Neutral Citation Number: [2009] EWHC 420 (Admin)

Case No: CO/238/2007; CO/923/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 March 2009

Before:

MISS BELINDA BUCKNALL QC
Sitting as a Deputy High Court Judge

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Between:

NA and AA	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Nicola Braganza (instructed by **Douglas & Partners**) for the **Claimants**
Nicola Greaney (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 7 November 2008

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Approved Judgment

Miss Belinda Bucknall QC:

1. At the start of the hearing in this case the Claimants applied for and were granted an anonymity order. Accordingly they will be referred to in these proceedings only by their initials.

2. NA and AA are both Iraqi nationals of Kurdish origin and formerly resident in the Kurdish Autonomous Zone ("KAZ") of Iraq.

Chronology of events relating to NA

3. NA was born on 12 February 1974. He arrived in the United Kingdom on 4th May 2000 and claimed asylum on arrival.

4. At the time when NA applied for asylum there was a very substantial backlog of applications for asylum to be processed. Information about this is contained in the statement made on 3rd May 2007 by Ms Emily Miles of the Border and Immigration Case Resolution Directorate. That statement was prepared for the purposes of other proceedings involving different Claimants and involved a dispute about whether current delay was unlawful; more than that I do not know. It does not, therefore, address the circumstances out of which the Claimants' claims in the present case arise and must be read with that reservation in mind. It was adduced in evidence in the hearing before me by the Defendant without objection by the Claimants. According to the statement, in 1998 the applications made by principal asylum seekers numbered 46,015, in 1999 the number rose to 71,160 and in 2000 it rose to 80,315.

5. On 27th August 2000 a Statement of Evidence Form ("SEF") was issued to NA and on 11th September 2000 NA returned the SEF form together with his signed statement of the same date. On 15th August 2003 NA was interviewed for the purposes of his asylum application.

6. By a letter dated 21st August 2003, the Defendant dismissed NA's application for refugee status, some three years and four months after it was made, on the ground that there was no well founded fear of persecution. He appealed and on 19th November 2003 the Adjudicator dismissed the claim, again on the ground that there was no well founded fear of persecution. An application for leave to appeal to the IAT was refused on 27th January 2004. As at that date, therefore, NA's status as a failed asylum seeker was confirmed.

7. The next event of significance is that on 22nd October 2004 judgment at first instance was given in the case of Bakhtear Rashid v Secretary of State for the Home Department [2004] EWHC 2465 (Admin) followed by judgment on appeal ([2005] EWCA Civ.744) on 16th June 2005 ("Rashid's case"). The effect of the decision of the Court of Appeal in Rashid's case was considered in the case of (A), (H) and (AH) v. Secretary of State for the Home Department [2006] EWHC 526 (Admin) ("(A), (H) and (AH)"'s case). In both those cases the Claimants' applications had been decided without regard to policies which were in force at the time of the decisions and which would, had they been applied, have resulted in the grant of either refugee status or ELR. In light of those decisions an Iraq Policy Bulletin was published on 1st August 2006 ("the 2006 Policy Bulletin") containing guidelines as to how certain categories of cases were to be dealt with in light of those decisions.

8. On 22nd August 2006 NA's solicitors sent a letter addressed to the inconveniently named Rashid Consideration Exercise Processed Cases Review Group at the Home Office, asking for NA to be granted ILR in light of the decisions in Rashid and (A) (H) and (AH) and the guidance contained in the 2006 Policy Bulletin. By letters dated 11th and 31st October 2006 the Defendant rejected the request on the ground that NA did not meet any of the criteria in the 2006 Policy Bulletin. It is the decision contained in these letters that NA complains of.

9. It appears that judicial review proceedings were held up at the request of the Defendant while R(S) v. Secretary of State for the Home Department [2007] EWCA Civ 546 ("R(S)"'s case) worked its way to the Court of Appeal. In that case the Claimant was held entitled to relief because on the balance of probabilities he had lost the benefit of a policy pursuant to which he would have been granted ELR because of the unlawful decision of the Defendant to shelve all cases such as his with effect from 1st January 2001. Following the Defendant's decision not to appeal the decision of the Court of Appeal in that case to the House of Lords, NA reapplied to the Defendant for ILR, relying on the principles set out in the judgments of the Court of Appeal as support for his claim.

10. On 23rd January 2008 the Defendant maintained the refusal to grant ILR and the judicial review proceedings were reactivated, with leave given to both parties to amend their grounds. On 20th August 2008 permission to apply for judicial review was granted by Mr Justice Foskett. There was then some correspondence as to whether two other claims, which raised similar points to NA's claim, should be heard together with NA's claim but one was withdrawn and I am told the other is awaiting the outcome of this case.

Chronology of events relating to AA

11. AA was born on 8th August 1974. He arrived in the United Kingdom on 3rd September 1999 and claimed asylum. He engaged the services of the Avon and Bristol Law Centre to assist him in furthering his asylum claim but there is no evidence as to what, if anything, that Law Centre did at this time. It appears that the Portishead Unit of the Immigration and Nationality Directorate (IND) issued a Statement of Evidence form on 5th May 2001. It seems from a fax dated 3rd May 2002 from Portishead IND to the Avon and Bristol Law Centre that there was some confusion on the part of the latter as to the correct Home Office reference number and IND Portishead provided the correct number in the same fax. It further appears from the same fax that IND Portishead was active in dealing with an application on AA's behalf for his address to be amended and for his temporary admission to be extended.

12. In a letter dated 11th September 2002 bearing the correct reference number but addressed to the IND unit at Croydon, the Avon and Bristol Law Centre says that it had returned AA's SEF and statement of additional grounds on 17th May 2001. It may have done so but the completed SEF, the statement and the covering letter which is likely to have accompanied them are not included in the documents before the court and it is not, therefore, clear whether the correct reference number was cited or to which IND unit the documents were sent. The terms of the letter of 11th September 2002 suggest that the Avon and Bristol Law Centre had heard nothing from any IND unit in response to the SEF and statement of additional grounds but had itself taken no steps in the intervening period of well over a year to provoke a response. I mention

these problems because the Claimants' case depends in part upon delay by the Defendant and the evidence relating to AA does not enable me to determine whether the Defendant was responsible for all the delay in this period.

13. The Defendant's decision to reject AA's application was notified by a letter dated 18th February 2003, a little less than three and a half years after the application was first made. The grounds of refusal in brief were that AA's account failed to establish the requisite well-founded fear of persecution and that his account in some respects was not credible. He appealed that decision on 7th March 2003, the appeal was heard on 25th November and on 4th December 2003 the Adjudicator rejected the appeal on the same grounds. On 3rd March 2004 AA was granted leave to appeal to the AIT and on 24th April 2004 the Asylum Immigration Tribunal dismissed the appeal, on the same grounds as before. As at that date, therefore, AA's status as a failed asylum seeker was confirmed.

14. It appears that AA's case thereafter took much the same course as NA's. By a letter dated 30th August 2006 he applied to the Rashid Consideration Exercise Processed Cases Review Group at the Home Office for his case to be reviewed and for ILR to be granted in light of the Iraq policy bulletin issued on 1st August 2006. After some prompting, the Defendant, by a letter dated 9th November 2006, refused to grant ILR on the ground that his case was not within the scope of that policy bulletin. This is the decision complained of by AA in these proceedings.

15. Judicial review proceedings were held up at the request of the Defendant pending the outcome of R(S)'s case and recommenced on 21st August 2007.

The Iraqi failed asylum seekers' policy

16. At the date of each of the Claimants' original applications for asylum there was in force in the United Kingdom a policy relating to Iraqi asylum seekers whose claims for refugee status failed. Neither party adduced the written text of this policy in evidence. I was told that it was not a published document and it appears that even within the ranks of those whose job it was to apply it, it was not universally known. Its content is known to me because it is described (I assume accurately) in paragraph 3.6 of the 2006 Policy Bulletin. Relying upon that source the policy started in April 1991 and came to an end on 20th October 2000. It provided that with effect from April 1991 all Iraqis whose claims for asylum failed were to be granted exceptional leave to remain ("ELR") for four years and thereafter were to be granted indefinite leave to remain ("ILR") provided that the results of various background checks were found to be satisfactory. I have called this the failed asylum seekers' policy to distinguish it from another policy relating to Iraqi asylum seekers in force over the same period.

17. Paragraph 3.6 of the 2006 Policy Bulletin further states that the policy arose out of factors such as the severity of the penalties visited on nationals who were returned to Iraq after leaving it unlawfully. The policy thus responded, on humanitarian grounds, to the circumstances in Iraq as they were at the time when it was formulated.

18. As will be apparent, it was a condition precedent to the grant of four years ELR under this policy that the Iraqi applicants should have had their claim for refugee status finally determined and refused. It was to the benefit of the applicants that this should

be so because there are some advantages attaching to the status of refugee which do not attach to someone who has been denied that status but granted ELR. I mention this point because certain of the submissions on behalf of the Claimants suggested that all that needed to be done in the case of an Iraqi asylum seeker during the currency of the failed asylum seekers policy was to determine that he or she was indeed an Iraqi national and then to apply the policy by granting four years' ELR, effectively a rubber stamp operation. If correct that this was all that was required, it would have had a bearing on the time taken to process the Claimants' applications and the question of whether there had been delay so excessive that it should be categorised not merely as administrative incompetence but as unlawful. In fact, as was ultimately accepted, the status of the asylum claim had first to be determined, involving the need for an SEF to be provided to the applicant, for the applicant to complete and return it, for an interview to take place which must frequently have required the services of an interpreter fluent in both English and the appropriate language, then the paper work processed and any rights of appeal against a refusal exhausted.

19. This policy is central to the relief sought by the Claimants in this case. If each Claimant's original application for asylum had been decided before 20th October 2000 and rejected (as each one ultimately was) the policy would and should have been applied. The claims were not, however, decided in this period. The same policy also applied to claimant (AH) in the case of R(A), (H) and (AH) and should have been applied to him because his application for asylum was decided and rejected during the currency of the policy. It was not applied to him and it was the unlawful failure of the Secretary of State to do so that justified the intervention of the court.

20. The 2006 Policy Bulletin also states in paragraph 3.6 that in light of improved conditions in the KAZ (which meant that failed asylum seekers from that area could safely be returned there) from 20th October 2000 onwards only failed asylum seekers from Iraq GCI were to be granted four years' ELR. The policy was amended, again in relation to failed asylum seekers from Iraq GCI, in that with effect from 20th February 2003 they were to be granted only six months' ELR in light of the uncertainty about conditions in Iraq caused by the prospect of imminent military action against Iraq. These changes further demonstrate the point that the policy was a response to the then-current conditions. Since the Claimants were not from the GCI, the policy as amended did not apply to them.

21. The 2006 Policy Bulletin further states that on 20th March 2003 initial consideration of all Iraqi asylum applications was suspended following the commencement of military action in Iraq, that decision making on Iraqi asylum claims was resumed on 16th June 2003 and that since that latter date all Iraqi asylum applications, regardless of where the claimant originated, have been considered on their individual merits. It does not seem to me that any complaint can be made about the period between 20th March and 16th June 2003.

22. There were other policies in force from time to time, relating to Iraqis and to nationals of other countries. For instance, as appears from paragraph 3.2 and 3.3 of the 2006 Policy Bulletin, between about 5th April 1991 and 20th March 2003, there was a policy not to deny refugee status to Iraqi nationals on the ground that mistreatment could be avoided by relocating the applicant from the GCI to KAZ. This was the policy that should have been, but was not, applied in Rashid's case and to claimants (A) and (H) in the case of R(A), (H) and (AH) because their claims were decided during the

currency of the policy and they were refused asylum on the ground that they could be relocated. This policy appears to have had its origin in practical considerations. It is worth pointing out to avoid confusion when reading the judgments in Rashid's case that the evidence before both courts was that the starting date for this policy was 1st October 2000 and it was only after the case had been decided on appeal that an investigation revealed the policy to be of much earlier origin. (See paragraph 3.3 of the Bulletin). Fortunately the error has no impact on the validity of the decisions.

23. According to paragraph 11 of Ms Miles' statement, in July 1998 the Government, recognising the need to tackle the problem of the backlog of asylum applications, set out its policy for doing so in a White Paper entitled "Fairer, Faster and Firmer". It seems that steps were thereafter taken to introduce a system to give effect to that policy. This included tackling the backlog but the very large increase in applications in the following two years overwhelmed the new system. Ms Miles says in paragraph 18 of her statement,

> *"The surge in intake coupled with the dual focus of the new system meant that many of these new cases could not be dealt with immediately and fell into the backlog."*

24. Paragraphs 16 and 27 of Ms Miles' statement record that although there were 71,160 new applications in 1999 only 33,720 decisions were made and of these 5,335 related to applications made in 1987 or earlier, with the result that the already substantial backlog increased to a record high of 125,100 applications awaiting an initial decision. The poor rate of decision-making in 1999 appears to have been caused at least in part by the late delivery of a new software programme which should have been in operation from 1998 but was not available until some time in 1999. In 2000 the decision-making process improved very significantly, possibly because the new computer system was up and running in this year. Altogether 109,205 decisions on initial applications were made, exceeding the number of initial applications in that year and thus reducing the backlog to 94,500. In 2001 the improvement continued with 120,950 decisions, again substantially exceeding the number of applications for that year and reducing the backlog to 42,200. All this was consistent with the White Paper policy of tackling the long outstanding applications at the same time as the fresh applications.

25. In 2001 an immigration-specific Public Service Agreement ("the 2001 PSA") was concluded between the Home Department and the Treasury. According to paragraph 20 of Ms Miles's statement, the target set out in that Agreement was that by 2004 75% of substantive asylum applications would be decided within two months. The target applied only to new applications, defined as those lodged on or after 1st January 2001. That is not to say, however, that all initial applications which predated 1st January 2001 were ignored. As the figures for 2001 already referred to show, nearly 50,000 more decisions were made in that year than fresh applications lodged. Taking this evidence in isolation I would not have formed the conclusion that there had been any unlawful decision deliberately to shelve initial applications which had been made before 1st January 2001 or that the Defendant's discretion had been unlawfully fettered by a decision to prioritise new applications at the expense of older cases. It is apparent, however, taking the evidence adduced on behalf of the Defendant in other cases such as R(S), together with the terms of the R(S) Policy Guidance referred to

below, that the Defendant accepts that this is so. I therefore proceed on the basis that for a period of time as from 1st January 2001 there was unlawful delay.

26. The 2006 Policy Bulletin was intended to give effect to the decisions of the courts in Rashid's case and the case of (A), (H) and (AH). Paragraph 1.2 required decision makers not to take action in respect of Iraqi claims made between April 1991 and 20th March 2003 without reference to the guidance in the bulletin. Both Applicants satisfied this threshold requirement but did not satisfy the requirement set out in paragraph 4.4 of the Bulletin because their claims were not decided during the period when the relevant policy was in force and without regard to it.

27. In light of the decision in 2007 in R(S)'s case the Home Office issued a document entitled "CRD Guidance on R(S) policy – dealing with asylum claims which may have lost the benefit of an ELR policy as a result of delay" ("the (S) Guidelines"). The date on which the (S) Guidelines were published does not appear on its face but a document control record at the back of the Guidelines (as provided to me) indicates that its first publication was on 4th April 2008. The (S) Guidelines establish what is in effect a flow chart. The Claimants fail to meet even the threshold requirement of stage 1 (which asks the question "*Is the individual a national of a country where a policy to grant 4 years exceptional leave to enter or remain in the UK was in force at 1 January 2001? (See Country Specific Four Year ELR Policies and if the individual is an Iraqi, also Hybrid cases)"* because the only Iraqi country policy to grant four years ELR which was in force at 1st January 2001 was the policy relating to Iraqis originating from the GCI.

The Claimants' claim for judicial review

28. By their amended Grounds the Claimants seek an order quashing the Defendant's refusal in the letters referred to above to apply the policy relating to failed Iraqi asylum seekers and a declaratory order granting them ILR in line with the policy. The Claimants' skeleton no longer claims the declaratory order but instead seeks an order quashing the Defendant's refusal to apply the policy and requiring the Defendant to reconsider the applications in light of the court's judgment. This change I assume reflects the guidance in the judgments of the Court of Appeal in the case of R(S) as to the appropriate remedies.

29. The grounds in support of that application, as expanded in the Claimants' skeleton and developed orally, are that the failed asylum seekers' policy should have been applied to the Claimants' applications because,

    i) Applications should be dealt with in light of any relevant policy in force at the date when the application was made, irrespective of whether it was still in force at the date when the application was determined.

    ii) The decision in Rashid's case supports that proposition.

    iii) By relying upon the date upon which the application is determined as the relevant date for the purpose of considering what if any policy applies to the applicant, instead of the date upon which the application was made, the Defendant is breaching the Claimants' legitimate expectation of fairness and consistency.

iv) It is conspicuously unfair to deny the Claimants the benefit of the policy.

v) The Defendant is benefiting from his own inexcusable delay.

vi) No explanation has been offered for the delay between each Claimant's application and the date on which the Failed Asylum Seekers' Policy came to an end and given the Court's comment in R(A), (H) and (AH)'s case that Iraqi Kurd cases were (during the period of the policy) relatively straightforward, the failure to deal promptly with each claim is inexcusable

vii) The Claimants' case is analogous to the case of R(S).

30. The Defendant's case in summary is that,

i) Country policies, including those relating to Iraq, are devised to reflect the circumstances prevailing in the particular country from time to time. Accordingly, the question whether a failed asylum seeker should be dealt with in accordance with a country policy falls to be decided in light of the policy (if any) in force at the date when the application is determined, in accordance with the principle in Ravichandran v. Secretary of State for the Home Department [1996] Imm AR 97.

ii) Rashid's case has no application to the facts of this case because in Rashid's case the Secretary of State wrongly failed to apply a policy in force on the date when the application was determined, whereas in the present case there was no relevant policy in force on the date when either of the applications was determined.

iii) There is no breach of legitimate expectation that the failed asylum seekers' policy would be applied fairly and consistently.

iv) There is no conspicuous unfairness in denying the Claimants the benefit of the policy.

v) The Defendant is not benefiting from his own inexcusable delay because the relevant delay was not inexcusable.

vi) Delay after the failed asylum seekers' policy came to an end on 20th October 2000 is irrelevant and the lapse of time between the date of each Claimant's original application and expiry of the policy in processing the Claimants' applications is simple delay which does not entitle the Claimants to a remedy.

vii) The Claimants' case is not analogous to the case of R(S) because in that case the decision to shelve all outstanding asylum applications made before 1st January 2001 to meet the targets of the 2001 PSA (which decision was declared in the same case to have been arbitrary and conspicuously unfair) caused (S) on the balance of probabilities to be deprived of the benefit of a policy which would otherwise have been applied to him and pursuant to which he would have been granted ELR and ultimately ILR. By contrast in the present case the unlawful decision did not cause the Claimants to lose the

benefit of the failed asylum seekers' policy because that had come to an end before the decision was made.

31. The issues which arise out of these respective contentions are as follows. (1) As a matter of principle does an asylum seeker's application fall to be determined in light of such policy (if any) as there may be at the time of his application or in light of such policy (if any) as there may be at the time when his application is decided? (2) If the second alternative is the correct one, can the court nevertheless review a decision which has been made in light of circumstances existing at the time of the decision? (3) If the answer to (2) is yes, what circumstances will impose upon the Secretary of State an obligation to remedy an injustice when reconsidering an application? (4) In light of the answer to (3) do the Claimants fulfil the relevant criteria?

32. (1) as a matter of principle does an asylum seeker's application fall to be determined in light of such policy (if any) as there may be at the time of his application or in light of such policy (if any) as there may be at the time when his application is decided? This issue was the central focus of the Claimants' case. They submit at paragraph 9(1) of their skeleton that

> *"in line with basic public law principles the policy should have been applied to individual applicants at the time of their application and not at the time that an individual case worker without method or system in place chose or simply came to consider an application."*

They thus contend that the first alternative (as set out above) is the correct approach.

33. As a general proposition, and even without resort to authority, this seems to me to be plainly wrong. The type of policy under consideration is a response, on humanitarian or practical grounds, to existing conditions in the country of origin. That being so, there is no logical reason why an asylum seeker whose claim is decided against him should be entitled as a matter of principle to be dealt with in light of a policy which is no longer in force at the date of the decision. Authority establishes that this view is correct. See Ravichandran [1996] Imm AR 97. The principle in that case has been applied in subsequent cases. See for instance Rashid's case at first instance where Davis J said:

> *"33. First there can be no doubt but that the normal position in public law where a decision is quashed is that the decision-maker is free to reconsider the decision in light of the material circumstances then prevailing at the time of the fresh decision: see, for example, R v. Secretary of State for the Home Department, ex parte Zeqiri [2002] Imm AR 296 at paragraphs 42 and 43 of Lord Hoffmann's speech".*

The passage then continues with a reference to Ravichandran's case in the following terms,

> *"It has also been expressly held by the Court of Appeal in the case of Ravichandran [1996] Imm AR 97 that in the case of asylum appeals the position is to be considered by reference to*

> *the circumstances prevailing at the date of the hearing in question."*

In the Court of Appeal the impact of the principle was considered in terms that show that the principle itself was regarded as settled, Dyson LJ referring to it as "*the important principle established by Ravichandran"* (See paragraph 51 of the report.)

34. Although this disposes of the first issue, I will, in case the matter goes further, mention briefly the other points advanced by the Claimants in support of this part of their case.

35. Somewhat surprisingly in light of the passage in the first instance judgment in Rashid cited above the Claimants rely upon the same case as support for their contention as to the basic principle. Specifically they rely upon a passage in the judgment of Davis J which states:

> *"47. First and foremost, the only reason why the claimant finds himself in the present position is because of the wrongful failure on the part of those acting for the Secretary of State to apply the policy to him as it should have been applied* ***at the time of his initial application"*** (The Claimants' emphasis).

Taking the words emphasised out of context, they appear to support the Claimants' case. Taking them in context they do not.

36. The context is that Mr. Rashid, an Iraqi Kurd coming from GCI, applied for asylum status on 4th December 2001. His application was dealt with very rapidly and refused on 11th December 2001. It was refused again by the Adjudicator and leave to appeal to the Immigration Appeal Tribunal was also refused, both these decisions being made in 2002. In each instance the decision was made on the ground that Mr. Rashid could be safely removed to the KAZ. At all material times those processing and determining Mr. Rashid's claim were in ignorance of the policy already described above, which had been in existence since April 1991 and was still in force, that Iraqi asylum seekers from GCI would not be denied refugee status on the grounds that they could be relocated to the KAZ. Had the policy been applied, as it should have been, Mr. Rashid would have been granted four years' ELR and thereafter ILR subject to background checks. The reason for the widespread ignorance of the policy was because it had not been adequately promulgated. When the existence of the policy became known to Mr. Rashid and his advisors, he applied to have his application reconsidered. There was delay in reconsidering his case and by the time it came to be considered circumstances in Iraq had changed radically and the policy had come to an end. His application was eventually decided and rejected by two letters in 2004 on the ground that in the circumstances then maintaining in Iraq he no longer qualified for refugee status. It was held by Davis J at first instance that in the circumstances of that case the 2004 decisions were so unfair as to amount to a misuse of policy requiring the intervention of the Court. He therefore quashed the decisions contained in the two 2004 letters and made a declaration that Mr. Rashid was entitled to refugee status with concomitant ILR. His decision was upheld save as to the nature of the remedy, the Court of Appeal stating that the proper remedy was a grant of ILR.

37. It is thus apparent that the court was not concerned with a situation like the present where a lawful policy change occurred between the date of the application and the date of the determination of the application. The difference between the date of the application and the date of the determination in Rashid's case was irrelevant and the language employed by the judge in the passage relied upon was not intended to express any statement of principle. Accordingly, the words emphasised do not have the status for which the Claimants contend.

38. For the same reason the Claimants' reliance upon a concession by the Defendant in the Rashid case in the following terms "*(1) It is accepted that the policy should have been applied to the Claimant* ***at the time of his application*** *and that had it been he would have been granted refugee status and indefinite leave to remain."* (the Claimants' emphasis) does not assist them.

39. The Claimants also rely upon the fact that (1) the relevant date for the one-off family concession policy of 24th October 2003 is the date on which the application for asylum is made and (2) the relevant date for determining which individuals are members of a refugee's family for the purposes of the family reunion policy is the date upon which the Applicant fled his or her country of origin. I was not provided with a copy of the text of either of these policies but with the assistance of counsel it was made clear to me that in each case the policy is merely specifying the date as at which the existence or otherwise of a qualifying circumstance is to be determined. That being so they do not demonstrate any general principle in conflict with or derogation from the principle in Ravichandran and they do not support the Claimants' case.

40. The Claimants also submit under the heading in their skeleton "*Why apply the policy at the time of the asylum application rather than at the time of the caseworker's consideration* [determination] *of the application?"* that if the principle is that the claim is to be decided in light of the policy in force at the date of the decision, that will lead to an irrational and arbitrary result because the outcome of any given decision will depend upon when, and by which case worker, an applicant's application is decided. Additionally, they submit that the public law principles of consistency, equality, transparency of process and reasonableness lead to the conclusion that applications must be determined in light of such policy as may have been in force at the date of the application.

41. Of course, it is correct that differences in result will follow if the Ravichanran principle is applied; for example two asylum seekers may apply for asylum on 1st December when a four year ELR policy applicable to them is in force; with no unlawful delay or other unlawful act in either case, the claim of one may be decided on 14th December when the policy is still in force, the other may be determined on 31st December when the policy has come to an end due to changes in the circumstances in the relevant country; the first is granted ELR; the other is not. The fact that such differences will follow does not, however, lead inexorably to the conclusion that the principle contended for by the Defendant must be wrong and the principle contended for by the Claimants must be right. On the contrary, provided that the Ravichandran principle is applied consistently to all decisions, the differences in result are neither arbitrary nor irrational but the inevitable consequence of legitimate procedures which do not offend the public law principles relied upon.

42. (2) On the basis that the correct principle is the Ravichandran principle can the court in judicial review proceedings, review a decision by the Secretary of State which has been made in light of circumstances existing at the time of the decision? At first blush it might seem curious that a decision made in accordance with the correct principle can be subject to the review of the court on the ground that it is unlawful. As against that, however, it seems undoubtedly curious that persons in the position of Mr. Rashid and the claimants in the R(A), (H) and (AH) case should have to suffer the serious disadvantage flowing from the original legally flawed decisions made in each of their cases without redress. The answer to this apparent conflict is to be found in the judgments of Carnwath and Moore-Bick LJJ in R(S)'s case, in which it was recognised that the power of the Secretary of State to grant relief of a kind that would remedy the injustice caused by the legally flawed decisions is one of the present circumstances that the Secretary of State, acting in accordance with the Ravichandran principle, has to take into account, with the result that a failure to do so is itself open to challenge. (See paragraphs 46 and 69 of the report.)

43. (3) Since the answer to (2) is yes, what circumstances will impose upon the Secretary of State an obligation to remedy an injustice when reconsidering an application? Clearly injustice in this context connotes unlawfulness because, as pointed out by Lord Justice Carnwath in R(S)'s case, the court's proper sphere is illegality, not maladministration. Every case will turn on its particular facts but the reported cases already referred to provide helpful illustrations. The guidance I derive from them is that there must be some past act or omission which is unlawful in the public law sense and which is so detrimental in its consequences that it would be wrong for the Secretary of State not to take it into account and remedy it.

44. (4) Do the Claimants fulfil the relevant criteria? It is pointed out on their behalf that the decision to shelve their cases was unlawful, just as it was in (R(S)'s case. That is correct but the critical difference in my view is that in the latter case the shelving of his case caused (S) to lose the valuable benefit of a four-year ELR policy followed by ILR, whereas in the present case the relevant policy had expired before the Defendant's unlawful decision to shelve applications which had been made before 1st January 2001. The detriment suffered by these Claimants in consequence of the unlawful shelving of their cases was thus limited to that caused by the period of delay after 1st January 2001. In the case of NA that period was 1st January 2001 to 20th March 2003 when decision making in relation to Iraqi asylum claims was suspended. (I have left out of account the period between the resumption of decision making on 16th June 2003 and the determination of his claim on 21st August 2003 because there is no evidence that his case was unlawfully shelved in this period.) In the case of AA the period lasted from 1st January 2001 to 18th February 2003. I do not consider the period of unlawful delay in each case was so serious an injustice that it imposed an obligation on the Secretary of State, when reconsidering the Claimants' cases, to remedy it by granting ILR. Accordingly, I conclude that there was no error of law in the decisions notified by the letters under review.

45. Finally, the Claimants also contend, on the basis of the evidence contained in the statements dated 23rd January 2007 and 24th October 2008 of Ms Beth Cooper (a trainee solicitor at the time of her first statement) that because other Iraqis were granted ILR when their cases were considered by the Secretary of State but the Claimants were not, there has been a breach of the Claimants' legitimate expectation

that they would be treated equally, making it unlawful for the Secretary of State not to remedy that injustice by granting ILR to the Claimants.

46. The problem with this contention is that Ms Cooper's evidence wholly fails to establish that ILR was granted to any Iraqi whose circumstances were the same as the Claimants. The only man she is certain was granted ILR was someone with whom she was dealing in light of the guidance in the Iraq Policy Bulletin 2006. That being so, he is more likely than not to have been someone whose circumstances were unlike the Claimants in that his application had been decided without regard to an applicable policy in force at the time of the decision. This submission therefore fails.