ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of hearing: 28 May 2008

Before

Senior Immigration Judge Gill

Between

PD Appellant

And

The Secretary of State for the Home Department Respondent

(1) The jurisdiction of the Tribunal is in all cases limited to the grounds of appeal, as varied before the Immigration Judge, plus any grounds contained in section 120 statements and Robinson obvious points. The Tribunal is not empowered by section 86 of the 2002 Act to allow an appeal on some other basis. Grounds of appeal cannot be varied by implication.

(2) Paragraph (1) informs the approach that the Tribunal must take on reconsideration in determining whether an Immigration Judge has materially erred in law.

(3) The Respondent's failure to consider the eligibility of an appellant under the backlog policy, announced in the White Paper entitled: "Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum" issued on 27 July 1998, does not raise any Robinson obvious point.

Representation:
For the Appellant: Mrs. J. Rothwell, of Counsel, instructed by Oaks Solicitors.
For the Respondent: Ms. R. Brown, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Sri Lanka, born on 21 May 1965. He entered the United Kingdom on 10 June 1995 with entry clearance as a visitor, and claimed asylum on 12 June 1995. His application was refused by the Respondent on non-compliance grounds (under paragraphs 336 and 340 of the Statement of Changes in Immigration Rules HC 395, as amended) (the Immigration Rules), on 24 May 2000. His appeal was heard before Mr A J Martin, a Special Adjudicator (the first Adjudicator) on 31

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May 2001, and dismissed on 11 July 2001. The Appellant did not embark. His representatives submitted further representations asking that his case be considered under the European Convention on Human Rights (ECHR). These representations were refused for reasons given in a letter from the Respondent dated 20 February 2002. His subsequent appeal was heard on 5 December 2002 before Mr C J Deavin, a Special Adjudicator (the second Adjudicator), and dismissed on 31 December 2002.

2. On 12 July 2005, new representatives made further representations on the Appellant's behalf, and sought to make a fresh asylum claim on his behalf. The Respondent did not accept the representations amounted to a fresh claim and gave reasons for this decision in a letter dated 2 October 2006. The Appellant was also served with notice of further removal directions dated 12 September 2006.

3. Oaks Solicitors, instructed as the Appellant's representatives, made representations against his proposed removal scheduled for 4 October 2006 and applied for Judicial Review. The Respondent, in a consent order dated 27 February 2007, agreed to treat the further representations of 2 and 3 October 2006 and the grounds of the Judicial Review application as a fresh claim. Those representations were rejected for reasons given in a letter dated 24 April 2007. The Respondent issued another notice of decision (a decision to refuse leave to enter) addressed to the Appellant on 18 May 2007. This contains proposals for the Appellant's removal to Sri Lanka.

4. The Appellant's appeal against the decision of 18 May 2007 was lodged on 6 June 2007. It does not assert that the Respondent's decision is not in accordance with the law, i.e., the grounds on which the appeal was brought did not include the ground in section 84(1)(e) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The appeal was heard on 4 July 2007 before Immigration Judge Bart-Stewart, who dismissed the appeal on asylum, humanitarian protection and human rights grounds. On 16 August 2007, a Senior Immigration Judge refused to order reconsideration. By an order of the High Court dated 23 November 2007, the Tribunal was ordered to reconsider its decision.

Basis of Claim

5. In summary, the Appellant claimed to have joined the Sri Lankan police force on 1 August 1986. He claimed to have had frequent encounters with the Liberation Tigers of Tamil Eelam (LTTE). After each attack by the LTTE, he would arrest suspects and send them to his headquarters. He later discovered that some of the people taken into custody would disappear, and, when asked about their whereabouts by relatives, he would refer them to his headquarters, which often denied that the individuals had been taken there in the first place. The Appellant claimed that this caused problems with the relatives and ordinary civilians as well as the LTTE. He claimed that he voiced his disapproval of these incidents to his superiors to no avail. In April 1989, he was posted to Colombo and carried out undercover work against the Janatha Vimukthi Peramuna (JVP) and the LTTE. He went to India with two other officers on a surveillance operation and became involved in fighting. He rounded up more suspects, and they also disappeared. He wanted to desert his post because of this and because he could not carry out his functions properly. He claimed to have found out that the LTTE planned to assassinate him. He discussed the situation with his uncle who advised him to leave Sri Lanka.

The Immigration Judge's determination

6. At paragraph 17 of the determination, the Immigration Judge said that she took as her starting point the findings of fact of the previous Tribunals and which the Respondent accepted. That is, that the Appellant is a member of the Sri Lankan police force who was engaged in intelligence duties, which became known to the LTTE. An indeterminate number of people with whom he dealt disappeared and, because of his role in the security services, the Appellant's name was on an LTTE hit list. This was the state of affairs in 1995 and he decided to leave the country and seek refuge in the United Kingdom. In assessing the risk on return, the Immigration Judge referred to the judgment in *Gedara* [2006] EWHC 1690 (Admin) in which the Court, inter alia, accepted the Secretary of State's submission that, as a matter of established principle, there is no entitlement to refugee status because of risks arising out of service in the security forces, whether against an external or internal enemy. This principle applied equally to the ECHR claim. The Immigration Judge noted that a state is entitled to require soldiers and police officers as representatives of the organs of the state to face a heightened risk of harm from internal or external enemies in order that it can provide due and practical protection to its citizens. The state does not have to guarantee perfect safety and the real question is whether the protection offered in Sri Lanka is practical and effective in the particular circumstances of the individual's claim. The Immigration Judge had earlier noted the finding of the first Adjudicator that the Appellant's primary fear is of the LTTE, and not the authorities. The Tribunal accepted this, saying that the Appellant would be liable to suffer a revenge killing. The Immigration Judge noted that the first Adjudicator had already found that there is no evidence of risk of persecution as a deserter from the police force. The Immigration Judge then said that, given these conclusions, she found that the Appellant had not shown that he was entitled to asylum.

7. The Immigration Judge then turned to consider the Appellant's Article 2 and Article 3 claims. She again referred to the judgment in *Gedara*, noting that the Appellant as a former security officer may be at heightened risk of harm, but that it does not follow that this places him within the terms of the ECHR. She noted that the second Adjudicator had taken account of the substantial changes in Sri Lanka since the Appellant left, which included the ceasefire between the LTTE and the government, and the fact that it was seven and a half years since the Appellant had operated as a police officer in Sri Lanka. The only fear that the Appellant had expressed was of a revenge attack because of being on the LTTE hit list. The Immigration Judge noted that a further four years had moved on since the previous hearing. The Appellant has now been in the United Kingdom for twelve years. She then turned to consider the expert evidence of Mr David Rampton, whose expertise she accepted. At paragraphs 26 and 27 of the determination, the Immigration Judge said:-

> "26. On the issue of desertion he said that police in hundreds have abandoned posts and later resigned prompting speculation that they were to be charged with cowardice. He said it remains unclear whether the appellant would face formal charges though he might be disciplined. He considered it highly unlikely that the JVP would represent a threat or have an adverse interest in the appellant and he has little to fear from the JVP on return to Sri Lanka. He considers what the appellant says about being on the LTTE hit list. He considers this presents a serious threat as the LTTE is and has been capable of ruthless elimination of opponents, which has not receded. He lists a number of individuals assassinated as anti LTTE activist [sic], supporters and suspected collaborators. He

considers that the large number of such assassinations indicates that the Sri Lankan authorities are incapable of protecting individuals who face persecution and harassment from the LTTE. He also considers the risk of asylum and detention at the airport. This he accepts usually applies to failed Tamil asylum seekers but considers it plausible that the appellant will undergo the same suspicions and experiences.

27. The country conditions described by Mr. Rampton do not differ from that in the extracts of the COIR relied on by Ms Jagaraja. Whether these conditions pose a real risk for the appellant is the issue I must decide. I accept Mr. Rampton as an expert on the political conditions in Sri Lanka however, he does not address the very pertinent issue of whether the LTTE would have any reason to target the appellant 12 years after he left the country nor help as to the numbers of former police officers who have been targeted and killed. Of the long list of people assassinated, he does not indicate whether any or how many are former intelligence officers. The fact that a number of people have been killed in a conflict does not assist in deciding the individual risk to the appellant. Mr. Rampton refers to hundreds of police deserting and no doubt many of these are for reasons similar to the appellant. There is no evidence before me that they have been hunted and killed and I do not consider it likely that the LTTE is concentrating on locating all those whom they considered as past enemies. Whatever view the LTTE had of the appellant, he ceased to be responsible for or involved in the arrest of their members many years ago. I do not consider that the breakdown of the peace process would be likely to put the appellant at any greater risk today than in 2002."

8. The Immigration Judge then said, at paragraph 28, that she did not consider it likely that the Appellant would have difficulties with the authorities, that he left on his own passport with a visa and is Sinhalese and that there was no reason why he could not return there on his own properly issued passport. She found that there was no real risk of the Appellant receiving treatment in breach of Articles 2 and 3 of the ECHR.

9. With regard to the Appellant's claim based on his medical condition, the Immigration Judge summarised the report of Dr. Gunam Kanagaratnam, who she noted described himself as having been a Consultant Psychiatrist until recently, when he chose to go down one grade after some ill health. She noted that the diagnosis made by Dr. Kanagaratnam is that the Appellant suffers from complex post-traumatic stress disorder with features of major depressive disorder, that he is being treated with antidepressants, that treatment should include an anxiety management and cognitive therapy and that there are no clinical psychologists in the Department of Health in Sri Lanka and so psychotherapy is not available. Dr. Kanagaratnam states that the main treatment centres in psychiatry are in Colombo. The Immigration Judge noted that Dr. Kanagaratnam is concerned that, on return to Sri Lanka, the Appellant would be detained and, due to intense interrogation, his mental health could deteriorate and that, in his disturbed state of mind, the likelihood of suicide is high. The Immigration Judge then assessed the evidence at paragraphs 30 and 31, which state:-

"30. I find that the assertion that the appellant would be detained and interrogated is mere speculation and as already found, consider his detention at the airport to be unlikely. The risk of suicide appears to related to this event and consequently I find the risk to also be unlikely.

31. There are a number of letters from the appellant's GP and other medical professional [sic]. There is the suggestion that the appellant may have taken an overdose of paracetamol but the hospital discharge notes that are disclosed merely record that his friends found a large quantity in his possession not that he took any. The notes refer to the recent break up with his fiancée because of his visa. He was found to have moderate depression due to his social circumstances. Although he was referred to his GP for further follow up and probably going to his local CMH, he failed to keep appointments that were given and ultimately his case was closed. A letter dated 30 August 2006 from

Vartouhi Ohanian Consultant Clinical Psychologist at West Middlesex University Hospital following a referral said that the appellant required to be seen by the Brief Intervention & Counselling Service rather than long-term psychological services. In light of these letters and reports, I attach little weight to the assessment of Dr Kanagaratnam that the appellant's symptoms are complex and requires treatment not available to him in Sri Lanka. The COIR report at 26.01 – 26.17 shows that whilst resources are stretched, it is inaccurate, as Dr Kanagaratnam appears to suggest mental health services would not be available to the appellant."

10. The Immigration Judge then went on to dismiss the Appellant's claim for humanitarian protection, before turning to the Article 8 claim at paragraph 33, which reads:-

> "33. The appellant submits that his rights under Article 8 of the 1950 Convention are engaged. He said that he has a private life with his friends and distant relatives, has a job and owns a property. These issues have been previously adjudicated on. His circumstances have not changed and I find any breach of his private life is lawful and proportionate. The fact that he has been in the UK for 12 years should not come to his aid when it is his determined attempts to avoid removal since 2001 that had let to him accumulating at least half of that period. The claim that he has no family in Sri Lanka I find not of significance. I do not find that he has established family life in the UK. He has no close relatives here and the medical records suggests [sic] he lives alone. I accept that after 12 years he would have established a private life here however he had no close family when he came here. He was able to learn the language and obtain employment and property. Such enterprise will be of assistance when he returns to his home country as a resourceful able-bodied single man. It would not be unlawful nor disproportionate for the appellant to be removed to Sri Lanka. I find that the decision appealed against would not cause the United Kingdom to be in breach of its obligations under the 1950 Convention."

11. Before the Immigration Judge, reliance was placed on the Respondent's backlog policy announced by the Respondent in a White Paper entitled "Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum" on 27 July 1998 (the White Paper), paragraphs 8.29 and 8.30 of which read:-

> "8.29 Such delay will not normally be a factor at all in the consideration of applications in the backlog dating from after 1995. Applications from before that date will be considered broadly in two groups. In certain of the very oldest cases, where an asylum application was made before the coming into force on 1 July 1993 of the Asylum and Immigration Appeals Act 1993, delay in itself will normally be considered so serious as to justify, as a matter of fairness, the grant of indefinite leave to enter or remain. This will not apply, however, to applicants whose presence here is not conducive to the public good (for example, on the basis of their conviction for a serious criminal offence), nor to any application for asylum made after the commencement of removal or deportation action against the applicant. Such cases will continue to be assessed on their merits without any presumptive weight being given to the delay in reaching a decision. Altogether in the pre-1993 Act group there are estimated to be a total of around 10,000 cases still outstanding.
>
> 8.30 For applications made between 1 July 1993 and 31 December 1995, estimated at about 20,000 cases, delay will not normally of itself justify the grant of leave to enter or remain where asylum is refused, but in individual cases will be weighed up with other considerations and, if there are specific compassionate or other exceptional factors present which are linked to the delay or which compound its effects on the applicant's situation, a decision to grant limited leave to enter or remain may then be justified. The sort of factors which might be relevant here, not otherwise by themselves sufficient to justify leave to enter or remain, could include such things as the presence of children attending school or a continuing record of voluntary or other work by the applicant in the local community."

12. The Immigration Judge dealt with the backlog policy at paragraph 18, which reads:-

> "18. For unexplained reasons the respondent did not get round to considering his case in 2000. By that time the conditions in Sri Lanka were improved. The appellant complains that he should have also benefited from a policy that the respondent had in place for clearing the 50,000 asylum cases that were then blocking the system. The respondents [sic] say that it is the appellant's fault as he failed to co-operate and send them information when requested. I find this a fair and reasonable response. In his representations (p71) the appellant suggests that it was his original solicitors who were responsible for the default however the respondents [sic] cannot be blamed for his poor representation. He did not respond to 2 letters under the backlog policy. I have been provided with a copy of the policy which applied in 1998. It reads "for applications made between 1 July 1993 and 31 December 1995, estimated at about 20000 cases, delay will not normally of itself justify the grant of leave to enter or remain where asylum is refused, but in individual cases will be weighed up with other considerations and if there are specific compassionate or other exceptional factors present which are linked to delay or which compound it's [sic] effects on the applicants [sic] situation, a decision to grant limited leave to enter or remain may then be justified." It goes on to indicate the type of factors that may be relevant. The appellant did not present any evidence to the respondent to assist on deciding whether the policy that in any event is discretionary, should be exercised in his favour. Further as reminded in MM [2005] UKIAT 00163 (Serbia and Montenegro) the applicant is not entitled to just sit back and then rely on delay. There is no evidence of any contact made by the appellant or his representatives to progress his case until after the initial refusal of his asylum claim in 2000. Thereafter the appellants [sic] continued presence in the United Kingdom has been because of his pursuing legal challenges to his removal. He is of course entitled to do so but I do not find that the appellant who did no [sic] cooperate with the respondent, is entitled to benefit from any policy that may have been operative prior to the determination of his asylum claim. There is no evidence he would have met the criteria to be granted any form of leave. I find [sic] is not relevant to the issues before me. I will return to this when considering his representations under Article 8."

13. Unfortunately, however, the Immigration Judge did not return to the backlog policy when considering the Article 8 claim at paragraph 33.

The Grounds of Application

14. The grounds of application contend that the Immigration Judge erred in law as follows:-

    (a) (Ground 1)

    (i) by erring in her assessment of the expert evidence of Mr. Rampton, in that, the Immigration Judge was highly selective in selecting the passages she quoted from the expert's report.

    (ii) by erring in her assessment of the issue of sufficiency of protection. At the hearing, Mrs. Rothwell accepted that, if I concluded that the Immigration Judge did not materially err in law in her assessment of the risk on return, then sufficiency of protection would not be relevant, and accordingly, Ground 1(ii) would not be material to the outcome.

    (b) (Ground 2) by failing to properly consider the medical evidence. Paragraph 7 of the grounds asserts that the Immigration Judge erred in law at paragraph 30 of the determination by linking the Appellant's mental suffering to the subjective fears of risk of arrest and detention on return and finding that they are based on mere speculation. At the hearing before me, Mrs. Rothwell submitted that this

ground was relevant to the Appellant's asylum claim as well as his Article 3 claim based on his medical condition.

(c) (Ground 3) by making flawed findings in respect of the Respondent's failure to consider the Appellant's claim under the backlog policy. Paragraphs 9 and 10 of the grounds contend that the Immigration Judge's finding that the Appellant had not co-operated with the Respondent was inconsistent with the finding of the previous Adjudicator that the Appellant should not be blamed because he had not received the alleged questionnaire from the Respondent. The grounds contend that it is a known fact that, despite the stipulated discretionary factors, the Respondent did in practice exercise excessively generous discretion in granting leave to remain to most applicants under the policy.

<u>Submissions</u>

15. Before I heard submissions, I raised some preliminary points with regard to Ground 3. It seemed to me that the issue as to whether the backlog policy was relevant in this case depended solely on whether the Appellant's application was actually lodged with the Respondent between 1 July 1993 and 31 December 1995 and, if so, whether it had been decided by the Respondent when the policy was announced on 27 July 1998. It seemed to me that the argument that the Appellant was entitled to be considered under the policy, even if no application had in fact been lodged (for whatever reason) was misconceived. The Respondent's policy was intended to address the unfairness that may have been caused due to administrative delays in dealing with applications that had actually been lodged. If the Respondent had not received an application from the Appellant, then it is not possible to say whether the Appellant's application would have been one of those that had fallen prey to the administrative delays and had not been dealt with when the policy was announced.

16. In this regard, Ms. Brown and Mrs. Rothwell agreed that the first date on which the Appellant lodged an asylum claim with the Respondent was 12 June 1995 and that a decision was made on that claim on 24 May 2000. The decision was to refuse the claim on non-compliance grounds, under paragraphs 336 and 340 of the Immigration Rules. On this basis, Ms. Brown agreed that the policy was relevant, and that the Immigration Judge was incorrect to find otherwise at paragraph 17 of the determination. Ms. Brown also agreed that there was nothing in the refusal letter dated 24 May 2000 which indicated that the Respondent had considered the backlog policy. At paragraph 28 of the refusal letter dated 28 October 2000, the Respondent appeared to have considered whether a different policy had existed, that is, that of granting asylum or exceptional leave to remain to Sri Lankan asylum seekers. The Respondent considered the issue of delay, seeking to distinguish the Appellant's case from the cases of *Shala v SSHD* [2003] EWCA Civ 233 and *SSHD v Akaeke* [2005] EWCA Civ 947. Ms. Brown agreed that the refusal letter dated 28 October 2006 indicates that the Respondent had considered the existence of a different policy.

17. However, I then raised the question as to whether the grounds on which the appeal was brought included a ground that the Respondent's decision was not in accordance with the law and, if not, whether an application had been made to the Immigration Judge to vary the grounds of appeal to include that ground, or whether the Immigration Judge had varied the grounds in the absence of an application. In this

regard, Mrs. Rothwell referred me to the Appellant's representatives' representations in their letter dated 12 July 2005 at page 70 of the Appellant's bundle, in which the Respondent was requested to consider the backlog policy in the Appellant's case. The refusal letter dated 28 October 2006 was issued in response of this letter.

18. I questioned whether, once a decision was made in his case, it was for the Appellant to bring his appeal on the grounds of appeal on which he wished to rely. In this regard, I noted that the "*Grounds of Appeal/Statement of Additional Grounds*" attached to the notice of appeal does not assert that the Respondent's decision is not in accordance with the law. I checked the Immigration Judge's Record of Proceedings, copies of which I provided to the parties, the relevant parts of which read:-

    (On the front page of the Record of Proceedings):

    > "Article 8 reps – p73
    >
    > Backlog policy – applied as he applied June 95 and policy was 1998
    >
    > Refused at p76."

    (On the penultimate page of the Record of Proceedings):

    > "Article 8
    >
    > Do not agree what he says about J par 16, 17, 28 & 33, 42 - domestic Article 8 case applies not N – high threshold test does not apply.
    >
    > Backlog
    >
    > Concede argument he did not return questionnaire – likely he'd have got leave – not be an immigration offender – would not have Article 8 application to make – should be used to assess proportionality – Tozlukaya has policy applied in Article 8 case - finding in 2001 he will be killed on return –"

19. I noted that there was no application to vary the grounds before the Immigration Judge and that Counsel for the Appellant before the Immigration Judge (Ms S Jegarajah) made submissions with regard to the policy in connection with the Article 8 claim. There was nothing which suggests that she contended that the decision is not in accordance with the law as a result of the Respondent's failure to consider the policy.

20. Mrs. Rothwell submitted that paragraph 17 of the determination shows that the Immigration Judge must have implicitly varied the grounds of appeal to include the ground that the decision was not in accordance with the law.

21. I then heard submissions from the parties, which I will now summarise.

22. On the Appellant's behalf, Mrs. Rothwell submitted that the report of the expert was important in this case, because the objective evidence in general relates to Tamil Sri Lankan asylum seekers. The basis of the Appellant's claim was unusual. The Immigration Judge accepted the expertise of Mr. Rampton. She made two errors of law, both of which were material. Firstly, the Immigration Judge misapprehended the

evidence of the expert when she said that the expert does not address "*the very pertinent issue of whether the LTTE would have any reason to target the Appellant twelve years after he left the country, nor help as to the numbers of former police officers who have been targeted and killed*." Secondly, the Immigration Judge also misapprehended the evidence of the expert when she said that, "*Of the long list of people assassinated, he does not indicate whether any or how many are former intelligence officers*". Mrs. Rothwell submitted that, given that Mr. Rampton was aware of the timing of the Appellant's arrival in the United Kingdom and his claim for asylum in the United Kingdom, it was implicitly the case that he was aware of the time lapse since the events on which the Appellant based his asylum claim. It is clear from page 4 of the report (page 38 of the Appellant's bundle) that Mr. Rampton had seen the Appellant's statement, the Respondent's documents and the previous asylum appeals by the Appellant. Mrs. Rothwell submitted that the final sentence of paragraph 4.0 of the report on pages 38 and 39 of the Appellant's bundle make it clear that Mr. Rampton was concentrating on the dangers the Appellant would face if returned to Sri Lanka. At paragraph 4.3 of the report, Mr. Rampton said that the Appellant's claim that the LTTE would have an adverse interest in him because he is on a hit list does represent a serious threat to the Appellant as the LTTE "*is and has been capable of ruthless elimination of opponents*" and (at the bottom of page 40 of the Appellant's bundle) that "*the LTTE also have an extremely efficient intelligence network that extends well beyond the North and East, but is highly active in Colombo as well*". Mr. Rampton went on to state that the Sri Lankan security forces are incapable of protecting individuals who face persecution and harassment from the LTTE. On page 41 of the Appellant's bundle, Mr. Rampton said that "*the LTTE has engaged in the ruthless targeting and assassination of individuals known to be working for the intelligence forces, whether that be the police or the army*". Mr. Rampton then went on to give the example of two high-ranking army officers who were assassinated in 2005 in Colombo, allegedly by the LTTE, and that "*Some 50 intelligence operatives of the Sri Lankan armed forces (were) killed in similar circumstances*". Mr. Rampton makes the point that these incidents relate to a period of the ceasefire agreement when the environment was more peaceful and have affected more personnel than senior officers. Accordingly, Mr. Rampton considered that, in the current context, the risk to the Appellant would be heightened.

23. Mrs. Rothwell submitted that the Immigration Judge was therefore incorrect to say that Mr. Rampton had not indicated whether any, or how many, of those people who were assassinated were former intelligence officers. Although it is correct that Mr. Rampton had not indicated this in the long list of people on page 40 of the Appellant's bundle, he did go on to say, at page 41 of the Appellant's bundle, that "*Some 50 intelligence operatives of the Sri Lankan armed forces (were) killed in similar circumstances*". Accordingly, the Immigration Judge had made a mistake of fact as to the expert evidence before her.

24. Accordingly, Mrs. Rothwell submitted that the remainder of the Immigration Judge's assessment of the evidence of Mr. Rampton was flawed.

25. With regard to Ground 2, Mrs. Rothwell submitted that the Immigration Judge looked at the medical evidence from the wrong perspective. It is clear from page 104 of the Appellant's bundle that Dr. Kanagaratnam had seen the Appellant on four separate occasions, for a total period of more than six hours. On page 111 of the Appellant's bundle, Dr. Kanagaratnam said that his questioning of the Appellant brought back

memories of working in the police service; on page 112, that it is not uncommon for active servicemen to suffer from post-traumatic stress disorder when they sustain physical injuries, witness the deaths of their colleagues in close proximity and learn about the deaths of their close colleagues; and, on page 113, that, in the event of being returned to Sri Lanka, the Appellant is certain that he would be arrested and detained and that it is his knowledge that the detainees would be subject to extreme physical and psychological harassment. On page 114 of the Appellant's bundle, Dr. Kanagaratnam said that the Appellant remains extremely concerned by the stigma of desertion from duty. At paragraph 30 of the determination, the Immigration Judge said that the assertion that the Appellant would be detained and interrogated is mere speculation, that she considered that the Appellant's detention at the airport was unlikely and that, given that the risk of suicide appears to be related to that event, she consequently found the risk of suicide also to be unlikely. Mrs. Rothwell submitted that the issue was not whether there was a real risk of the Appellant being arrested and detained and interrogated, but the Appellant's perception of whether he would be arrested and detained and interrogated. Mrs. Rothwell submitted that the Appellant's perception of the risk is what gives rise to the risk of suicide, and not whether it is reasonably likely that he would be arrested and detained and interrogated. Given the Appellant's perception, Mrs. Rothwell submitted that his subjective fear is such that the effect on him of his perception would reach the high Article 3 threshold, by precipitating a risk of suicide or giving rise to an increased risk.

26. I asked whether the Appellant had made any previous suicide attempts. Mrs. Rothwell referred me to pages 120, 121, 124 and 119 of the Appellant's bundle. These indicate that the Appellant was found by his friends in possession of a large quantity of paracetamol, as a consequence of which he was taken to the Accident and Emergency Department in West Middlesex University Hospital NHS Trust. The notes of the Accident and Emergency Department record that the Appellant was not suicidal (page 124 of the Appellant's bundle). There was a subsequent letter from the Appellant's GP (page 119 of the Appellant's bundle) which does not refer to the risk of suicide. Dr. Kanagaratnam's report refers to the future risk of suicide, but it does not mention any past attempts. However, Mrs. Rothwell submitted that Dr. Kanagaratnam had seen the Appellant for six hours over a number of occasions. As early as March 2007, Dr. Kanagaratnam referred to the Appellant's "intense suicidal ideation" (page 131 of the Appellant's bundle). Accordingly, Mrs. Rothwell submitted that the Immigration Judge had erred in her assessment of the medical evidence, by placing too little weight on the medical report of Dr. Kanagaratnam.

27. With regard to Ground 3, Mrs. Rothwell submitted that the Immigration Judge had implicitly varied the grounds of appeal to include the ground that the Respondent's decision was not in accordance with the law. If I was with her in this regard, she submitted that the appeal should be allowed to the extent that the Appellant's application for consideration under the backlog policy was still outstanding before the Respondent. In the event that I was against her, she submitted that the Respondent's failure to consider the policy was still relevant in connection with the Article 8 claim in two respects. In the first place, although not argued in the grounds of application, the Immigration Judge had failed to consider the step-by-step approach set out in the judgment of the House of Lords in *Razgar* [2004] UKHL 27. Mrs. Rothwell submitted that, if the Immigration Judge had considered the step-by-step approach set out in *Razgar*, she would have concluded that the Respondent's decision was not in accordance with the law under Article 8(2) because of the failure

to consider whether the Appellant should be granted leave under the backlog policy. Secondly, the Immigration Judge failed to consider the relevance of the failure to consider the Appellant's eligibility under the backlog policy when carrying out the balancing exercise under Article 8(2) in order to decide whether the Appellant's removal prejudices his private and family life in a manner sufficiently serious to warrant a breach of a fundamental right protected by Article 8. The Immigration Judge had made errors at paragraph 17 of the determination, culminating in her finding that the backlog policy was not relevant. At paragraph 17, she said she would return to this issue when considering the Appellant's Article 8 claim, but failed to do so. The errors made at paragraph 17 of the determination include the fact that she overlooked the finding of the first Adjudicator that the Appellant had not received the questionnaire. By failing to take the policy into account when considering the balancing exercise under Article 8(2), the Immigration Judge overlooked a material matter.

28. In response, Ms. Brown submitted that the Immigration Judge's comments with regard to the report of Mr. Rampton, at paragraph 27 of the determination, were factually accurate. The expert did not make it clear that he had considered the lapse of time since the Appellant's departure from Sri Lanka when assessing whether there was a current risk from the LTTE. In any event, Ms. Brown submitted that the Immigration Judge was referring to whether the expert had adequately explained the causal link between the events of twelve years ago and the current risk. At paragraph 4.3 on page 40 of the Appellant's bundle, the expert had said that "*the LTTE is and has been capable of ruthless elimination of opponents*". In the sentence immediately preceding this, Mr. Rampton referred to the Appellant's claim that he "*is*" on a hit list. Ms. Brown submitted that it was not clear that the expert was aware that the accepted evidence was that the Appellant was on a hit list at the time of his departure from Sri Lanka. The issue was whether that hit list would be maintained. The expert's opinion that the LTTE is and has been capable of eliminating its opponents was not the issue. The issue was whether it was reasonably likely that they would maintain an adverse interest in the Appellant in his circumstances, given the lapse of time.

29. Ms. Brown submitted that the Immigration Judge had not overlooked any relevant evidence when she said that Mr. Rampton had failed to indicate whether any of the long list of people assassinated were former intelligence officers. The key word, Ms. Brown submitted, was the word "*former*". Ms. Brown submitted that Mr. Rampton did not explain whether any of the victims mentioned on either pages 40 or 41 of the Appellant's bundle were former members of the intelligence services, or former members of the armed forces. Mr. Rampton did not say whether the people he referred to as having been assassinated were killed at a time when they were still serving, or whether they were people who had ended their service historically. Mr. Rampton's report was silent on the question of whether the LTTE maintain an interest in individuals, notwithstanding the fact that they have left the services of the Sri Lankan security forces and notwithstanding a lapse of time. At page 41 of the Appellant's bundle, Mr. Rampton said that there was no doubt that the Appellant would be at risk from the LTTE if he returned to Sri Lanka. However, he failed to explain the evidential foundation for this opinion.

30. Accordingly, Ground 1(ii) falls away. In any event, Ms. Brown drew my attention to the final sentence of paragraph 4.9 of Mr. Rampton's report (page 42 of the

Appellant's bundle), where he said that it is "*nonetheless perfectly plausible*" that the Appellant would "*undergo the same suspicions and experiences suffered by other failed asylum seekers*". Ms. Brown submitted that "perfectly plausible" fell a long way short of demonstrating a real risk.

31. With regard to Ground 2, Ms. Brown referred me to page 115 of the Appellant's bundle, where Dr. Kanagaratnam said: "*I am concerned that were [the Appellant] returned to Sri Lanka he is very likely to be apprehended at the airport and detained.*" Accordingly, Ms. Brown submitted that this shows that Dr. Kanagaratnam had assumed that the Appellant would be very likely to be detained, in reaching his conclusion that if returned to Sri Lanka, the Appellant is at risk of increased deliberate self-harm with a substantial risk of suicide. Ms. Brown submitted that Dr. Kanagaratnam's opinion was directly linked to his [Dr. Kanagaratnam's] concern that the Appellant would be apprehended and detained at the airport. His conclusions at page 116 of the Appellant's bundle flow directly from that concern. At no point did Dr. Kanagaratnam refer to a subjective fear directly impacting on the risk of suicide regardless of whether the Appellant's fear is well-founded. Ms. Brown submitted that this is exactly what the Immigration Judge was referring to at paragraph 30. At paragraph 31, the Immigration Judge considered other medical evidence which was before her and decided to place little weight to the assessment of Dr. Kanagaratnam. Ms. Brown submitted that she was fully entitled to do so. At page 131 of the Appellant's bundle, Dr. Kanagaratnam had referred to the Appellant's "*history of intense suicidal ideations*". However, page 110 of the Appellant's bundle indicates that, when questioned by Dr. Kanagaratnam about his suicidal behaviour, the Appellant reported having experienced "*bouts of foreshortened future without hope of a normal life*" and had obtained a large quantity of paracetamol, which he had intended to consume. Ms. Brown submitted that this hardly supports the statement at page 116 that the Appellant had a "*intense history of suicidal ideations*". Accordingly, Ms. Brown submitted that the Immigration Judge was entitled to place little weight on the report of Dr. Kanagaratnam.

32. With regard to Ground 3, Ms. Brown submitted that the fact that the Immigration Judge had indicated that the policy was not relevant and that she would return to it when considering the Article 8 claim, shows that this was the extent of the arguments relating to the backlog policy before her. Ms. Brown submitted that no application had been made to vary the grounds, nor had reliance been placed upon any contention that the Respondent's decision was not in accordance with the law as a ground distinct from the Article 8 claim.

33. Even if the Immigration Judge was incorrect to state that the policy was not a relevant factor in connection with the Article 8 claim, this was not material because it is clear from the terms of the policy that the Respondent did not consider that delay would normally of itself justify the grant of leave to enter or remain where asylum had been refused. Paragraph 8.30 of the White Paper states that, if there are specific, compassionate or other exceptional factors present which were linked to the delay, or which compound its effect on the applicant's situation, then a decision to grant limited leave to enter or remain may then be justified. Accordingly, Ms. Brown submitted that this is not one of those cases to which one could apply *IA (Mauritius)* [2006] UK AIT 00082 relying on *Baig v SSHD* [2005] EWCA Civ 1246, Ms. Brown submitted that there was little point in remitting the case back to the Secretary of State for consideration of the backlog policy if it is clear that the Appellant cannot come within

the policy. The Appellant had to show specific compassionate or other exceptional factors which are linked to the delay or which compound its effects on the Appellant's situation. This is a high test. At paragraph 18, the Immigration Judge had said that there was no evidence that the Appellant would have met the criteria to be granted any form of leave under the backlog policy. Ms. Brown submitted that this was correct, and that, even if the Immigration Judge had considered the backlog policy in relation to Article 8, it would not have made a material difference to the outcome.

34. In response, Mrs. Rothwell submitted that Ms. Brown had attempted to re-write the Immigration Judge's reasoning with regard to the report of Mr. Rampton, at paragraph 27 of the determination. She submitted that it was obvious that Mr. Rampton was aware of the chronology of the case and that twelve years had elapsed since the Appellant's departure. At paragraph 28 of the determination, the Immigration Judge failed to take into account the fact that the Appellant may face criminal charges because of his desertion. With regard to the backlog policy, Mrs. Rothwell submitted that it was not open to the Tribunal to apply the Respondent's policy itself, or to seek to include or exclude the Appellant from the policy. It cannot be said that the circumstances of this case were such that the Appellant could not benefit from the policy. The letter at pages 73 and 74 of the Appellant's bundle referred to the trauma the Appellant had suffered as a consequence of his experiences in Sri Lanka.

35. I reserved my decision.

Assessment

Ground 1:

36. I do not agree with Mrs. Rothwell that the Immigration Judge had misapprehended the evidence of Mr. Rampton or made any mistake of fact in relation to it. I agree with Ms. Brown that, in the second and third sentences of paragraph 27 of the determination, the Immigration Judge was referring to the fact that Mr. Rampton had not explained the causal link between the Appellant's service as a police officer in Sri Lanka twelve years ago and the current risk from the LTTE. The second sentence of paragraph 27 of the determination shows that the Immigration Judge had the issue of the current risk at the forefront of her mind before turning to assess the evidence of Mr. Rampton. She then said that he did not address "*the very pertinent issue*" of whether the LTTE would have any reason to target the Appellant twelve years after he left the country. She was correct to consider that this was a "*very pertinent issue*". Given the finding of the previous Adjudicator that the Appellant was on a LTTE hit list when he left Sri Lanka and the fact that the Appellant's second appeal was dismissed by the second Adjudicator because he (the second Adjudicator) found that the Appellant would not be at real risk from being on the LTTE hit list when he left Sri Lanka, the question whether the LTTE would have any reason to target the Appellant twelve years after he left Sri Lanka was indeed a "*very pertinent issue*".

37. It is simply not enough to say that it was implicit, from the fact that Mr. Rampton knew of the date of the Appellant's departure from Sri Lanka and the date of his asylum claim in the United Kingdom, that he must have been aware of the fact that the events upon which the Appellant had based his claim took place twelve years ago. This should have been made clear. In any event, even if he was implicitly aware of the lapse of time, it was still necessary for him to explain the evidential basis for

his opinion as to the causal connection between the current risk and the historic events. This is not apparent from his report. I agree with Ms. Brown that Mr. Rampton did not say, at pages 40 and 41 of his report (or, indeed, elsewhere, as far as I can see), whether the individuals he listed on page 40 as having been assassinated by the LTTE or the individuals described or referred to at page 41 were still serving with the Sri Lankan security forces at the time of their deaths. I agree with Ms. Brown that this is precisely what the Immigration Judge meant by her use of the word "*former*" in the fourth sentence of paragraph 27 of the determination. I reject Mrs. Rothwell's submission that Ms. Brown effectively re-wrote paragraph 27 of the determination. When the paragraph is read as a whole, and bearing in mind, in particular, the second sentence of the paragraph, it is plain that she was concerned about the current risk given that the Appellant is a former police officer who has not participated in any security operations against the LTTE for some twelve years.

38. Accordingly, I reject Mrs. Rothwell's contention that the Immigration Judge misapprehended the report of Mr. Rampton. The Immigration Judge did not err in law in concluding that the Appellant had not shown that it was reasonably likely that the LTTE maintains an adverse interest in him. Accordingly, the issue of sufficiency of protection is not material to the outcome.

39. Ground 1 also raises the issue of risk on return as a deserter at the hands of the Sri Lankan authorities. At paragraph 5 of his statement dated 26 June 2007 on page 3 of the Appellant's bundle, the Appellant said that, as he left the police force without first seeking permission and because he has information which could damage the Sri Lankan government, his presence in Sri Lanka would be seen as a threat. He said that he would be subjected to lengthy interrogation. The Immigration Judge dealt with this at paragraph 22 of the determination. She referred to the finding of the first Adjudicator that there is no evidence of risk of persecution as a deserter from the police force. At paragraph 19 of the determination, the Immigration Judge said that it still seems to be the case that the Appellant's primary fear is of the LTTE and not the authorities. Mrs. Rothwell confirmed that that is still the case. Nevertheless, the Appellant does fear the Sri Lankan authorities, as he said at paragraph 5 of his statement, which was before the Immigration Judge. Accordingly, I accept that the Immigration Judge ought to have given reasons for finding that the Appellant was not at real risk from the Sri Lankan authorities. She should not simply have relied on the finding of the first Adjudicator and/or the second Adjudicator that the Appellant is not at such risk.

40. However, this is not material, for the following reasons: At paragraph 4.1 of his report, Mr. Rampton suggested that desertion is chargeable through the courts martial and is applicable under the Navy and Army Acts in Sri Lanka, whereas the charge under administrative regulations in the police service would most likely be dereliction of duty. He states that, given the general breakdown in the rule of law and military-civil distinctions, it is unclear what charges a police officer may become open to in a case of dereliction of duty. The examples he proceeds to give of police officers who were "*charged with cowardice*" relates to police officers who abandoned their posts. The Appellant is not someone who abandoned his post. His evidence was that, whilst he was on annual leave, he spoke to his uncle who advised him to leave Sri Lanka and that he did not return to work at the end of his annual leave (see Dr. Kanagaratnam's report, on page 108 of the Appellant's bundle). Although I noted that the second Adjudicator accepted the Appellant's evidence that he felt it unwise

to resign (paragraph 39 of the second Adjudicator's determination, on page 60 of the Appellant's bundle), the fact still remains that he did not abandon his post; he simply did not return to work at the end of his annual leave. At paragraph 3 of his statement on page 2 of the Appellant's bundle, the Appellant confirmed that Dr. Kanagaratnam's report correctly sets out the basis of his claim. Although I noted that paragraph 4.0 of Mr. Rampton's report indicates that he had before him the Appellant's statements, it is not clear whether he was aware that the Appellant left Sri Lanka whilst on leave, and that it is not the case that he abandoned his post whilst on duty. I have carefully considered the two statements in the Appellant's bundle, at pages 1 to 16. Paragraph 20 of the statement dated 26 November 2002 refers to the Appellant visiting his uncle during his fortnight's holiday but it does not specifically state that he did not return to work from his period of leave. As far as I can see, this is only referred to in Dr. Kanagaratnam's report, which does not appear to have been before Mr. Rampton.

41. Even if Mr. Rampton was aware that the Appellant left Sri Lanka whilst he was on annual leave, he (Mr. Rampton) did not explain why he appeared to place the Appellant at the same risk as someone who abandoned his post whilst on duty. In addition, the use of the word "*possible*" by Mr. Rampton to describe the likelihood of the Appellant being disciplined or being detected on entry is not enough to show that the risk of this happening is such as to amount a real risk or a reasonable likelihood, albeit that I am mindful that this is a low standard of proof. Furthermore, Mr. Rampton does not suggest that such a possibility (of being disciplined or being detected on entry) would be accompanied or followed by ill-treatment amounting to persecution or serious harm or treatment in breach of Article 3 as opposed to, for example, being prosecuted for, for example, dereliction of duty or going absent without leave. In the final sentence of paragraph 4.4 of his report, Mr. Rampton states that it "*perfectly plausible*" that the Appellant would suffer the same fate as returned Tamil failed asylum seekers. However, it is plain that he assumes that Tamil failed asylum seekers would be at risk of persecution. It is clearly not the case that Tamil failed asylum seekers would be at real risk of persecution simply because they are Tamil failed asylum seekers. In addition, I agree with Ms. Brown that the words "*perfectly plausible*" simply place the likelihood of risk too low.

42. The Immigration Judge relied on the finding of the first Adjudicator that the Appellant would not be at real risk of persecution on account of his desertion from the police force. The first Adjudicator found that the Appellant would have a reasonably fair trial and that any sentence that he might be given would not be seriously disproportionate (paragraph 41 of his determination, on page 61 of the Appellant's bundle). For the reasons I have given in the preceding paragraph, any failure by the Immigration Judge to engage with paragraphs 4.1 and 4.4 of Mr. Rampton's report is not material. Even if she had engaged with it, she could not properly have reached a conclusion different to the one she reached, that the Appellant is not at real risk of persecution or serious harm or treatment in breach of Article 3 at the hands of the Sri Lankan authorities.

43. This leaves the assertion in the penultimate bullet point on the second page of the grounds that the Immigration Judge failed to consider the fact that the Appellant is a failed asylum seeker who would be returning to Sri Lanka after twelve years' absence. However, the Immigration Judge was clearly aware that the Appellant would be returning to Sri Lanka after twelve years – see paragraph 27 of the

determination, where she made it clear that she had to decide the risk after a lapse of twelve years. It is inconceivable that she then failed to have this in mind when considering, in the next paragraph, whether the Appellant would be at risk on account of returning to Sri Lanka after an absence of twelve years. She was clearly aware that, if the Appellant loses his appeal, he would be returning as a failed asylum seeker.

44. Accordingly, I concluded that Ground 1 does not establish any material error of law.

Ground 2:

45. The main thrust of Mrs. Rothwell's submissions was that the Immigration Judge incorrectly focused on the likelihood of arrest or detention and that she did not consider the fact that it is the Appellant's own perception of the risk of his being arrested or detained which would precipitate the risk of suicide. However, as Ms. Brown correctly said, Dr. Kanagaratnam's does not state that it is the Appellant's perception of the risk which would precipitate the risk of suicide. To the contrary, Dr. Kanagaratnam specifically refers to his (Dr. Kanagaratnam's) concern that the Appellant is very likely to be apprehended at the airport and detained. He then states that the Appellant would be subjected to intense interrogation and that this would result in a great degree of distress (page 115 of the Appellant's bundle). In the next paragraph, he states that, in the Appellant's disturbed state of mind, the likelihood of suicide is high. When read as a whole, I agree with Ms. Brown that Dr. Kanagaratnam indicates that the risk of suicide would be at the level he indicates in his report *if* the Appellant is arrested or detained and interrogated. Accordingly, the Immigration Judge did not overlook any relevant evidence, because there was no medical evidence to the effect that it is the Appellant's subjective belief that he would be arrested or detained and interrogated which would itself raise the risk of suicide, regardless of whether his subjective fear is objectively founded.

46. There is nothing in the medical evidence to suggest that the Appellant is delusional or that he suffers from hallucinations. Indeed, the notes of the Accident and Emergency Department of the West Middlesex University Hospital NHS Trust in March 2006, when the Appellant was seen as an out-patient after he had been found in possession of a large quantity of paracetamol, specifically state that he is not hallucinating and that he is "*oriented in time, [person?] and place*" (page 124 of the Appellant's bundle).

47. Accordingly, given the Immigration Judge's finding that it is not reasonably likely that the Appellant would be detained at the airport, she was entitled to reject Dr. Kanagaratnam's opinion as to the escalation of the risk of suicide.

48. The Immigration Judge considered the other medical evidence before her at paragraph 31 of the determination. She then said that, in the light of this other evidence, she attached little weight to the evidence of Dr. Kanagaratnam. I make the follow points. In the first place, the weight to be given to specific aspects of the evidence was essentially a matter for the Immigration Judge. Secondly, and in any event, she was fully entitled to place little weight on Dr. Kanagaratnam's opinion, for the reasons she gave. When considered as a whole, she considered the medical evidence before her adequately, and gave adequate reasons for her conclusions.

Ground 3

49. This ground concerns the backlog policy. It was accepted before me that the Appellant's application for asylum was lodged with the Respondent in the period between 1 July 1993 and 31 December 1995 (it was lodged on 12 June 1995) and that it had not been decided by the Respondent as at 27 July 1998, the date on which the White Paper was issued. Accordingly, Ms. Brown accepted that the Appellant fell to be considered under paragraph 8.30 of the White Paper. She also accepted that the refusal letter dated 24 May 2000 (page 47 of the Appellant's bundle), which states that the Appellant's application was refused on non-compliance grounds as well as after substantive consideration of his asylum claim under paragraphs 3340 and 336 of the Immigration Rules, did not refer to the backlog policy and that the refusal letter dated 2 October 2006 (page 76 of the Appellant's bundle) referred to the wrong policy at paragraph 28 notwithstanding the fact that this letter was ostensibly a response to the letter from the Appellant's representatives dated 12 July 2005 (page 70 of the Appellant's bundle) which asserted, inter alia, that the Appellant should have been considered under the backlog policy.

50. In other words, it is accepted on the Respondent's behalf that the Appellant should have been considered under paragraph 8.30 of the White Paper.

51. The first Adjudicator accepted that the Appellant had not received the letters from the Home Office requesting him to complete an "*asylum questionnaire*". According to paragraph 2 of the refusal letter dated 24 May 2000 (page 47 of the Appellant's bundle), the Appellant was sent two letters, one dated 6 October 1999 and one dated 4 December 1999, requesting him to complete and return an "*asylum questionnaire*". He failed to do so. Ms. Brown said at the hearing before me that this questionnaire was designed to elicit the information the Respondent considered necessary in order to decide whether the discretion with regard to the backlog policy should be exercised in the Appellant's favour. In oral evidence before the first Adjudicator, the Appellant said that he did not receive these two letters and that he did reply to the letter he received (paragraph 13 of the determination of the first Adjudicator, on page 57 of the Appellant's bundle). The first Adjudicator believed the Appellant's evidence that he did not receive the two letters referred to at paragraph 2 of the refusal letter dated 24 May 2000 (see paragraph 47 of the determination, on page 62 of the Appellant's bundle). Ms. Brown submitted before me that, as the Respondent had not received the questionnaire, it would not have been possible to decide whether the discretion should have been exercised in the Appellant's favour. Whilst it may well be that, in the absence of a completed questionnaire, the Respondent may have had insufficient information to enable him to reach an informed decision as to whether the discretion should be exercised in the Appellant's favour, this does not help the Respondent resist a challenge (if one had been brought in this case) on the basis that the decision is not in accordance with the law because of a failure to consider the policy. A decision under the policy should have been reached on the basis of such information or evidence as had in fact been lodged. There was some.

52. However, the difficulty in this case is that the grounds on which this appeal was brought did not include the ground that the Respondent's decision is not in accordance with the law, i.e. the ground in section 84(1)(e) of the 2002 Act. The guidance in *AH (Scope of s103A reconsideration) Sudan* [2006] UKAIT 00038 was considered by the Court of Appeal in *DK (Serbia) and others v SSHD* [2006] EWCA

Civ 1747. At paragraphs 16 and 17 of the judgment in <u>*DK (Serbia)*</u>, Latham LJ set out a summary of the Tribunal's conclusions in *AH*, the relevant parts of which read:

> "16. ………… The head note to the determination [in *AH*] reads as follows:
>
> "In a reconsideration of an appeal following an order for reconsideration made by the AIT (as distinct from a grant of permission to appeal to the IAT):
> (1) the reconsideration is of the appeal as a whole; therefore
> (2) it is not limited to the grounds of review or the grounds upon which reconsideration is ordered, but
> (3) it <u>is</u> limited to the grounds of appeal to the Tribunal (including any variation allowed under Rule 14 by the <u>original [judicial] decision maker</u>)
> [(4) to (9)] ………"
>
> 17. In this determination, the Tribunal, presided over by Mr Ockelton (Deputy President) considered in detail the provisions of the 2004 Act and of the rules. His conclusion was that there was no justification to be found in the 2004 Act or in the rules for restricting the scope of a reconsideration, either in relation to the question as to what, if any, error or errors of law could be identified in the original decision, or as to the scope of the reconsideration if any such error of law has been found. *The only constraint implicit in the structure is that the reconsideration is restricted to the grounds of the original appeal, subject to the caveat that there might be an obvious point of convention law so far overlooked (see below). This, the Tribunal reasoned, was the necessary consequence of rule 14 being omitted from the powers of the Tribunal on reconsideration.* It concluded that rule 31(4) did not empower the Tribunal to restrict the scope of a reconsideration to the grounds upon which the reconsideration had been ordered, but only to "have regard" to directions given by the immigration judge ordering the reconsideration, and limiting submissions or evidence to specified issues. Rule 31(3) required the Tribunal, having identified a material error of law, to "substitute a fresh decision". *It further concluded, bearing in mind in particular the decision of this court in R-v- SSHD ex p Robinson [1998] QB 929 that part of the recommendation might involve an issue which was obvious but had not formed part of the appeal…*

(my emphasis)

53. Despite referring to the Tribunal's conclusion in *AH*, inter alia, that reconsideration is limited to the grounds of appeal to the Tribunal as varied under rule 14 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended) (the Procedure Rules) subject to the *Robinson* obvious caveat, Latham LJ did not disapprove of this conclusion. At paragraph 21 of the judgment, Latham LJ said:

> "21. In the first instance, *in relation to the identification of any error or errors of law, that should normally be restricted to those grounds upon which the immigration judge ordered reconsideration, and any point which properly falls within the category of an obvious or manifest point of Convention jurisprudence, as described in Robinson (supra).* … It must [ ] be very much the exception, rather than the rule, that a Tribunal will permit other grounds to be argued. But clearly the Tribunal needs to be alert to the possibility of an error of law other than that identified by the immigration judge, otherwise its own decision may be unlawful."

(my emphasis)

53. If, in identifying an error of law, the Tribunal should normally be restricted to those grounds upon which reconsideration was ordered and any obvious points of convention law, as explained in *R. v SSHD ex p Robinson* [1998] QC 929, it would be very odd indeed (again, subject to any *Robinson* obvious points) if an appellant is not also restricted to his original grounds of appeal as varied under rule 14.

54. In my view, *AH* and *DK (Serbia)* are authority for the proposition that, on reconsideration, the parties are limited to the Appellant's original grounds of appeal as varied, subject to any obvious point of convention law, as explained in *Robinson*. It is accepted that the principle in *Robinson* extends to the rights protected under the ECHR (see, for example, paragraph 29 of *AM (Serbia) and others v SSHD* [2007] EWCA Civ 16*).*

55. The next question is whether the fact that Respondent has not considered the Appellant's application under the backlog policy is an obvious point within *ex p Robinson*, as extended.

56. In my view, it is not. The removal of an individual who may well have qualified under the backlog policy if the Respondent had considered whether to exercise the discretion under that policy in the individual's favour cannot, for this reason alone, be said potentially to place the United Kingdom in breach of its obligations under the Geneva Convention; nor (by extending the principle to potential breaches of an individual's rights under the ECHR) can it be said, on account of the failure alone, potentially to result in the removal of an individual in breach of his or her human rights. It is axiomatic that the mere fact that the Respondent has not considered the Appellant's application under the backlog policy does not mean that the United Kingdom is potentially in danger of removing someone who may be a refugee. Similarly, it does not, of itself, mean that removal might be in breach of the Appellant’s human rights. Accordingly, the *Robinson* obvious exception does not help the Appellant establish a material error of law in the Immigration Judge's determination.

57. Accordingly, the Appellant is limited to his original grounds of appeal, as varied. As the Immigration Judge's Record of Proceedings shows, an application was not made to vary the grounds of appeal so as to include the ground that the decision was not in accordance with the law.

58. I reject the suggestion that, even if an application to vary the grounds under rule 14 has not been made, the grounds of appeal may be varied by an Immigration Judge by implication. The issue as to whether an appeal was brought on a particular ground goes to the very core of the appeal. It defines the scope of the appeal and determines many important matters, such as the substantive issues, what evidence is relevant and the case-law applicable. Section 84 of the 2002 Act sets out the various grounds of appeal. Rule 14 of the Procedure Rules sets out the process by which an appellant may vary his grounds. An appellant must state his case, and the grounds upon which he challenges the decision. This means that an appellant who challenges a decision must state clearly the ground or grounds in section 84 upon which he brings that challenge. The grounds of appeal should be notified in the Notice of appeal or “*Statement of Additional Grounds*" or other document attached to the Notice of appeal, or be the subject of an application before an Immigration Judge under rule 14 to vary the grounds of appeal. If an application is made at the hearing, it should be made at the outset. If it is made after a hearing has commenced, care should be taken to ensure that the other party has an adequate opportunity to deal with any evidence which may already have been given and which is relevant to the new ground.

59. In the case of appellants who are not represented, there may be a case for saying that an Immigration Judge ought to consider the basis of the claim, the grounds of appeal and whether variation is an issue that should be raised before the hearing commences. I do not need to decide that point, because the Appellant in the instant appeal was represented before the Immigration Judge.

60. If an appellant is represented, his representative should make any application under rule 14 if the grounds need to be varied. If a formal application to vary the grounds of appeal is made, then an Immigration Judge should make a decision on that application before the hearing commences, or continues. If no formal application is made, then the Immigration Judge should decide the issues in the appeal by reference to the grounds upon which it has been brought and as set out in the Notice of appeal or other document accompanying the Notice of appeal which is said in the Notice of appeal to set out the grounds of appeal. Nothing I have said in this paragraph contradicts the principle in *ex p Robinson*.

61. Further, and in any event, I do not accept that, in the particular circumstances of this case, there was in fact any variation by implication in this appeal. In oral submissions before the Immigration Judge, Counsel for the Appellant only argued the backlog policy in the context of Article 8. She did not contend that the Respondent's failure to consider the backlog policy meant that the decision was not in accordance with the law. Accordingly, there was no reason for the Immigration Judge to consider varying the grounds. The final sentence of paragraph 18 of the determination reinforces the fact that the Immigration Judge was only considering the submissions made before her in connection with the backlog policy in the context of Article 8, as does the fact that paragraphs 34, 35 and 36, which record the Immigration Judge's decision on the grounds of appeal, only state that the appeal is dismissed on asylum grounds, humanitarian protection grounds and human rights grounds. The fact that the Immigration Judge did not indicate her conclusion on the ground in section 84(1)(e) is a further indication that paragraph 18 of the determination was not intended to vary the grounds of appeal.

62. The next question is whether section 86(3) of the 2002 Act is worded in such a way as to oblige the Tribunal to allow an appeal on the ground that the Respondent's decision is not "*in accordance with the law*" even when an appellant's original grounds of appeal (as may have been varied under rule 14) do not include the ground in section 84(1)(e).

63. The wording of section 86(1), (2), (3) and (5) is important in this regard. It is also convenient to set out at this point the wording of section 82 (in so far as relevant) and sections 83, 84 and 85(2). These provisions read:

> "82 Right of appeal: general
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part 'immigration decision' means—
> [(a) to (k)]
>
> 83 Appeal: asylum claim
>
> (1) This section applies where a person has made an asylum claim and—

(a) his claim has been rejected by the Secretary of State, but
(b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).

(2) The person may appeal to the Tribunal against the rejection of his asylum claim.

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—
(a) that the decision is not in accordance with immigration rules;
(b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities);
(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
(e) that the decision is otherwise not in accordance with the law;
(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

(2) In subsection (1)(d) "EEA national" means a national of a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as it has effect from time to time).

(3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

85. Matters to be considered

(1) ………..
(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

86. Determination of appeal

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

(2) The Tribunal must determine-
(a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
(b) any matter which section 85 requires it to consider.

(3) The Tribunal must allow an appeal in so far as it thinks that-
(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

(4) ………

(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal."

64. There appears to be nothing in section 86 which limits the application of section 86(3) to the grounds of appeal. Accordingly, one might argue that the whole of section 86, including subsection (3), is available in respect of any appeal brought under section 82(1) or section 83 and that, once an appeal is brought under section 82(1) or section 83, an Immigration Judge has the jurisdiction in section 86.

65. The position under the Immigration and Asylum Appeals Act 1999, as amended (the 1999 Act), was that an Adjudicator's jurisdiction under section 19 of the Immigration Act 1971 as amended and subsequently maintained in paragraph 21(1)(a) of Schedule 4 to the 1999 Act was made "*subject to ….. any restriction on the grounds of appeal*". In *MA (Seven Year Child Concession) Pakistan* [2005] UKIAT 00090*,* the Immigration Appeal Tribunal considered that it was not open to an appellant to contend that a decision was not in accordance with the law under the principles enunciated in *D S Abdi* [1996] Immigration AR 148 in that case because the appeal in that case was brought under section 65 of the 1999 Act, which meant that the appeal was restricted to human rights grounds. The Tribunal in *MA* left open the question whether the position might be different under the 2002 Act.

66. The meaning of the phrase "*in so far as he thinks that*" in section 86(3) of the 2002 Act was considered by the Tribunal, in a different context, in *CP (Section 86(3) and (5); wrong immigration rule) Dominica* [2006] UKAIT 00040. The issue which arises in the instant appeal did not arise in *CP*. In *CP*, the Tribunal held that the words: "*in so far as it thinks that*" in section 86(3) enables the Tribunal, when dealing with one ground of appeal, to allow it in part under section 86(3) to the limited (and, the Tribunal said, inconsequential) extent that the decision was "*not in accordance with the law*" and to dismiss the appeal in substance under section 86(5) if any (or all) of the requirements under the Immigration Rules are not satisfied.

67. Another (more frequently-encountered) example of the application of the words: "*in so far as it thinks that*" in section 86(3) and "in so far as subsection (3) does not apply" in section 86(5) is as follows: If, in a particular case, an Immigration Judge concludes that there is a real risk that the appellant will suffer serious harm or treatment in breach of Article 3 but that there is no applicable Geneva Convention reason, then, if the appeal was brought on asylum, humanitarian protection and human rights grounds, the Immigration Judge would dismiss the appeal on asylum grounds but allow it on humanitarian protection and human rights (Article 3). The phrase *"in so far as he thinks that*" in the opening sentence of section 86(3) obliges the Immigration Judge to allow the appeal on humanitarian protection grounds and on human rights grounds, and the phrase "*in so as far subsection (3) does not apply*" in section 86(5) obliges the Immigration Judge to dismiss the appeal on asylum grounds.

68. In *SS (Jurisdiction – Rule 62(7); Refugee's family; Policy) Somalia* [2005] UKAIT 00167*,* the Tribunal held that, in an '*upgrade*' appeal under section 83 of the 2002 Act against the refusal of asylum, the appellant cannot invoke the other (non-asylum) grounds listed at section 84(1), which are available on an appeal under section 82. Accordingly, the Tribunal went on to hold that the adjudicator in that instant case had no jurisdiction to allow the appeal on the basis that the Respondent's decision was '*not in accordance with the law*', since the appeal was not under section 82. At paragraphs 16 and 17, the Tribunal said:

"16. It is in our view abundantly clear that the wider grounds available in an appeal under s82 are not available in an appeal under s83. Under s82, an appellant can indeed appeal on the ground that the decision against which he appeals "*is otherwise not in accordance with the law*" (s82(1)(e)); but that ground is not available under s83. If a person has been granted more than twelve months leave to enter or remain, his appeal is on asylum grounds only.

17. The Adjudicator erred in stating that the appeal was under s82: it was not. It was under s83, as the documents before him made clear. He also erred in taking into account grounds which were not open to the Appellant in an appeal under s83. It follows that he had no jurisdiction to allow the appeal, as he did, on those grounds only."

69. It is difficult to see where the restriction to asylum grounds in the case of an appeal under section 83 is to be found. The words: "*may appeal to the Tribunal against the rejection of his asylum claim*" in section 83(2) does not help to explain the Tribunal's decision in *SS*, because these words refer to the type of decision that may be appealed. Section 84(3) does not help to explain the Tribunal's decision in *SS*, because section 84(3) specifies the ground upon which an appeal under section 83 must be brought. It does not state that an appeal under section 83 cannot be brought on any other grounds, nor is section 84(3) concerned with the jurisdiction of the Tribunal. Yet, the Tribunal found that the jurisdiction under section 86 to allow the appeal was restricted to the available grounds and that, in the case of an 'up-grade' appeal, only one ground was available.

70. Clearly, in the instant case, the ground in section 84(1)(e) was available to the Appellant. For the reasons I have given in paragraphs 52 to 59 above, the first stage of the reconsideration in this appeal is restricted to the grounds actually before the Tribunal, i.e. the original grounds as varied pursuant to an application under rule 14. Since the original grounds, as varied, do not include the section 84(1)(e) ground, the Appellant in this case can only succeed if the words "*not in accordance with the law*" in section 86(3)(a) are to be interpreted so widely that section 86(3)(a) will always oblige the Tribunal to allow an appeal on the ground that the decision is "*not in accordance with the law"* even when the original grounds of appeal, as varied, do not include the ground in section 84(1)(e).

71. When one compares section 86(3) with the various grounds listed in section 84, it is interesting to note that only the ground in section 84(1)(f) is reflected in section 86. The ground in section 84(1)(e) is narrower than section 86(3)(a), because section 84(1)(e) states: "*that a decision is <u>otherwise</u> not in accordance with the law*" whereas section 86(1)(a) states: "*that the decision ……… was not in accordance with the law (including immigration rules)*". The formulation in section 86(3)(a) is wide enough to encapsulate all the grounds in section 84 as well as the ground in section 83, except for the ground in section 84(1)(f). This ground has been separately provided for in section 86(3)(b). In other words, the formulation in section 86(3)(a) was a convenient way of encapsulating all the grounds referred to in section 84(1) and section 83 with the exception of section 84(1)(f), which does not fit easily into this formulation, without any intention to enlarge the jurisdiction of the Tribunal beyond the grounds as originally properly brought, or as varied.

72. Furthermore, it seems to me that if, upon reconsideration, the Tribunal always has jurisdiction to allow an appeal on the ground that the decision was not in accordance with the law in the sense explained in *Abdi* regardless of whether the appeal was brought on the ground in section 84(1)(e), then rule 14 of the Procedure Rules would

effectively be robbed of any useful purpose. In addition, in *AH,* the Tribunal decided that rule 14 is not available on a reconsideration. This restriction would also be rendered meaningless if section 86(3)(a) can be employed to argue that, once an appeal is brought under section 82(1) or 83, the Tribunal's jurisdiction is not limited to the grounds on which the appeal was brought.

73. The clear benefits of requiring an appellant to state his grounds of appeal clearly (so that both parties have proper notice of the issues) are lost, to the possible detriment of the respondent, if an appellant is to be allowed to by-pass the rule 14 procedure by simply relying on the jurisdiction in section 86(3)(a) to allow an appeal on the ground that it is not in accordance with the law. More importantly, the Tribunal's conclusion in *AH*, that, upon reconsideration, the Tribunal is limited to the original grounds as varied, subject to any *Robinson* obvious points, becomes otiose if appellants can circumvent that restriction by relying on the words "*not in accordance with the law*" in section 86(3)(a).

74. I also draw support from the fact that section 85(2) obliges the Tribunal to consider "*any matter raised in [a statement made under section 120] which constitutes a ground of appeal of a kind listed in section 84(1) …..*" (my emphasis). This means that grounds of appeal may be raised in a statement made under section 120 as well as in the Notice of appeal. Importantly, it should be noted that matters raised in a section 120 statement must constitute a *ground of appeal* of a kind listed in section 84 before the obligation to consider it arises. Section 86(2), which sets out the Tribunal's jurisdiction, states, inter alia, that the Tribunal must determine any matter raised as a *ground of appeal*, that is, a matter must be raised as a ground of appeal before the obligation to determine it arises. It is true to say that neither section 85(2) nor section 86(2) prevent the Tribunal from considering, or determining, any matter which has not been raised as a ground of appeal. However, it would be very odd indeed if one were to conclude that the Tribunal is *obliged* to allow an appeal on the basis of a matter which has not been raised as a ground of appeal even if the Tribunal was not obliged to consider, or determine, the matter (because it had not been raised as a ground of appeal of a kind listed in section 84). The result would be illogical and would amount to the following: "*I do not have any obligation to consider or determine matter X but, if I do consider it or determine it, then I may be obliged to allow the appeal if I find in the appellant's favour on matter X*". This simply cannot be right.

75. For all of these reasons, I have concluded that the jurisdiction of the Tribunal under section 86(3)(a) is limited to the original grounds of appeal as varied under rule 14 before the Immigration Judge, with the exception of any *Robinson* obvious points which have been overlooked. As I have said above, the backlog policy does not raise any such points, although there may well be other policies which do.

76. Accordingly, I have concluded that the fact that it was accepted before me that the Respondent had failed to consider the Appellant's application under the backlog policy does not show an error of law in the Immigration Judge's determination. The section 84(1)(e) ground of appeal was not before her, either in the original grounds of appeal nor by way of an application under rule 14. It was not argued before her that the Respondent's failure to consider the Appellant's application under the backlog policy rendered his decision not in accordance with the law on *Abdi* principles.

77. However, the policy was argued before the Immigration Judge in the context of the Article 8 claim which was pleaded in the grounds of appeal. I turn to consider whether the Immigration Judge materially erred in law in deciding the Article 8 claim. Mrs. Rothwell argued that the Respondent's failure to consider the backlog policy means that the decision was not in accordance with the law within Article 8(2). There are three difficulties with this submission. Firstly, this was not argued in the grounds of application for reconsideration. This is not necessarily fatal. Pursuant to the guidance of the Tribunal in *AH*, the Tribunal reconsiders the original appeal upon reconsideration and is therefore not limited to the grounds of application for reconsideration or the grounds upon which reconsideration was ordered. Since the original appeal was brought on human rights grounds, it is, in principle, possible for the Appellant to argue that the Respondent's decision is not in accordance with the law within the meaning of Article 8(2) even though this was not pleaded in the grounds of application for reconsideration.

78. However, the second difficulty is that the argument that the decision is not in accordance with the law within the meaning of Article 8(2) was not argued before the Immigration Judge. In oral submissions before the Immigration Judge, Counsel for the Appellant only argued it in terms of the balancing exercise under Article 8(2). Immigration Judges cannot be expected to pursue every possible argument, whether or not advanced before them. This particular argument is not one which can be said to be a *Robinson* obvious point with a strong prospect of success. Accordingly, the Immigration Judge cannot be said to have erred in law by failing to consider an argument that was never put to her.

79. The third difficulty, which is determinative, concerns the meaning of the term "*in accordance with the law*" under Article 8(2). This has been dealt with by the Tribunal in previous cases – see *KK (Under 12 policy – in country implications) Jamaica* [2004] UKIAT 00268 and *MA (Seven Year Child Concession) Pakistan* [2005] UKIAT 00090. Paragraph 17 of *MA* provides a helpful and concise summary of the meaning of this phrase for the purposes of Article 8 (2), as follows:

> "17. ………In Strasbourg jurisprudence the `in accordance with the law` requirement has essentially been seen to embody the principle of legality, itself seen as comprising three rules: identification of a basis in law, accessibility and certainty. As the Tribunal has noted in KK [2004] 00268, the jurisprudence of the European Court of Human Rights thus requires that governmental policies are sufficiently accessible and precise so as to enable citizens to regulate their conduct by it."

80. In *MA*, the Tribunal considered and rejected the argument that the term "*in accordance with the law*" under Article 8(2) encompasses the same principle of administrative law as set out by the Court of Appeal in *Abdi*. The relevant paragraph is paragraph 18 of *MA*, which reads:

> "18. Ms Weston's argument was really about a somewhat different point, namely that "in accordance with the law" under Art 8(2) encompassed the same principle of administrative law as set out in D S Abdi – that decision-makers were under a duty to apply the law (including law as founding the form of governmental policies). Here there is this difficulty. We would accept it is *arguable* that the principle of legality includes the principle that decision-makers should apply (as well as properly identify) the law in this broad sense. But we are not prepared to accept without more that Strasbourg has seen the principle of legality to extend that far in the context of Art 8(2). Ms Weston produced no authority in support of this contention. That being so, we do not accept that Art 8(2)

can be said to encapsulate precisely the same principles as those set out in the context of UK Immigration Acts in D S Abdi."

81. No authority was produced before me in support of the contention that the term "*in accordance with the law*" under Article 8 (2) bears the same meaning as explained in *Abdi* with regard to administrative law.

82. Accordingly, giving the term "*in accordance with the law*" in Article 8(2) the meaning explained in paragraph 17 of *MA*, there is a basis in law for the Respondent's decision of 18 May 2007 to refuse the Appellant leave to enter the United Kingdom. The law is sufficiently accessible and precise so as to enable individuals to regulate their conduct by it. Accordingly, the decision is "*in accordance with the law*" under Article 8 (2).

83. Before the Immigration Judge, the backlog policy was argued in the context of the balancing exercise under Article 8(2). I turn to consider whether the Immigration Judge materially erred in law in carrying out the balancing exercise. At paragraph 18 of the determination, the Immigration Judge said that the backlog policy was irrelevant to the issues before her. Ms. Brown accepted before me that the Appellant should have been considered under the backlog policy. The Respondent did have *some* information, such as the Appellant's name, date of arrival, circumstances of his claim for asylum, length of absence from Sri Lanka, basis of his claim etc. which should have been considered. Limited though this information was, it was possible for the Respondent to reach a decision as to whether the Appellant should benefit from the exercise of the discretion in his favour.

84. In *IA ('applying policies') Mauritius* [2006] UKAIT 00082, the Tribunal said (at paragraph 30) that, in deciding whether removal is necessary or proportionate, an Immigration Judge is entitled to have regard to a policy even if the appellant that he is considering does not benefit directly from the policy, and, (at paragraph 35) that, where an Immigration Judge concludes that a person is entitled to remain under a policy, he must go on to conclude that removal would be disproportionate to the proper purposes of enforcing immigration control. In the instant appeal, the Immigration Judge found that there is no evidence that the Appellant would have met the criteria in order to be granted any form of leave. I would agree that much of the reasoning she gave to support this finding was irrelevant. The reasoning she employed, as evidenced by her reference to *MM*, largely concerned the principles that are generally used to analyse the significance of delay when assessing an Article 8 claim where no specific policy is applicable on the issue of delay itself. In this case, there was a specific policy in place dealing with the issue of delay. The general principles for deciding the significance of delay were not relevant in deciding whether the backlog policy was itself relevant to the balancing exercise. It is clear that the Immigration Judge employed the reasoning usually employed to analyse the significance of delay in Article 8 cases pursuant to the guidance in *HB (Ethiopia) and others* [2006] EWCA Civ 1713 in order to decide whether the backlog policy was relevant to the balancing exercise under Article 8 (2). She erred in doing so. The Immigration Judge also relied on the Appellant's failure to contact the Respondent after the decision had been made. This failure was not relevant under the backlog policy. Accordingly, both of the reasons the Immigration Judge gave for concluding that the backlog policy was not relevant to the Article 8 claim were themselves not relevant to the questions she was deciding, i.e. whether the backlog policy was

relevant to the balancing exercise and whether the Appellant was entitled to leave under the backlog policy.

85. Nevertheless, given the wording of the policy (in this regard, see paragraph 8.30 of the White Paper quoted at paragraph 11 above and which the Immigration Judge quoted at paragraph 18 of the determination), she could not conceivably have reached any other conclusion on the balancing exercise. As paragraph 8.30 of the White Paper clearly states, the presumption was against the grant of leave. This presumption was only displaced if there were specific compassionate or other exceptional factors present *which are linked to the delay or which compound its effects on the situation of the applicant*. Even where this was shown, the Respondent *still* retained a discretion to grant leave if *justified*. In contrast, the appellant in *IA Mauritius* was refused for two reasons only, i.e. that her marriage was not genuine and subsisting and that it was reasonable for her spouse to accompany her in the event of her removal. The Immigration Judge who heard her appeal found in her favour on both of these factual issues. It was therefore possible to say that there were no elements that genuinely left the decision under the policy open (see, in this regard, the Tribunal's guidance in *AG and others (Policies; executive discretions; Tribunal's powers) Kosovo* [2007] UKAIT 00082)). The situation is very different in the present case. It is plain, from paragraph 8.30 of the White Paper, that the benefit to the Appellant under the policy depends on the exercise of a discretion outside the Immigration Rules. Accordingly, it cannot be said that the Appellant is entitled to benefit from the backlog policy. For *this* reason (and not the reasons the Immigration Judge gave), the backlog policy was either not relevant to the Article 8 claim (as distinct from the question whether the backlog policy was relevant to any ground of appeal that the decision was not in accordance with the law) or it could not properly have carried much, if any, weight against the interests of the state in immigration control. In connection with the latter, I noted that the reasons the Immigration Judge gave at paragraph 33 of the determination for finding that the Appellant's removal would not be in breach of Article 8 were not challenged.

86. Accordingly, the Immigration Judge was correct to find that the backlog policy was not relevant to the Article 8 claim, albeit not for the reasons she gave at paragraph 18 of the determination. This means that any error in her reasoning at paragraph 18 of the determination is not material to the outcome. Alternatively, if the backlog policy was nevertheless relevant to the balancing exercise under Article 8(2), any error of the Immigration Judge in overlooking this consideration was not material to the outcome, given her reasons at paragraph 33 of the determination.

87. In case it is suggested that, notwithstanding the Appellant's inability to show that he was entitled to benefit from the backlog policy, the general delay was nevertheless a relevant consideration in the balancing exercise pursuant to the guidance in *HB (Ethiopia)*, the reasoning the Immigration Judge erroneously used in order to decide whether the backlog policy was relevant to the balancing exercise under Article 8 (2) remains valid in terms of an assessment of the significance of the delay on the Article 8 claim pursuant to the guidance in *HB (Ethiopia).* The Immigration Judge said at paragraph 18 of the determination that there was no evidence of any contact made by the Appellant or his representative to progress his case until after the initial refusal of his asylum claim in 2000 and that the Appellant's continued presence in the United Kingdom has been because of his pursuing legal challenges to his removal. The Appellant is someone who does not have a potential right to remain in

the United Kingdom (see paragraph 23. iii) of *HB (Ethiopia))*. Accordingly, whilst the delay was a relevant factor in conducting the balancing exercise, the Appellant had to show that it had very substantial effects if the delay was to influence the outcome (paragraph 23.v) of *HB (Ethiopia)*). In this regard, I make two points. In the first place, the Immigration Judge's reasoning at paragraph 18 shows that she did consider the relevance of the delay along the general principles embodied in cases such as *Akaeke [2005] EWCA Civ 947* and *HB (Ethiopia)* (as opposed to the relevance of the delay under the backlog policy), albeit that her reasoning at paragraph 18 is at times erroneous in relation to the relevance of the backlog policy to the Article 8 claim. Similarly, her reasoning at paragraph 33 shows that she did consider the relevance of the delay in line with general principles. In the second place, her reasoning at paragraph 33 with regard to the quality of the Appellant's private life in the United Kingdom (she found that he had not established family life) shows that she did not consider that the delay had had any substantial effect.

88. I reject Mrs. Rothwell's submission that Ms. Brown was effectively asking me to apply the backlog policy myself and to decide whether to exclude the Appellant from the policy. The wording of the policy determines its relevance to the balancing exercise under Article 8 (2). What I have done is to consider the Appellant's ability to satisfy the requirements of the policy, in line with the guidance in decided cases (see, in particular, *IA Mauritius* and *AG and others)* in order to decide whether the Immigration Judge materially erred in law in concluding that his removal would not be in breach of Article 8. I have concluded that she did not.

89. For all of the above reasons, I have concluded that the Immigration Judge did not materially err in law.

90. **Decision:**

The original Tribunal did not make a material error of law and the original determination of the appeal shall stand. That is:

The appeal is dismissed on asylum grounds.
The appeal is dismissed on humanitarian protection grounds.
The appeal is dismissed on human rights grounds.

Ms. D. K. GILL
Senior Immigration Judge　　　　Date: 25 June 2008

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