JS (Family ILR Exercise –near-miss argument) Albania [2007] UKAIT 00080

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 30th April, 2007

Before

Senior Immigration Judge Chalkley
Senior Immigration Judge Gill
Mrs B W Southwell

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:	*Mr P Nathan of Counsel, instructed by Sutovic & Hartigan, solicitors.*
For the Respondent:	*Mr S Kovats of Counsel, instructed by the Treasury Solicitor.*

Individuals who lodged their asylum claims after 2 October 2000 were subject to one-stop appeals under the Immigration and Asylum Act, 1999 which did not apply to individuals who lodge their claims before that date. Given the rationale for this cut-off date, it has an "all or nothing" significance in that where an individual lodged a claim for asylum on or after 2 October 2000 the Family ILR Exercise does not apply to him or her and the fact that he or she "only just missed" being eligible, even if only by one day, is irrelevant.
The Court of Appeal in Jovan Shkembi v Secretary of State for the Home Department [2005] EWCA Civ 1592 did not decide that the Family ILR Exercise had any significance or relevance to the Article 8 claim of an individual who lodged his claim on or after 2 October 2002. The court in that case was concerned with procedural unfairness.

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DETERMINATION AND REASONS

1. This is the reconsideration of the determination of Adjudicator Morrison, promulgated on 25th February, 2004, following the appellant's hearing at Hatton Cross held on 12th February, 2004, in which the Adjudicator dismissed the appellant's appeal, against the decision of the Secretary of State for the Home Department, taken on 21st December, 2000, to direct the appellant's removal to Albania as an illegal entrant.

The appellant

2. The appellant is a citizen of Albania, who was born on 30th March, 1956. He claims to have arrived in the United Kingdom on 23rd November, 2000, concealed in a lorry and claimed asylum on 30th November, 2000, at the Asylum Screening Unit. His wife and son are his dependants.

Grounds of application for leave to appeal

3. Following the promulgation of the Adjudicator's determination, the appellant sought leave to appeal to the former Immigration Appeal Tribunal (IAT). The grounds of application are relevant and we set the relevant part out in full below:-

> "***Expulsion from UK***
>
> 2. *It was submitted to the Adjudicator that to remove the family would interfere with their Private and Family Life under Article 8. This the Adjudicator accepted. However, he went on to find that the Respondent's actions in so interfering would be proportionate under Article 8(2) ECHR to the need to maintain an effective immigration control. In so doing the Adjudicator refused at paragraph 42 to consider as relevant to the 'balancing exercise' the Secretary of State's ILR concession announced in October 2003 to cover families arriving in the UK prior to October 2000. It is submitted that in so doing the Adjudicator erred and failed to take into account a significant factor. In particular the appellant seeks to rely on the following passage of the skeleton argument before the Adjudicator and about which the Adjudicator failed at all to comment.*
>
> > *'However it is submitted that the views of the Secretary of State himself would appear to indicate that he, as arguably the best positioned individual to assess proportionality in the context of interference with Immigration Control, now believes himself, that the interference with the appellant's son's education would breach Article 8(2). Speaking on BBC Radio 4 on Monday 27th October, Mr Blunkett, when questioned about the above concession, stated in reference to potential interference with children's education that:*
> >
> > *'…not only would it be disproportionate but it would be wrong."*
>
> *This was a case where the Respondent had not previously considered Article 8 and as such was one where the Adjudicator was required to carry out the Article 8 balancing exercise himself. However the President of the Tribunal recently gave 'starred' guidance on how*

such cases should be considered by both Adjudicators and the Tribunal observing in M (Croatia) [2004] UKIAT 00024:

> *'The way in which that independent decision is reached **must** [my emphasis] reflect State's primary role in the assessment of proportionality,'*

3. *It is submitted that in refusing to consider Mr Blunkett's informed position that the interference with education would be both 'disproportionate' and 'wrong' and instead making a recommendation that the family be allowed to remain in the UK until the conclusion of the appellant's secondary education, the Adjudicator failed to properly pay heed to the aforementioned 'primary role' of the Secretary of State."*

The Family ILR Exercise

4. The "ILR concession" referred to was, in fact, the **Family ILR Exercise**, as described in APU Notice 4/2003.

5. As originally formulated and announced by the Home Office on 4th October, 2003, under the Family ILR Exercise, a family with dependent children would be granted indefinite leave to remain in the United Kingdom (ILR) outside the Immigration Rules, if the application for asylum was made before the 2nd October, 2000, and the applicant for asylum at the time of the application "*has*" at least one dependant "*currently*" aged under 18 who "*has been living*" in the UK since 2nd October, 2000. Provided the family were still present, neither the refusal of asylum nor the grant of limited leave, removed eligibility under the exercise. To qualify, the dependant, since 2nd October, 2000, and on 4th October, 2003, had to be a child of the applicant, or of the applicant's spouse, aged under 18 and financially or emotionally dependent on the appellant and part of the family unit. Once an applicant for asylum met that criteria, leave would be granted in line with that grant to all dependants who met the basic criteria; a dependant for these purposes was a spouse, a child of the applicant or spouse, who was dependent on and formed part of the family unit on 24th October, 2003. APU Notice 4/2003 contains exclusions *inter alia* in respect of dependants having criminal convictions, or who present a risk to security, or whose presence in the United Kingdom is not conducive to the public good and for other reasons set out in the notice.

The former Immigration Appeal Tribunal

6. Leave to appeal to IAT was granted and the IAT heard the appeal on 14th December, 2004. The IAT dismissed the appeal.

7. During the course of the hearing before the IAT, the Chairman of the panel asked Counsel for the appellant how he intended to prove what the former Secretary of State had said during the BBC Radio 4 programme on 27th October, 2003. Counsel applied for an adjournment. It was refused and it was on the basis of that refusal that the appellant sought permission to appeal to the Court of Appeal. Permission to appeal was refused by the IAT, but granted on application to the Court of Appeal.

The Court of Appeal

8. By order dated 23rd November, 2005, the Court of Appeal ordered that the appellant's appeal be allowed and that the matter be remitted to the Asylum and Immigration Tribunal. The judgment of the Court was given in Jovan Shkembi v SSHD [2005] EWCA Civ 1592.

9. It is against this background that the appellant's appeal came before us as a first stage reconsideration hearing.

The hearing before us

10. Mr Nathan started by pointing out that the decision of the Court of Appeal in Delo Mongoto [2005] EWCA Civ 715 is pending before the House of Lords and that the decision of Ouseley J, in Rudi [2007] EWHC 60 (Admin) was pending in the Court of Appeal. By way of clarification, he confirmed that he was not seeking an adjournment.

11. On behalf of the Respondent, the following documents have been submitted to the Tribunal:

    (a) a witness statement dated 14 September 2006 from Mr. J. Ponsord, senior policy officer in the Asylum and Appeals Policy Directorate of the Immigration and Nationality Directorate; this statement refers to the three exhibits mentioned below;
    (b) Exhibit JP1, which is a copy of a press release of 24 October 2003 announcing the Family ILR Exercise;
    (c) Exhibit JP2, which is the transcript of a radio interview given by the then Secretary of State to Radio 4 "The World At One" programme on 24 October 2003; and
    (d) Exhibit JP3, which is a copy of the policy document (APU Notice 4/2003).

12. Mr. Nathan objected to the admission of Mr. Ponsford's statement and, initially, to all three Exhibits. However, he subsequently confirmed that the Tribunal was entitled to consider the policy itself (Exhibit JP3), since this was a document in the public domain. Under Rule 32 of the Asylum and Immigration Tribunal (Procedure) Rules, 2005 ("Procedure Rules") and under paragraph 14A.2 of the President's Practice Directions, the Secretary of State should have given notice if he wished the Tribunal to accept such new evidence which had not been submitted on a previous occasion when the appeal was considered. Such notice should indicate the nature of the evidence and explain why it was not submitted on a previous occasion. Additionally, new evidence will normally only be admitted in accordance with "*Ladd and Marshall principles*" (see Ladd v Marshall [1954] 1 WLR 1489). Paragraph 14A.2 of the Practice Directions requires that parties must comply with the requirements of paragraph 32(2) of the Procedure Rules.

13. This case, Mr Nathan reminded us, predates Rudi. The Secretary of State has had a number of opportunities to prepare his case and did not do so, either before the Adjudicator, before the IAT or before the Court of Appeal. In Mr Nathan's submission, the Secretary of State's reliance on the fresh evidence in the form of the witness statement from Mr Ponsford was in breach of the Procedure Rules, the President's Practice Direction and the *Ladd and Marshall* principles. In his submission, the decision of the Court of Appeal in ex parte Ravichandran and Jeyeanthan [1999] EWCA Civ 3010 was not relevant.

14. Mr Nathan explained that he was embarrassed, because solicitors acting on behalf of the appellant had written to the Treasury Solicitors Office on 23rd April, 2007, and, in referring to Mr Ponsford's statement, enquired whether the Treasury Solicitors had complied with "*Rule 32 of the Civil Procedure Rules*". This reference was intended to be to Rule 32 of the *Asylum and Immigration Tribunal (Procedure) Rules, 2005*, not to the *Civil Procedure Rules*. In responding to this letter, the Treasury Solicitors had not answered the point. Mr. Nathan submitted that in the circumstances, it would only be fair to the appellant to exclude Mr Ponsford's evidence; comprising his statement and exhibits and that to do otherwise would be grossly unfair to the appellant.

15. Responding briefly, Mr Kovats suggested that the appellant had not been in any way prejudiced and the evidence had been served as long ago as last September. Mr Kovats suggested that it was not necessary for him to rely on Mr Ponsford's evidence. However, he submitted that the Tribunal should base its decision on all the evidence before it, because the accuracy of that evidence was not challenged. There was no prejudice caused to the appellant, who had been in possession of the evidence for months. There was substantial compliance with requirements of Rule 32, in that the evidence was identified and it was served as long ago as September 2006. The hearing has not in any way been delayed because of this evidence. The reason why it was not submitted earlier was because, given the history of the appeal, the focus earlier was on other issues.

16. In response, Mr Nathan suggested that there was a degree of prejudice in this case, in that it was being prolonged by the Secretary of State putting in evidence that he could and should have relied on prior to or at the Court of Appeal hearing. He submitted that the arguments as set out in Mr. Ponsford's statement should have been raised before the Court of Appeal because Mr. Ponsford's statement might have been determinative; the appellant's case might have been resolved much sooner. Mr Nathan submitted that the Secretary of State's position seems to have "*flowed as the case moved against him*".

17. The Tribunal enquired of Mr Nathan why the actions on behalf of the appellant, in putting questions in correspondence to the Treasury Solicitor to be put to Mr Ponsford dealing with his statement, should not be considered to be a waiver on behalf of the appellant of any procedural irregularities in this appeal? Mr. Nathan suggested that, in any event, the letter setting out the questions to be put to Mr

Ponsford addressed to the Treasury Solicitor contained the request for confirmation that the Procedure Rules were being complied with.

18. Mr Nathan confirmed that he was ready to deal with the substantive issues today and if Mr Ponsford's evidence were to be admitted, he would be happy to deal with it today. Mr Kovats invited us to consider Mr Ponsford's evidence and accept it because it would promote the overriding objective.

19. Mr. Nathan accepted that there had been no change in Home Office policy announced as a result of the comments made by the Secretary of State and it has never been sought to suggest on behalf of the appellant that there was. However, it is suggested on behalf of the appellant that the Secretary of State's comments were, and amounted to, "a gloss" on the Secretary of State's published policy.

20. Mr Nathan suggested that Mr Ponsford's evidence took the matter no further. The decision of Ouseley J in Rudi was, he suggested, a difficult one. He referred us to paragraph 61 where Ouseley J said:-

> "*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 Adjudicator 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 Adjudicator 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 Adjudicator to consider on appeal.*"

21. At paragraph 79 of his judgment, Ouseley J went on to say:-

> "*79. An Adjudicator 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 Adjudicator 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."

22. Mr Nathan suggested that there was a tension between the decision in Shkembi and that in Mongoto. He suggested that the comments of the Secretary of State made during a Radio programme are something that should be and could be taken into account and, in the circumstances, those comments are material to a consideration of the appellant's Article 8 claim. Mr Nathan relied on the judgment of Latham LJ in Shkembi and in particular to paragraph 14 of it, where it was argued on behalf of the Secretary of State that it was not material, because the case was bound to fail. The "*near miss*" should, he submitted, make a difference to the outcome of the appeal. The Secretary of State's views about "*dragging children out of school*" are clear; his decision to remove the appellant was disproportionate.

23. At paragraph 45 of his appeal, the Adjudicator dismissed the appellant's Article 8 claim, but made a recommendation that the appellant's son, Oreste, be allowed to complete his sixth form studies, since he only had a short period of his education to complete and recommended that the respondent did not remove Oreste or the family until he completes his sixth year studies in July, 2004. One should bear in mind, urged Mr. Nathan, that the Adjudicator had rejected the Article 8 submission, but nonetheless, made a recommendation to the Secretary of State for the Home Department. When that is coupled with the fact that the Secretary of State provided a gloss to his Family ILR concession, one can see that, if the Adjudicator had not failed to consider what the Secretary of State had said, he may very well have allowed the appeal.

24. Mr Kovats reminded the Tribunal that the appellant's grounds of appeal did not raise an Article 8 claim on behalf of the appellant. The skeleton argument put before the Adjudicator dealt with the Article 8 claim, although it has been accepted on behalf of the appellant that the family do not come within the Family ILR concession made by the Secretary of State and referred to by him during the course of the Radio 4 programme.

25. In his determination, the Adjudicator recorded the appellant's immigration history at paragraph 2. He recorded that the appellant arrived in the United Kingdom on 23rd November, 2000. Mr Kovats submitted that the appellant clearly arrived in the United Kingdom too late in order to meet the requirements of the Family ILR Exercise.

26. At paragraph 40 of the determination, the Adjudicator was prepared to accept that the appellant and his wife and child had established both a private and family life in the United Kingdom. The Adjudicator referred at paragraph 42 of the determination to Mr Nathan's submission in relation to the one-off, Family ILR exercise. He records, at paragraph 42 of his determination:-

"42. *Mr Nathan also relied on the respondent's recent concession made on 24th October 2003 in which he announced the intention to grant ILR to families arriving in the UK before October 2000. This concession is purely a matter for the respondent. Having announced the concession the respondent will decide in due course which families at present within the system qualify to benefit from the concession. The concession does not change the law or in any way affect the way in which Article 8 appeals require to be dealt with and I cannot regard the concession as having any significance in this appeal. I have to decide the Article 8 appeal solely on the evidence before me*."

27. That was a correct statement of the law, submitted Mr Kovats. This was an Article 8 appeal, not an '*in accordance with the law*" appeal. The Adjudicator properly dealt with the question of proportionality at paragraphs 43 and 44 of his determination.

28. So far as the recommendation made by the Adjudicator was concerned, this was clearly directed towards the son's completion of his education in July, 2004, and to that extent is therefore "*spent*".

29. The grounds of appeal relevant to today are the un-amended grounds which had been submitted to the Immigration Appeal Tribunal dated 9th March, 2004, (an extract of which appears at paragraph 3 above). When the matter came before the IAT, the chairman of the IAT's panel refused to grant an adjournment and Counsel who then appeared for the appellant (Mr. M. Mullins) had conceded that, unless an adjournment was granted, he was bound to fail.

30. At paragraph 4 of his judgement in Shkembi , Latham LJ said this:-

"4. *Counsel acting for the appellant before the Adjudicator, Mr Nathan, who appears for him today, relied in his support of his argument that the removal would be a breach of the family's Article 8 rights on a concession made by the respondent to the effect that, as a matter of policy, he would not remove those families with children who had come to this country prior to October 2000. Mr Nathan's argument was that although the appellant and his family clearly fell outside the strict terms of that concession, nonetheless the rationale for that concession applied to the family and, accordingly, there was a proper basis for saying that there could and should be a departure from the normal rule which was that those refused asylum should be refused leave to enter this country.*"

31. And paragraph 9, he went on to say:-

"9. *When the matter came before the Tribunal, the Tribunal was not prepared to accept mere say-so as to what Mr Blunkett was said to have said in the interview referred to in the grounds of appeal. In my judgment, the Tribunal was absolutely correct to take that view. The position was that in order to make any sensible decision on this issue, the factual matrix had to be properly established. That matrix was not merely what was said by Mr Blunkett in an interview, but was, and should have been, the terms of the concession and its context. The Tribunal, however, refused to grant an adjournment to the appellant to allow that matter to be put in proper order. It is against that decision to refuse an adjournment, essentially, that this appeal relates.*"

32. Mr Kovats submitted that it was clear that the appeal was allowed on pure fairness grounds. Mr Kovats then addressed us at some length on Mr Ponsford's statement and the exhibits to it. For reasons which will become apparent, it is not necessary for us to record those submissions.

33. Mr Kovats asked us to note that the appellant had conceded that he did not come within the one-off Family ILR Exercise.

34. The only ground relied on by the appellant was whether the decision of the Secretary of State would breach Section 6 of the Human Rights Act 1998 (HRA 1998), because it would cause a breach of the appellant's Article 8 rights. At the time, the decision of the Tribunal in M* (Croatia) [2004] 00024 was the authority on the point, but now it was the opinion of the Appellate Committee of the House of Lords in Huang and Kashmiri v Secretary of State for the Home Department [2007] UKHL 11. The latter, Mr Kovats suggested makes it clear that the question of proportionality is for the Tribunal and the Tribunal alone. Whatever the Secretary of State said or did not say during the course of his radio broadcast, it could not possibly affect the outcome of this appeal, since it is only the Tribunal who are able to decide the question of proportionality. The facts are the circumstances of the family, not the views expressed by a member of the Executive. Any view expressed by the Secretary of State could not affect the Adjudicator's decision, he said, because proportionality was for the Adjudicator.

35. In *Rudi*, Mr Justice Ouseley was there dealing with a minor who arrived in the United Kingdom with a cousin in August 1999 and claimed asylum on 10th August, 1999, aged 16. The appellant in that appeal was not granted ELR until his eighteenth birthday. His application for asylum was refused on 19th July, 2000, and his appeal dismissed on 9th April, 2001. He asked to be considered under the Family ILR Exercise because, as the Exercise was subsequently amended in August 2004, it would apply to somebody who had a dependant under the age of 18 in the United Kingdom on 2nd October, 2000, or on 24th October, 2003. Qualifying dependency could be shown by dependency, living as part of a family unit, on either of those two dates. It was argued that the appellant would have been eligible for a grant of leave if he had arrived in the United Kingdom with his parents or one of them and had been part of a family unit on 24th October, 2003. It was argued by the applicants in the Rudi case that the operation of terms of the Exercise so as to exclude them from being eligible was unlawful, because this would offend the principle that like cases should be treated alike; no rational distinction could be drawn between the accompanied and unaccompanied child, when deciding to whom to grant indefinite leave to remain.

36. Mr. Kovats relied on the reasoning at paragraph 79 of the Rudi judgment. He submitted that the Adjudicator made no error of law. The Adjudicator had correctly decided that it was for him to decide the question of proportionality and his decision was correct.

37. Finally Mr Kovats relied on the Tribunal's decision in TK (Immigration Rules – policy - (Article 8) Jamaica [2007] UKIAT 00025. In that case it was contended that the Adjudicator, who dismissed an appellant's appeal, had failed, when considering an Article 8 claim, to consider that the appellants fell within the "spirit" of paragraph 297(1) of Statement of Changes in Immigration Rules, HC 395, in that although the appellant's mother was not settled in the United Kingdom at the date of the Secretary of State's decision, she was "*residing in the UK and not intending to return to Jamaica*". The Tribunal noted the decision of Collins J in R v Immigration Appeal Tribunal ex parte Lekstaka [2005] EWHC 745 (Admin) and in paragraph 18 noted Shkembi. The Tribunal concluded that the issue of whether a person falls within the spirit of the Immigration Rules or the rationale of a Home Office policy is a matter which is capable of affecting the determination of whether, in all the circumstances, the immigration decision, if implemented, would involve a disproportionate interference with Article 8 rights. There, Mr Kovats submitted, factual circumstances were being compared with the Immigration Rules. Here, in this current appeal, there is no comparison between the appellant's circumstances (the facts) and the Immigration Rules or policy, but instead between the policy and the Secretary of State's views on the policy. *TK* did not, he submitted, assist. He invited us to dismiss the appeal.

38. Responding, Mr Nathan reminded us that it was a requirement, under the Procedure Rules and that of *Ladd and Marshall* principles that the statement of Mr Ponsford and its exhibits should not be allowed in evidence. He accepted that following Huang and Others v Secretary of State for the Home Department [2007] UKHL 11, it was for the Tribunal to assess the question of proportionality. But, he submitted, the views of the Secretary of State must be relevant. The Secretary of State has an important role in considering what is and what is not proportionate.

39. We reserved our determination.

Determination

40. At the bottom of the second page of Mr. Nathan's skeleton argument, it is said that the Court of Appeal remitted the appellant's appeal to the Tribunal for further hearing *on the merits*. This is not correct. It was accepted before us that the issue before us is whether the Adjudicator materially erred in law in his determination.

41. Mr. Nathan contends that the Adjudicator did err in law, in that, he failed to consider the Family ILR Exercise, together with the "gloss" put upon it by the then Secretary of State in the radio broadcast of 27th October, 2003, when conducting the balancing exercise in relation to proportionality under Article 8(2). Mr. Nathan's skeleton argument dated 24 January 2007 (paragraph 8) refers to this radio broadcast as providing an "insight" into the rationale for the policy that the removal of children who fell within the terms of the policy would be disproportionate. Mr. Nathan's skeleton argument specifically makes the point that it is not sought to argue on the appellant's behalf that the radio broadcast amends the Family ILR Exercise, as such. So, we stress, the argument for the appellant is simply that the radio broadcast

provides a "gloss on the policy", or an "insight into the rationale for the policy", so that, although the policy does not strictly apply to the appellant, it furnishes through its rationale a stronger Article 8 claim. It is contended that the Adjudicator's failure to consider such rationale for the policy, as may be gleaned from the radio broadcast of 27th October, 2003, when carrying out the balancing exercise in relation to the appellant's Article 8 claim, was an error of law. The appellant's case is that the error is material, given the circumstances of this case, in particular, the fact that the Adjudicator considered that the circumstances warranted the making of a recommendation to the Secretary of State to defer removal until after 31st July, 2004 (the determination was signed on 22nd February, 2004) so as to enable the appellant's son to complete his sixth form studies in Bradford. On this basis, Mr. Nathan asked us to allow the appeal outright. Alternatively, if we concluded that there was an error of law, Mr. Nathan asked us to proceed immediately to determine the substantive Article 8 claim on the basis of the evidence which was before the Adjudicator, together with the statement from the appellant's son dated 5th September 2006. If we were not with him on this option either, then he asked us to adjourn the hearing part-heard for a second-stage reconsideration of the Article 8 claim.

42. The significance of Mr. Nathan's objection to Mr. Ponsford's statement and Exhibits 1 and 2 and of Mr. Nathan's reminder to us that the Rudi judgment was delivered after this case was heard, is that he wishes us to discern what we can in terms of the rationale for the Family ILR Exercise from one document only – i.e. the transcript of the radio broadcast of 27th October, 2003. He does not wish us to decide what the rationale for the policy is from Mr. Ponsford's statement or Exhibits 1 and 2, nor from the summary of a similar statement from Mr. Ponsford in the Rudi judgment, or from the summary of the radio broadcast of 24th October, 2003 in the Rudi judgment.

43. We therefore will first deal with Mr. Nathan's objection to the admissibility of Mr. Ponsford's statement and Exhibits 1 and 2. The objection is made on the basis that Rule 32 of the Procedure Rules and paragraph 14A.2of the Practice Directions have not been complied with, i.e. that no formal application complying with Rule 32 has been made for Mr. Ponsford's and the Exhibits thereto to be admitted in evidence and that no explanation has been given for the failure to produce this evidence on any previous occasion when the appeal was considered.

44. We are wholly unimpressed by Mr. Nathan's objection to the admission of Mr. Ponsford's statement and Exhibits 1 and 2 for the following reasons:

(a) It is apparent that Mr. Ponsford's statement and Exhibits 1 and 2 explain the rationale for the Family ILR Exercise. Whilst we note that paragraph 12 of the Court of Appeal's judgment in *Shkembi* refers to the extracts from the radio broadcast of 27th October, 2003, to which the Court was referred as:

> *"……the gloss, if that is what it can properly be described as, on the concession……."*

it is also apparent from paragraphs 4 and 15 of the judgment that Mr. Nathan's argument before the Court of Appeal related to the *rationale* for the policy, not merely a "gloss", such as may be gleaned from one or two sentences in one radio broadcast, the main topic of which concerned an entirely different subject matter. Given that the main argument for the appellant before the Court of Appeal was that he should have been allowed by the Tribunal to rely on the rationale for the Family ILR Exercise, albeit that the argument at that stage was that the rationale for the policy could be ascertained from the radio broadcast of 27th October, 2003, we would need very strong reasons to exclude evidence as to the *rationale* for the policy, even if that evidence was to be found in documents other than the radio broadcast of 27th October, 2003 (subject, of course, to the requirement of procedural fairness , in that, the appellant should have an opportunity to deal with any evidence relied upon).

(b) Mr. Nathan accepted that, by their letter of 23rd April, 2007 to the Treasury Solicitor, the appellant's solicitors requested questions to be put to Mr. Ponsford. However, Mr. Nathan pointed out that the letter also refers to Rule 32, albeit that it incorrectly refers to the Civil Procedure Rules. However, we noted that a previous hearing before the Tribunal on 29th January, 2007 was adjourned in order to enable the appellant's representatives to put questions to Mr. Ponsford. In these circumstances, we do not consider that the bare mention of Rule 32 in the letter of 23rd April, 2007 is sufficient to preserve to the appellant the right to object to the admission of the documents at this late stage, if, indeed, it is being suggested that the appellant's representatives had reserved to themselves the right to object on a later date to the admission of the documents. To the contrary, we are of the view that it is evident from the letter that the appellant's representatives were aware that Rule 32 was relevant and yet they did not take the opportunity to register any objection. If anything, they appear to be suggesting to the Respondent that it would be appropriate to make an application under Rule 32.

(c) Mr. Nathan considered that the guidance in ex parte Ravichandran and Jeyeanthan was not relevant. He relied on Ladd v Marshall. In our view, the guidance in ex parte Ravichandran and Jeyeanthan applies, since the issue before us is whether the Respondent should be allowed to rely on Mr. Ponsford's statement and Exhibits, notwithstanding the failure to comply with a procedural rule. We have noted the fact that Mr. Kovats was in difficulty giving an explanation for the failure to comply with Rule 32, but asked us to bear in mind the history of the proceedings in this case and the way in which the arguments have developed since the IAT refused permission to appeal to the Court of Appeal by its decision dated 24th February, 2005. We have some considerable sympathy with this argument. Mr. Nathan submitted that the prejudice in this case was the fact that the Respondent had failed to produce this evidence before the hearing which took place before the Court of Appeal. He says that the arguments as set out in Mr. Ponsford's statement should have been raised before the Court of Appeal, because Mr. Ponsford's statement might have

been determinative; the appellant's case might have been resolved much sooner. However, it is clear from paragraph 16 of the Court of Appeal's judgment in Shkembi that the Court considered that the appellant should make his argument before the Tribunal which Parliament had provided for the determination of the appeal, rather than the Court taking upon itself any other role than that the Court considered it should take. Accordingly, we do not agree with Mr. Nathan that the appellant's case might have been resolved a long time before it came before us, if Mr. Ponsford's statement had been served sooner. Furthermore, it is plain to us that there has been substantial compliance with Rule 32. Notwithstanding the absence of a formal application, the appellant and his representatives could not have been any misapprehension as to whether the Respondent intended to rely on these documents. Mr. Ponsford's statement was served as long ago as September, 2006. The hearing on 29th January, 2007 was adjourned specifically to enable the appellant's representatives to put questions to Mr. Ponsford. The nature of the evidence to be relied upon is plain to all, and has been for some time. We cannot see that there is any prejudice to the admission of the documents, given especially the fact that Mr. Nathan confirmed that he was ready to deal with the documents and that, in that respect, he would not be prejudiced by the late admission of the documents.

45. In all of the circumstances, we concluded that Mr. Nathan's late objection to Mr. Ponsford's statement and Exhibits 1 and 2 is devoid of any merit. We exercise our discretion under Rule 32 to admit the documents. In any event, we are entitled to rely on the judgment in Rudi, in particular, the summary of a similar statement from Mr. Ponsford and the radio broadcast of 24th October, 2003. The judgment sets out, in all material respects, the evidence which Mr. Nathan takes objection to. There is reference at paragraph 18 of the judgment of a statement from Mr. Ponsford, which makes the main points made in greater detail in the statement before us. The press release which is the subject of Exhibit 1 to Mr. Ponsford's statement before us is summarised at paragraph 7 of the judgment. The "World at One" interview of 24th October, 2003, the transcript of which is the subject of Exhibit 2 before us, is summarised at paragraph 15 of the judgment. We know of no authority which would preclude us from relying on the judgment in Rudi. Indeed, the letter from the appellant's representatives dated 23rd April, 2007 gave the Treasury Solicitor notice of their intention to include this judgment in the case law bundle. Mr. Nathan asked us to note that the appellant's appeal pre-dates Rudi. However, that is not a reason for the Tribunal not to take notice of the judgment in Rudi.

46. Since this case has had a protracted history, we are prepared to draw our conclusions about the rationale for the Family ILR Exercise entirely from the summary of the evidence in the judgment in Rudi without taking into account Mr. Ponsford's statement and Exhibits 1 and 2. Even on that basis, this appeal fails, as we shall explain. The summary of the relevant evidence in the judgment in Rudi as to the rationale for the Family ILR Exercise shows that the policy was intended, inter alia, to relieve the administrative and financial burden on the Home Office caused by the rapid growth in asylum applications and a backlog in the removal of those whose

claims had failed. Paragraphs 19 to 21 of the judgment in Rudi (which we quote below) explain the administrative (or practical) and economic objectives of the policy, whilst paragraph 22 of the judgment (also quoted below) explains the social considerations taken into account. The exercise was directed at families with children for reasons set out at in the following paragraphs of the Rudi judgment:

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.

47. It is clear that only those families which had applied for asylum prior to 2nd October, 2000 were be eligible for consideration under the Family ILR Exercise. Paragraphs 12 to 14 and paragraph 28 of the judgment explain the reason for this cut-off date. These paragraphs read:

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.

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.

48. We draw particular attention to paragraph 28 of the judgment. When all of this evidence is considered, it is clear that the reason for the 2nd October, 2000 cut-off date is because, in the case of asylum applications lodged prior to that date, applicants were able to make further individual human rights claims. That is the date on which the HRA 1998 came into force, as well as the one-stop appeal procedure introduced by the Immigration and Asylum Appeals Act, 1999 (the 1999 Act). The aim of the one-stop procedure is to make applicants give all reasons for wanting to enter or remain in the United Kingdom as early as possible. Individuals who had lodged asylum applications prior to 2nd October, 2000 were entitled to lodge human rights claims after they had exhausted their rights of appeal against the refusal of their asylum claims. This made this category of applicants considerably more difficult to remove, as, in many cases, it was necessary to continue to maintain them at public expense whilst they pursued (if they wished to) further human rights claims and appeals on human rights grounds. Accordingly, the cut-off date of 2nd October, 2000

was, and is, inextricably linked with the Executive's aim of achieving the administrative and economic objectives of the policy. It is important to bear this in mind because individuals who (like the appellant in the instant case) lodged their asylum claims on or after the cut-off date came under a different statutory regime (the one-stop procedure). Any argument on their behalf that the Secretary of State's rationale for the Family ILR Exercise is relevant when considering their Article 8 claims (in particular, when considering proportionality) must be considered in the light of the fact that the administrative and financial objectives of the policy intended by the Executive to be achieved as exemplified by the imposition of the cut-off date of 2nd October, 2000 is based on the different regimes applicable to the appeals of those who lodged their asylum claims before the cut-off date and those who lodged their asylum claims on or after the cut-off dates, regardless of any consideration as to how close to the cut-off any asylum claims of the latter group were actually lodged.

49. Mr. Nathan contended that the then Secretary of State's radio broadcast interview of 27th October, 2003 provides a "gloss" on the rationale for the Family ILR Exercise. What is meant by the term "gloss" appears from the following extract of Mr. Nathan's skeleton argument (paragraph 11):

> *"As to the suggestion that the written policy was never amended to reflect Mr Blunkett's comments on 'Start the Week' this is correct but it is submitted irrelevant. Those comments could not have justified any positive change to the policy.* ***Mr Blunkett indicated his then belief, as the member of both the legislative and executive best positioned to pass comment on such matters, that at that time he believed it would be disproportionate to uproot children who had been studying in schools in the UK for three years or more.*** *The usual consequence of such disproportionate action would have been for his department to grant a family in that situation discretionary leave to remain."* [Our emphasis]

50. It is contended that, due this "gloss" on the Family ILR Exercise, the Family ILR Exercise was therefore a relevant consideration in the balancing exercise under Article 8 in that it strengthens his Article 8 claim and that, by failing to take it into account, the Immigration Judge erred in law. It is contended that, having regard to the fact that the Adjudicator made a recommendation, was material to the Adjudicator's decision on proportionality.

51. We will now set out relevant extracts from the radio broadcast of 27th October, 2003. The then Secretary of State was interviewed on the "Start the Week" programme on Radio 4 on 27th October, 2003. With the Secretary of State, was the former United States' Secretary of State, Madeleine Albright, a documentary maker [and Chairman of the Medical Foundation], Mr Rex Bloomstein, author, Francis Spufford, and the interviewer, Andrew Marr. The programme was concerned with diversity and faith. The interviewer said to the then Secretary of State:-

> *"And these asylum seekers who are going to be allowed to stay. The crucial thing from your point of view is that they become, and their children become, absolutely British citizens, who feel a sense of belonging and full contribution, and indeed, you're encouraging migration to this country."*

to which the then Secretary of State replied:-

> "*I am encouraging legal migration. I've expanded the work permit system to 200,000 which is now the greatest in the world. We're encouraging through the gateway with the UN, people to come who are facing death and torture, rather than being trafficked by organised criminals. But we're also trying to sort out what's happening here and the signals we send.*
>
> ***So what we announced on Friday****, was about saying* ***these people*** *are* already *embedded in our community and, it would be not only disproportionate but wrong to uproot* ***those children*** *from school and from the community. And I took that difficult decision because I think we need to draw a line under that and we need to deal with the future, not the past.*" [our emphasis]

52. Reading the transcript as a whole, it is clear that the people the then Secretary of State was talking about were the people who qualified under the Family ILR Exercise; he was very clearly *not* referring to *all* failed asylum seekers who happened to have dependant children at school. When he spoke of it being "*wrong to uproot those children from school and from community*", the then Secretary of State was talking about the children of people who qualified under the Exercise which he had announced. He was not suggesting, and it would be wrong in our view to interpret his words as if he were suggesting, that it would be disproportionate to remove *any* immigrant family which had children at school. We do not consider that the then Secretary of State intended to set out his entire rationale for the Family ILR Exercise in this particular radio broadcast interview.

53. The then Secretary of State emphasised that a line had to be drawn somewhere and he had decided that it should be drawn in respect of those individuals who had applied for asylum before 2nd October, 2000 and who satisfied the other eligibility criteria. The imposition of this cut-off date emphasises the administrative and economic objectives of the policy. The then Secretary of State was not saying that the social consideration – of not "*uprooting those with children from school and from the community*" – was *the* rationale for the policy so that, in his (the then Secretary of State's) view, it would be disproportionate to remove any immigrant family whose children had attended school in the United Kingdom for 3 years or more.

54. Mr. Nathan contended that there is a tension between the judgment in Shkembi and the judgment in Mongoto. In his submission, the judgement of Ouseley J on Rudi is inconsistent with the judgments in Mongoto and Shkembi. The argument that Shkembi is inconsistent with Rudi was considered by the Tribunal in KL (Article 8-Lekstaka-delay-near-misses) Serbia & Montenegro [2007] UKAIT 00044. Unfortunately, we were not referred to this case by either party. In KL, the Tribunal dealt at some length with the "near-miss" argument. The relevant paragraphs are paragraphs 44 to 47 of the determination, which we now quote:

> "44. *Before proceeding further it will be helpful to set out the main propositions regarding near-misses that can be extracted from case law. It is apparent from higher court decisions, SB [SB (Bangladesh) v. SSHD [2007] EWCA Civ 28] in particular, that there have been cases that have*

been taken by practitioners to assert opposing positions. In particular the case of R (Shkembi) v SSHD [2005] EWCA Civ 1592 and that of Mongoto v SSHD [2005] EWCA Civ 751 have been contrasted. In the former it was 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. In the latter it was held, in relation to the Family Exercise policy, that where there was a lawful policy to assist limited categories of entrants, 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. In Rudi Ouseley J appeared to align himself with the Mongoto approach, stating at [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."*

45. *In SB Waller LJ stated:*

> *"30. In paragraph [64], the Tribunal first said that, applying the approach of Collins J in Lekstaka, the fact that the appellant "only just failed to qualify for admission" was a fact to be counted in her favour. They were right to take that view. We agree with the view expressed by Collins J in Lekstaka in paragraph 38 that:*
>
> > *"… one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter."*
>
> *That seems to us to be the right approach. As Simon Brown LJ said in Ekinci at paragraph 16:*
>
> > *"Even if strictly he fails to qualify so that the ECO would be prohibited from granting leave to enter, given the obvious Article 8 dimension to the case the ECO would refer the application to an Immigration Officer who undoubtedly has a discretion to admit someone outside the Rules. And if entry were to be refused at that stage, then indeed a s. 59 right of appeal would certainly arise in which, by virtue of s. 65(3), (4) and (5) the adjudicator would have jurisdiction to consider the appellant's human rights."*
>
> *31. The ultimate test is, of course, that set out in paragraph 59 of the judgment of the Court given by Laws L.J. in Huang…":*

46. *It seems to us that the above cases are not in conflict. (The reliance at [31] of SB on the test of truly exceptional circumstances, cannot survive Huang [2007] UKHL 11, but we do not see that this makes any substantive difference to the guidance given by SB in any other respect: we are*

fortified in that view by what Carnwath LJ states at [16] of AG (Eritrea)). None of them is authority for the proposition that the immigration rules or policies can be rewritten by judges. Integral to each of them is the distinction between (1) cases in which the rationale for a rule or policy applies fully to the case in question although the rule or policy does not technically cover it; and (2) cases in which the rationale for such a rule or policy does not apply or applies only loosely. Even if a case comes within (1) all three higher court decisions recognise that at most a "near miss" is a factor which has to be taken into account. Just because a case comes within (1) does not mean that that a decision amounts to a disproportionate interference with legitimate public ends. (If we are wrong to consider that Ouseley J's reasoning can be reconciled with Court of Appeal authority, then, of course, the latter must prevail, but we see nothing said in SB or any other case which takes matters further than Ouseley J envisages in Rudi).

47. *Whilst dealing with case law we should make clear our view about the continuing value of the recent reported Tribunal case of TK(Immigration Rules-policy-Article 8) Jamaica [2007] UKAIT 00025. Although the reliance placed by the Tribunal in TK on the "truly exceptional circumstances" test has since been shown by Huang [2007] UKHL 11 to be wrong, its guidance on "near-misses" remains valid. Even when an individual's circumstances fall squarely within the rationale of a relevant immigration rule or policy and so accord with its "spirit" albeit not its "letter", a "near miss" does not of itself mean that an expulsion decision constitutes a disproportionate interference with an appellant's right to respect for private or family life. "*

55. The Tribunal in KL did not agree that the judgment in Shkembi is in conflict with the judgment in Rudi. That was an argument advanced before us. We see no reason to take a different view from that taken by the Tribunal in KL. As we have said above, the radio broadcast interview of 27th October, 2003 was not a "gloss" on the policy as announced. It is not the case that the then Secretary of State was saying that the rationale for the policy was that it would be disproportionate to uproot children who and been studying in schools in the United Kingdom for three years or more. The policy was introduced to achieve the administrative and economic objectives explained above, taking account of the social considerations mentioned. All of these considerations collectively comprise the rationale for the policy.

56. Given that the administrative and economic objectives explained above for the policy are predicated on the fact that the statutory regime applicable to the appeals of those who made their asylum claims before the cut-off date is different from the statutory regime applicable to the appeals of those who made their asylum claims on or after the cut-off date, it cannot be said, on any reasonable view, that the rationale for the policy applies to those who lodged their asylum claims on or after the cut-off date, or that those who lodged their asylum claims on or after the cut-off date come within the "spirit" of the policy even if they do not fall within the letter.

57. Accordingly, we decide this case on the basis that, given the entire rationale for the Family ILR Exercise (the administrative and economic objectives taken in conjunction with the social considerations explained), the policy is not relevant to any consideration of the Article 8 claims of those who claim asylum on or after the cut-off date. The imposition of the cut-off date may well result in anomalies, in that, the policy itself as well as the press releases, radio broadcasts and statements we have referred to above refer to social considerations, such as links which children and families who may potentially qualify may have developed with the community and

education which the children might be receiving, which may well apply in varying degrees to those who claimed asylum on or after the cut-off date. However, the mere fact that there may be such anomalies does not mean that the policy is a relevant consideration in deciding the Article 8 claims for those who claimed asylum on or after the cut-off date, nor can it be said that, on the basis of such social considerations alone, an individual who lodged his asylum claim on or after the cut-off date has "nearly-missed" being eligible under the Family ILR Exercise. This is because (as we have said) the cut-off date was inextricably linked with the achievement of the administrative and economic objectives of the policy. Accordingly, any social considerations which an individual who lodged his asylum claim on or after the cut-off date may share with someone who lodged his asylum claim before the cut-off do not bring that individual within the ambit of the near-miss argument.

58. Accordingly, the Adjudicator did not err in law when he decided that the policy was not relevant to the appellant's Article 8 claim. We have reached the same conclusion, albeit for different reasons. He did not err in law by failing (when determining proportionality) to consider what he had been told by Mr. Nathan about the then Secretary of State's radio interview on 27th October, 2003, because (as we have said) the radio broadcast interview was not a "gloss" on the policy and because the policy was not relevant to his balancing exercise, which he himself had to conduct.

59. Mr. Nathan relied on the fact that the Adjudicator had made a recommendation that removal of the appellant and his family be deferred until after 31st July, 2004. Although is it clear that he sought to rely on this fact in conjunction with the contention that the Adjudicator had erred in law by failing to consider the remarks of the then Secretary of State in the radio broadcast interview, we will nevertheless consider the argument that some significance is to be attached to the Adjudicator's recommendation. In this regard, it is necessary for consider the Adjudicator's determination of the Article 8 claim as a whole.

60. It is clear from the second sentence of paragraph 39 of the determination that the Adjudicator made his own decision on Article 8; he (correctly) did not apply the Tribunal's guidance in M (Croatia) [2004] UKIAT 00024. He gave careful consideration to the circumstances of the appellant and his family. However, he recorded that one of the difficulties for the appellant in the appeal was that there was not a great deal of evidence before him (the Adjudicator) as to the family's circumstances. He noted that the family been in the United Kingdom since November, 2000 and lived together as a family in Bradford; he accepted that the appellant's son had made friends in the United Kingdom and was in a sixth form school. He stated that:

> *"Beyond that however there is no other evidence of the family's situation in the United Kingdom".*

61. At paragraph 44 of the determination, the Adjudicator stated that he accepted that to disrupt the education of the appellant's son was a matter which he should take into

account as removal would interfere with his private life and in particular with his education. He noted that the evidence was that the appellant's son speaks good English and is in sixth form, but (again) noted that there was no evidence as to how long the appellant's son had been receiving education in England. The Adjudicator assumed that, at best, this would have been for three years, since the family's arrival in the United Kingdom. He regarded it as significant that the appellant's son was in sixth form. The Adjudicator presumed that the appellant's son would conclude his secondary education in July that year [2004]. He noted that there was no evidence as to what the appellant's son intended to do after August, 2004, and whether he wished at that stage to seek employment or to continue with his education. At paragraph 45, the Adjudicator recorded that there were no other factors put forward by Mr. Nathan, that he had considered the position of the family and that of the appellant's son carefully. He concluded that removal would not be disproportionate.

62. Given the paucity of evidence before the Adjudicator as to the nature and quality of private life, not only of the appellant, but also of his family members including his son, it is plain that his recommendation to the Secretary of State for removal to be deferred until after 31st July, 2004 was made, not because he considered that there were any private life elements which were sufficiently strong as to warrant a recommendation, but simply in order to enable the appellant's son to complete his secondary education before being required to leave. It is plain that his primary decision was that the appellant and his son *should* be required to leave, but that such removal should be deferred for a very short time. We do not consider that any significance is to be attached to the fact of the recommendation such that it can said that there is any error of law in the Adjudicator's reasoning with regard to the Article 8 claim.

63. We have concluded that for all these reasons the **Adjudicator did not err in law in his determination which will stand. The appeal is dismissed.**

Senior Immigration Judge Chalkley
Signed: 16th August 2007