issue he would win through the courts and achieve removal, but whether the effort required to do so was disproportionate, in the context of the backlog exercise.

59. It would be idle to pretend that none of these factors could apply in some form or other to those who had arrived as unaccompanied minors; the distinctions in life are rarely so sharp edged. But that does not alter the essential rationale for the difference: they are more readily removable because they do not have the family connections in general; their employment is less likely to remove a family from being a public burden. The rationale for the Exercise was lawful; the extension has not been shown to be irrational. Rather it extends the Exercise as intended.

60. Accordingly, the ratio of *AL* shows that the exclusion of the Claimants from the operation of the extension is not discriminatory, and the common law challenge is equally doomed to fail on the same reasoning. There was no significant argument which the Court of Appeal lacked and the elaborate submissions made by the Claimants in response to the decision in *AL* cannot show that it is distinguishable, or that there is a new point to be considered. Mr Rudi's claim fails and is dismissed.

Mr Ibrahimi's fresh claim

61. The second group of arguments on behalf of Mr Ibrahimi remains for consideration and to that I now turn. Mr Ibrahimi contends that the refusal of the SSHD to treat his circumstances, set out in his judicial review claim form, as amounting to a fresh claim is irrational. An Immigration Judge arguably might allow the claim on appeal. He first relied on the terms of the Exercise and extension which does not apply to him: the circumstances arguably fell within the spirit if not the letter of the policy. In *R (Domi) v SSHD* [2006] EWHC 1314 Admin, Keith J had held that it was arguable that the Exercise drew an irrational distinction, as argued here, and that an Immigration Judge might allow an appeal on that basis. In *R (Shkembi) v SSHD* [2005] EWCA Civ 1592, the Court of Appeal had held in effect that a policy which did not strictly apply could supply through its rationale an exceptional case for an Immigration Judge to consider on appeal.

62. Second he relied on personal circumstances. There had been an inordinate delay in deciding the asylum application: three years and more, whereas the SSHD should have decided it, as Mr Ibrahimi was a minor, within 6 months of his claim for asylum. Even for an adult, a year would have represented the outer limits of what was a reasonable time for a decision. This delay was not his fault and it had amounted to acquiescence by the SSHD in Mr Ibrahimi becoming embedded in the UK. Here there had also been pressure by the Claimant's solicitors for a decision. Delay by itself and without any consequential prejudice could make removal unlawful; *Akaeke v SSHD* [2005] EWCA Civ 947.

63. The SSHD had also failed to grant ELR contrary to his policy to do so for unaccompanied minors. This would have lasted until Mr Ibrahimi's eighteenth birthday. On its expiry he could have applied for an extension and appealed against a refusal. The failure of the SSHD to take steps to remove Mr Ibrahimi had also added to his expectation that he would be allowed to remain, and to his becoming further embedded in the UK.

64. He now lived with a girlfriend and were he to leave the UK he could not apply for entry clearance because they had not lived together as unmarried partners for two years and she was neither a UK national nor settled here. Her immigration status was itself uncertain. The relationship had started when they both knew that their status in the UK was precarious. She could not join him in Kosovo. She is Slovakian. His only known surviving relative, a cousin with whom Social Services had housed him on his first arrival in the UK, provided emotional support beyond that normally implicit in

such a relationship. They had lived together from 2000-2003. Removal would rupture that relationship.

65. This relationship had not been referred to by the Claimant in his asylum and human rights one stop appeal to the Adjudicator. Possible relationships of relevance had not been pursued by his counsel, Mr Adler, as he freely accepted. The Claimant's evidence had been that he had no family in the UK. However the SSHD did not dispute that the Claimant had lived with his cousin for three years nor that the cousin was the Claimant's only known living relative. Mr Adler submitted that it was unfair to hold the Claimant's failure to mention this relationship as evidence that the relationship was not as deep as the Claimant asserted. There was also evidence from the cousin that the two lived ten minutes away from each other now and saw each other at least once a week; they treated each other like brothers as they had no surviving relatives in the UK; there would be disastrous emotional consequences for the Claimant were the Claimant to be removed. Contrary to what the Adjudicator had held in 2004, the Claimant had now established a private and family life in the UK over the six years he had been here. These facts had not yet received judicial consideration. The Adjudicator did however consider the facts relating to delay as at that mid 2004.

66. Although the consequences of the SSHD's failure to grant ELR up to the Claimant's eighteenth birthday were not comparable to those in *Shala v SSHD* [2003] EWCA Civ 233, [2003] INLR 349 the Claimant had lost other benefits: a lawful period of leave which would have further embedded him within the UK, permission to work and an "upgrade" appeal under Article 8.

67. The SSHD did not accept that even if the asylum claim had been decided within a short time of the Claimant's arrival in the UK, the Claimant would have succeeded, because of the changed situation in Kosovo. Had the Claimant been granted exceptional leave to remain following a reasonably prompt decision, so that he could have applied for an "upgrade", by the time he had ceased to be a minor he was in a position to return to Kosovo as an adult.

68. Mr Waite for the SSHD submitted that it would be inappropriate for decisions in cases of this sort to be made by close comparisons of similar cases in order to see whether other cases which bore some similarities had been treated as exceptional. In *Mongoto v SSHD* [2005] EWCA Civ 751, it had been held, in relation to the Family Exercise where there was a lawful policy to assist limited categories of entrants, that it would be quite wrong for the courts to build expectations approaching enforceable rights for the benefit of those to whom the policy did not apply. This would

discourage the adoption of humane but exceptional policies by the SSHD. Mr Waite submitted that there was no room for a near miss approach so as to create an exceptional case.

69. There was nothing irrational in the SSHD's refusing to treat the circumstances as exceptional so as to warrant the grant of leave outside the terms of the Exercise. The Claimant had not mentioned his cousin to the Adjudicator. The relationship with the girlfriend had not started until October 2005 and cohabitation only in early 2006. The SSHD enjoyed a wide margin of discretion as to whom he granted leave outside the terms of the Exercise.

70. As to the fresh claim, it was agreed that something more than normal emotional ties had to exist in order to establish family life between adult siblings, such as a relationship of dependency. That had not been shown here. The fact that the cousin had an outstanding application for leave to remain did not mean that there was any significant obstacle to his also going to Kosovo with the Claimant. There was no more than the bald assertion that the Claimant was living with his girlfriend and the SSHD was entitled to see some evidence of joint life. There was no reason why she should not join him in Kosovo.

71. On delay, Mr Waite submitted that evidence produced in other cases, notably in *Ajanaku v SSHD* [2005] EWHC 2515 Admin, showed that the decisions made in 2000 were in respect of claims already some 18 months old. In the preceding three years there had been an unprecedented rise in the number of asylum seeking unaccompanied minors. A delay of three years and seven months in that case on a claim made in 1997 was held not to be so egregious as to be in itself unlawful especially as the decision had not been chased. Here the only chasing had been in the last six months before the decision.

72. There was no comparison with *Shala*, above, in which the delay meant that the probable failure to grant either ILR or ELR meant that *Shala* lost the opportunity to make an in-country marriage application. I regard *Shala* as a good example of how the failure of the SSHD to deal with immigration procedures with proper expedition, creating procedural problems for the entrant, can impede his reliance on the proper fulfilment of procedural requirements as a basis for removal. The family relationship here such as it is could not give rise to any entitlement to stay or enter under the Rules.

73. There was some debate over whether the decisions of the Court of Appeal in *Strbac v SSHD* [2005] EWCA Civ 828, [2005] Imm AR 504 and *Akaeke v SSHD* [2005] EWCA Civ 947, [2005] INLR 575 were consistent; and over what the proper approach to delay in the absence of prejudice should be. These issues were considered authoritatively by the Court of Appeal in *HB (Ethiopia) and Others v SSHD* [2006] EWCA Civ 1713, heard at the end of November 2006 and decided on 14 December 2006. I permitted Mr Adler and Mr Waite to make further submissions on this decision; these were concluded on 22 January 2007.

74. I set out what Buxton LJ said at paragraph 24, drawing out the principles from the authorities binding on the Court of Appeal:

> *"i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within article 8(1). That however is a question of fact, and to be treated as such.*
>
> *ii) The application to an article 8 case of immigration policy will usually suffice without more to meet the requirements of article 8(2) [Razgar]. Cases where the demands of immigration policy are not conclusive will be truly exceptional [Huang].*
>
> *iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in Shala and Akaeke); and persons who have no such right.*
>
> *iv) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [Akaeke], to enforce those procedural rules [Shala; Akaeke]*
>
> *v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome [Strbac at § 25].*
>
> *vi) The mere fact that delay has caused an appellant who now has no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR does not in itself affect the determination of a subsequent article 8 claim [Strbac, at § 32].*

vii) And further, it is not clear that the court in Strbac thought that the failure to obtain ELR on asylum grounds because of failure to make a timely decision could ever be relevant to a decision on the substance, as opposed to the procedure, of a subsequent article 8 claim. Certainly, there is no reason in logic why the fact alone should affect the article 8 claim. On this dilemma, see further § 6 above.

viii) Arguments based on the breakdown of immigration control or of failure to apply the system properly are likely only to be of relevance if the system in question is that which the Secretary of State seeks to rely on in the present proceedings: for instance, where a procedural rule of the system is sought to be enforced against the applicant [Akaeke]. The same arguments do not follow where appeal is made in article 8 proceedings to earlier failures in operating the asylum system.

ix) Decisions on the proportionality made by tribunals should not, in the absence of errors of principle, be interfered with by an appellate court [Akaeke]."

Conclusions on the fresh claim

75. The Claimant's arguments are not tenable. The starting point is that there is no Rule or policy which applies to him. He falls outside the scope of the Family Exercise and its limitations are lawful. He has had his asylum claim and a human rights claim including Article 8 heard and dismissed. He seeks to raise a fresh claim based on Article 8. The arguably new material consists of his relationship with his cousin which he could and should have adduced before the Adjudicator but did not; his relationship with his girlfriend, the greater lapse of time and what he sees as the rationale of the Family Exercise even if its terms did not apply to him. All this is set within the overarching submission that the SSHD has delayed inordinately in reaching a decision on his case and the while he has become embedded in a community in the UK.

76. The failure of the Claimant to mention his cousin before the Adjudicator is surprising but the essential facts are not disputed, only the degree to which any dependency on his cousin exceeds that which might be expected between cousins. I expect that he would succeed in establishing that the degree of emotional dependency was greater than would normally be found between cousins, but that it would be no more and probably less than that between adult brothers. There is no basis for accepting that the emotional dependency is such that removal would have "disastrous emotional consequences" for the Claimant, as the cousin but not the Claimant says. The

cousin's statement incorporates language which is that of a lawyer and he is not obviously qualified to make that assessment. It is obvious that the degree of dependency is considerably overstated in view of the failure to mention it to the Adjudicator. They now live separately and seeing each other at least once a week cannot support that degree of dependency. Besides it is clear that, as young adults, their dependency will reduce as other relationships develop, work locations change and they develop separate lives. Moreover, the departure of the Claimant for Kosovo would only break the relationship completely if they were unable to see each other or to communicate with each other and I see no reason to suppose that the rupture would be so final and complete. It is not to be overlooked that the cousin does not say that he cannot return because he is and remains a refugee. His outstanding application may prevent his removal but not his voluntary departure to a place where he would not be persecuted.

77. I see no reason to suppose that the Claimant and his girlfriend have not been living together since early 2006, or rather that he would fail to establish that on an appeal, if the relationship survived. I also accept that an Immigration Judge would hold that he could not apply for entry clearance based on this relationship. There is currently no evidence either way as to whether the relationship could be carried on through her going to Kosovo or him to Slovakia; and for present purposes I assume that he could show that neither could go to the other's country. But the IJ would also note that the relationship had developed quite recently and while their immigration statuses were precarious. The length of time which the Claimant has been here for and his age make such relationships more probable than not, but there is legitimate scope for debate as to the stability of any such relationship as a basis for a durable permission to remain. He has not been deprived of any specific benefit or opportunity of the type which was so influential in the decision in *Shala.*

78. He has been here for six years and the impact of that period of time on him has to be considered. The delay in reaching a decision was inordinate even making all due allowance for the pressure of the numbers of applications facing the SSHD. I do not accept Mr Adler's latest suggestion that had his case been dealt with reasonably expeditiously, Mr Ibrahimi would have been granted asylum either by the SSHD or on appeal. He would have expected a grant of ELR up to his eighteenth birthday and the opportunity then to seek an "upgrade" but that would have depended on the circumstances including the fact that he could be returned to Kosovo without facing persecution. In fact as Mr Waite points out in response to Mr Adler's claim that the consequence of the failure to grant ELR until the Claimant's eighteenth birthday on 5 March 2003, was that he could not seek an "upgrade" and have his asylum claim or human rights determined judicially, that is in fact exactly what he did have in February 2004. The lapse of time has been accompanied with the development of his private and family life, as would be expected. It has weakened with his cousin and started with his girlfriend.

79. An Immigration Judge would have to approach the Family Exercise on the footing that the Claimant fell outside it and that its scope was lawful. Much of the rationale could apply to many whose lives had developed over the prolonged periods for which they remain in this country either without a decision or before removal action. But the approach in *Mongoto* to those who fall outside the scope of a particular policy to my mind precludes an Immigration Judge in effect expanding it to cover near misses or those to whom aspects of the rationale could apply. I accept that there may be cases in which the rationale for a policy may inform the judge of the significance of a particular point; there may be lacunae, but that is very different from treating a policy as the basis for extension by analogy or comparison. That is not what *Shkembi* decided. There is not a near miss penumbra around every policy providing scope for its extension in practice to that which it did not cover, and this case is not a near miss but wholly outside the Exercise. The rationale for the exercise does not apply to the Claimant, although some of the points made about its purpose could apply to any who have stayed for a while in this country after their appeals on all grounds have been dismissed.

80. An Immigration Judge would conclude that the Claimant had a private life in the UK, and could reasonably conclude that he had a family life in the UK consisting of the relationships with his cousin and his girlfriend. There would be a degree of interference with both. However, even if there were no prospect of either joining the Claimant in Kosovo, which does not appear to be the case for the cousin, he would conclude inevitably that there would be no breach of Article 8 in the removal of the Claimant. The case, even with the added factor of the time which he has been here and the significance of his age during that period, could not and would not be regarded as exceptional for the purposes of *Huang v SSHD* [2006] QB 1.

81. The reality is that he has no claim for protection and no claim within the Rules or under any extra statutory policy. He is in a relationship started fairly recently when both were of precarious status. His relationship with his cousin would necessarily diminish with time if both stayed in this country. His cousin, even if deciding not to return with him to Kosovo, could still maintain contact. The extra time which he has had here after February 2004 and the dismissal of his appeals, could really be given only very limited weight. The delay in making a decision has not deprived him of any rights, procedural or substantive. He has in fact had the human rights appeal. It is not a procedural immigration provision which is being enforced. The delay in decision making has had no really substantial effects nor has the overall length of time which he has been here, contesting his removal. There is no arguable fresh claim and the SSHD's decision on that is not challengeable. No IJ would find that these were in sum exceptional circumstances.

82. The suggestion that the precariousness of his position, his failure to embed himself further, is due to the decision-making delay is not supported by evidence. The Adjudicator dismissed his appeal nearly two years before he started cohabiting with his girlfriend. He has grown apart from his cousin as they become young adults. Specific prejudice is one thing, but a prejudice through not being in a position to assert greater prejudice is quite another.

83. The suggestion that the SSHD has only set out what his views are and not asked himself what an IJ might think is one possible view of the decision letter. But, in reality the whole exercise involves a prediction and he does not think that any IJ would disagree with him. I do not decide this on the basis that there is no new material to be looked at, but what is new is quite limited: the relationships with the cousin and the girlfriend, and the lapse of time. The absence of family in Kosovo was known to the Adjudicator. Taking the material, old and new, as a whole, any appeal based on it would be bound to be dismissed.

84. That leaves the question of whether there is an exceptional case outside the Family Exercise which the SSHD has unlawfully failed to recognise. This is essentially answered by the factors which I have already referred to. There is no such case. This application is also dismissed.