Neutral Citation Number: [2010] EWCA Civ 225

Case No: C5/2009/1939

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
Senior Immigration Judge Southern
IA/15130/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2010

Before :

LORD JUSTICE WARD
LORD JUSTICE JACKSON
and
LORD JUSTICE PATTEN

- -

Between :

SL (VIETNAM)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ms. Samantha Knights (instructed by **Refugee and Migrant Justice**) for the **Appellant**
Mr. Neil Sheldon (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates : 25th February 2010

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Judgment

Lord Justice Jackson :

1. This judgment is in six parts namely;

   Part 1: Introduction,

   Part 2: The Facts,

   Part 3: The Appeal to the Court of Appeal,

   Part 4: The Law,

   Part 5: The First Ground of Appeal,

   Part 6: The Second Ground of Appeal.

Part 1. Introduction

2. This is an appeal against the decision of Senior Immigration Judge Southern to dismiss, upon reconsideration, the appeal of the appellant against a decision of the Secretary of State for the Home Department to make a deportation order requiring the appellant's return to Vietnam.

3. In this judgment I shall refer to the Immigration Appeal Tribunal as "IAT". I shall refer to the Asylum and Immigration Tribunal (the successor to the IAT) as the "AIT". I shall refer to the European Convention on Human Rights as "ECHR". I shall refer to the Immigration Act 1971 as "the 1971 Act". I shall refer to the policy which has at all times been in force in relation to unaccompanied minors as "the Minors Policy". I shall use the abbreviation "ELR" for exceptional leave to remain. I shall use the abbreviation "ILR" for indefinite leave to remain. It should be noted that ELR has now been replaced by discretionary leave to remain.

4. I shall now set out the statutory and other provisions which are of particular relevance to this appeal. Article 8 of ECHR provides:

   "8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.

   8.2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

5. Section 3(5) of the 1971 Act provides:

   > "A person who is not a British citizen is liable to deportation from the United Kingdom if--
   >
   > (a) the Secretary of State deems his deportation to be conducive to the public good; "

6. Paragraph 364 of the Immigration Rules provides as follows:

> "Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority."

7. The Minors Policy has at all material times been adopted by the Secretary of State for the Home Department. This provides that no unaccompanied child will be removed from the UK unless the Secretary of State is satisfied that adequate reception and care arrangements are in place in the country to which the child is to be removed. The policy also provides that normally an unaccompanied child who cannot be removed by reason of that provision will be given leave to remain in this country until his or her 18th birthday.

8. After these brief introductory remarks I must now turn to the facts.

Part 2. The Facts

9. The appellant is a Vietnamese national who was born on the 10th July 1987. His father died in 1997. His mother left the appellant and his younger brother to live with their grandmother. Their grandmother died in 2001. The mother then returned and arranged for the appellant and his younger brother to travel to the United Kingdom.

10. The appellant arrived in the UK on 10th June 2002, when he was aged 14. He was accompanied by his brother who was then aged 13. Both the appellant and his brother claimed asylum on the 18th June 2002.

11. By letter dated 22nd July 2002 the Secretary of State refused the appellant's asylum claim. The appellant appealed to an adjudicator against that refusal. In a letter following the appellant's notice of appeal the appellant's solicitors drew the attention of the Home Office to the Minors Policy and in that letter the solicitors commented that if the Policy was applicable they would have expected the appellant to be given ELR.

12. The appellant was neither present nor represented at the hearing of his appeal, owing to an error on the part of his solicitors. The appeal proceeded on the basis of the appellant's written statement. By a written decision dated 3rd December 2002 the

adjudicator dismissed the appellant's appeal both on asylum and human rights grounds. The question of the appellant's entitlement under the Minors Policy was not raised by the respondent, the Secretary of State, and that matter was not considered by the adjudicator.

13. On 12th October 2003 the appellant applied for permission to appeal out of time against the adjudicator's decision of 3rd December 2002. Owing to an administrative error by the IAT, that application was not considered until 2005. On 1st April 2005 the Deputy President of the IAT dismissed that application. The reasons for dismissing the application included the following paragraph:

> "The grounds of appeal and the reasons given for extending time are that the applicant knew nothing of the refusal of his claim or of the progress of his appeal. He was at one time represented by Mathis and Co, a firm that has been the subject of intervention by the Law Society. However, Arona Sarwar & Co, who made this application to the Tribunal, do not appear to have had contact with Russell Cooke, who, as the firm taking over Mathis' files, would appear to be partly at fault in relation to the delay. Nothing in the grounds shows that time should be extended for as long as would be required to render this application valid."

14. While those matters were proceeding at a leisurely pace through the IAT, the appellant formed a relationship with a young woman called Than Thi Nguyen. Ms Nguyen is a Vietnamese national who was brought to the UK at the age of 10 by her father in 2000 and who subsequently became a British Citizen.

15. On the findings of fact recently made by the AIT after hearing oral evidence, the appellant had a friendship with Ms Nguyen in 2004. This friendship developed into a relationship and the appellant and Ms Nguyen lived together for a time at Ms Nguyen's foster carer's home. That continued until August 2007, when Ms Nguyen made a trip to Vietnam in the hope of tracing and finding her father, although she was unsuccessful in that quest. Whilst Ms Nguyen was in Vietnam, the appellant was arrested at an address in Chadwell Heath. The arrest occurred on the 4th September 2007, when the appellant was found to be engaged in the large scale cultivation of cannabis at that address. Two days later, on the 6th September, Ms Nguyen returned from Vietnam. On the 29th November 2007 the appellant pleaded guilty to being concerned in the production of cannabis, contrary to section 4(1) of the Misuse of Drugs Act 1971. The appellant was sentenced to two years detention in a Young Offenders Institution.

16. The appellant's custodial sentence did not bring to an end his relationship with Ms Nguyen. Whilst the appellant was serving his sentence Ms Nguyen visited him in the Young Offenders Institution. Indeed, following the appellant's release from the Young Offenders Institution, the appellant and Ms Nguyen resumed living together, this time in independent accommodation.

17. In January 2008 the Secretary of State invited the appellant to make representations as to why he should not be deported. The appellant responded by a letter dated 7th May 2008 sent from Rochester Young Offenders Institution, arguing that he would lead a

constructive and law abiding life in this country. Accordingly, he should be allowed to remain here.

18. On the 6th August 2008 the Secretary of State wrote to the appellant stating that he took a serious view of the appellant's offence and he was considering deportation. The Secretary of State invited the appellant to make representations.

19. The appellant duly submitted representations to the effect that he was in a relationship with Ms Nguyen and deportation would be in breach of his rights under ECHR Article 8. The representations were supported by a letter from Ms Nguyen.

20. By letter dated the 2nd September 2008 the Secretary of State informed the appellant's representative that the appellant would be deported. The Secretary of State stated that he had taken into account the seriousness of the appellant's offence, as well as the appellant's circumstances and his various representations. The Secretary of State did not consider that deportation would be in breach of the appellant's rights under Article 8. A notice of decision to make a deportation order was attached to that letter, dated 4th September 2008.

21. Pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002, the appellant appealed to the AIT against the Secretary of State's decision to deport. The hearing took place on the 7th January 2009 before IJ Baker and Doctor Okitikpi. The Tribunal heard oral evidence from the appellant and Ms Nguyen. The Tribunal also received a letter from the foster carer with whom the appellant and Ms Nguyen had lived when Ms Nguyen was younger. The foster carer in that letter confirmed the relationship between the appellant and Ms Nguyen.

22. In its decision dated 15th January 2009 the Tribunal held that although the appellant and Ms Nguyen were not married, they had established a family life together in the United Kingdom. The Tribunal concluded that if the appellant were deported, Ms Nguyen could travel with him and they could continue their life together in Vietnam. The Tribunal noted that Ms Nguyen had recently visited Vietnam and experienced no difficulties there. In paragraph 63 of its decision the Tribunal wrote as follows:

> "However, even if we had found that the decision would interfere in their family life, we would agree with the Secretary of State that it is necessary in a democratic society for the prevention of disorder or crime and to maintain effective immigration control in the wider interests of the public. We would also agree that it is proportionate, taking into account that they are young, healthy adults who spent their childhood in Vietnam and cannot be said not to have experience of life there. They have both studied in the UK and even if they have no home or family to return to, there is no reason to believe that they could not establish themselves in Vietnam society and support one another. We accept that Mr. SL was a minor when he came to the UK and that he has been here for a period of approximately six years. However, he made an unfounded asylum claim and remained even after, on his own evidence, he was aware that he no longer had a right to remain in the UK. We also take account of the nature of the offence committed by

> Mr. SL. Drug crime is regarded as serious because of the severity of the effects it has on the community at large and cannot be categorised as purely a dishonesty offence. We also note that he continues to try and excuse his behaviour."

23. The Tribunal also considered the effect of paragraph 364 of the Immigration Rules and concluded that deportation was appropriate in the circumstances of this case. Accordingly, the Tribunal dismissed the appellant's appeal.

24. The appellant applied for reconsideration of the AIT's decision. The grounds upon which the appellant sought reconsideration were threefold. First, the appellant argued that he should have been granted leave to remain as an unaccompanied minor. That leave had not been granted to him. The Tribunal failed to take that matter into account. The second ground on which reconsideration was sought was that the IAT erred in law in failing to grant an extension of time for the appellant's asylum appeal. The appellant did not now seek to re-open that appeal. Nevertheless in those circumstances, the AIT in July 2009 erred in attaching any significance to the earlier decision refusing asylum. The third ground for reconsideration was that the AIT erred in its manner of dealing with the Article 8 claim.

25. In due course the Administrative Court made an order for reconsideration. The reconsideration hearing took place on the 22nd June 2009 before Senior Immigration Judge Southern. By a decision dated 15th July 2009 the Senior Immigration Judge held that the AIT had made no error of law in its original decision. Accordingly, the Senior Immigration Judge dismissed the application for reconsideration.

26. The most important part of the Senior Immigration Judge's decision, for present purposes, is to be found at paragraphs 14 to 17. These paragraphs read as follows:

> "14. The grounds upon which the appellant sought an order for reconsideration, as amplified by submissions at the hearing, were not altogether easy to follow but amount to this. There are two main challenges, although there is some overlap between them. First, the decision to make a deportation order was said to be unlawful. That was in the sense that since the respondent failed to have proper or adequate regard to what were said to be the exceptional circumstances in the history of this particular appellant, the decision had been made on the basis of an inadequately informed assessment and so was a decision that was not in accordance with the law. The second ground concerns the assessment of the article 8 claim which is said to be flawed because it failed to take account of the circumstances that led the appellant to be the person he was when he committed the offence and for other reasons that I will examine in detail below.
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> 15. Addressing the first of those grounds, it becomes clear that there are in fact a collection of points being argued. Complaint is made that when the appellant arrived in the United Kingdom he should have benefited from the respondent's policy to grant exceptional leave to remain as an unaccompanied minor who

> could not be returned as it could not be established that adequate reception facilities were in place in Vietnam.
>
> 16. The first problem with that submission is that in refusing the appellant's asylum claim in July 2002 the respondent made clear that the appellant's claim that he had lost contact with his mother was not accepted to be true. Thus the appellant was not someone, in the respondent's view, who had no contact with parents in his country of nationality. The immigration judge reached a similar conclusion.
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> 17. In any event, even if the appellant had been granted exceptional leave on that basis it would have been only until just before his eighteenth birthday. As has been mentioned above, the appellant was twenty years old when he committed the offence that gave rise to the deportation decision and so would not have been in possession of that leave when the decision was made. And nor has any reason been advanced to suggest that he might have expected to be granted any further leave upon reaching his majority. "

The appellant was aggrieved by the decision of the Senior Immigration Judge and now appeals to this court.

Part 3. The Appeal to the Court of Appeal

27. The appeal to the Court of Appeal is brought essentially on two grounds, which I would summarise as follows. First, it is said that the Senior Immigration Judge erred in paragraphs 15 to 17 of his decision in dismissing as irrelevant the breach of the Minors Policy that occurred. The Senior Immigration Judge should have held that the breach was a serious matter (especially when taken in conjunction with other mishaps), which the Secretary of State should have taken into account in his decision of 2nd September 2008. The Secretary of State had not done so. Therefore, the Secretary of State should retake the decision. Secondly, it is argued that in considering the application of ECHR Article 8, the Senior Immigration Judge wrongly placed reliance on the fact that the appellant had made an unfounded asylum claim. The Senior Immigration Judge wrongly failed to take into account the breach of the Minors Policy and its consequences.

28. Before addressing the grounds of appeal, I must first review the relevant law.

Part 4. The Law

29. In *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 the adjudicator hearing an appeal from the Secretary of State's decision overlooked AA's entitlement to ELR as an unaccompanied minor. The Secretary of State contended that no prejudice had been caused, because AA was aged 17 years and 2 months. So ELR, if given, would have expired ten months later and AA had no entitlement to any extension of leave to remain. The Court of Appeal, allowing AA's appeal, rejected the Secretary of State's contentions. Keene LJ, giving the leading judgment, said this:

> "22. I recognize the importance to be attached to the loss of the potential right to an in-country appeal against any refusal of variation of leave to remain. It is true that the chances of such an appeal eventually meeting with success may have been slim: on this I see the force of the points made by Mr Waite about the substantive merits of such an appeal. Nonetheless, it is to be borne in mind that such an appeal process would have afforded the applicant the advantage of an independent judicial consideration of those merits as they stood at the time. That is a significant advantage when compared with the arguments which could be put forward on a judicial review of a decision by the Secretary of State that no new asylum or human rights claim had been advanced. The appellant has lost that advantage because of the errors of law by the adjudicator and the AIT.
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> 23. He cannot, of course, now be restored to the position he would have been in, had he been granted discretionary leave to remain until his 18th birthday. Mr Waite is right to emphasise that. But the loss which the appellant has suffered is a consideration which the Secretary of State should consider in the exercise of his discretion as to whether the appellant should now be granted any further leave to remain and, if so, for how long.
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> 24. The same seems to me to be true of another disbenefit suffered by the appellant as a result of the errors of law. In written submissions accepted by the court after the close of oral argument, the intervener has made the point that if the appellant had enjoyed discretionary leave to remain until his 18th birthday, any application by him made before that leave expired to extend it would have resulted in an automatic extension of leave until the application (and any consequential appeal) had been decided or withdrawn. That is the consequence of section 3(c) of the Immigration Act 1971. Moreover, while lawfully in this country because of such an automatic extension of leave, he would have been entitled to work and to obtain various forms of assistance under the Children Act 1989. Neither of those benefits is available to an overstayer.
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> 25. Legally the propositions seem to me to be sound. Once again, the appellant cannot now obtain these benefits as of right: as is said on behalf of the Secretary of State, this court cannot put the appellant into the position in which he would have been, had discretionary leave been granted. But, again, there can be no doubt that he has suffered a disbenefit as a result of the legal errors made in this case, and that is something which the Secretary of State ought now to take into account."

30. In *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 AC 1159 the House of Lords had to consider the effect of excessive delay in

dealing with the asylum claim of a young Kosovar. Lord Bingham identified three ways in which the delay was relevant. At paragraph 16 he dealt with the third way in which delay might be relevant. He said:

> "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields, unpredictable, inconsistent and unfair outcomes."

31. In *R (S, H, Q) v Secretary of State for the Home Department* [2009] EWCA Civ 334 the Court of Appeal held that when the Secretary of State was exercising her discretion as to whether to grant ILR, she ought to have regard to past failures to apply a relevant policy. In particular, she should have regard to "the correction of injustice caused by the previous unlawful failure to apply the policy".

32. In *HH(Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 727 the Secretary of State made a decision to deport HH following his conviction for three sexual offences. In making that decision the Secretary of State overlooked his policy that persons should not be deported to war zones. By the time the case reached the AIT that policy had been withdrawn. Nevertheless, the AIT held that such withdrawal could not retrospectively validate the Secretary of State's decision. The matter should be remitted to the Secretary of State for a fresh decision. The Court of Appeal upheld that decision of the AIT.

33. A number of propositions may be derived from those authorities, including the following:

    i) A decision may be unlawful if it is reached in disregard of a relevant policy.

    ii) Past prejudice suffered in consequence of such a decision may be a relevant factor to take into account, even when that policy has ceased to be applicable.

34. After this review of the authorities, I must now turn to the first ground of appeal.

Part 5. The First Ground of Appeal

35. The Secretary of State no longer relies upon paragraph 16 of the Senior Immigration Judge's decision. In paragraph 12 of his skeleton argument, counsel for the Secretary of State states:

> "The SSHD is content to accept for the purposes of this appeal that a thorough assessment of the reception arrangements likely to be available to him in Vietnam would have found them to be inadequate".

That is a realistic concession: see *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551; [2009] 1 WLR 1873. That was a decision concerning the appellant's younger brother. It was held that the assessment of reception arrangements in Vietnam was a matter for the Immigration Judge, not for the Secretary of State.

36. It therefore becomes necessary to focus on the Senior Immigration Judge's second line of reasoning. That is contained in paragraph 17 of the Senior Immigration Judge's decision. It is necessary to ask, what is the relevance of a historic breach of the Minors Policy in relation to the deportation decision which was taken in September 2008?

37. It is first necessary to note that the breach of the Minors Policy formed part of a series of errors. The appellant's rights under the Minors Policy and his possible entitlement to ELR here were first drawn to the attention of the Secretary of State by the appellant's solicitors in a letter of August 2002. The Secretary of State did not act on that letter. Nor did the Secretary of State draw the attention of the IAT to the appellant's entitlement to ELR. Accordingly, the appellant's appeal to the IAT was dismissed on the 3rd December 2002 without any reference being made to the appellant's entitlement to ELR.

38. So throughout 2002 the appellant was living in the UK with the status of failed asylum seeker, when he should have been lawfully residing here with ELR under the Minors Policy. The next event in the saga is the misfiling by the IAT of the appellant's application for leave to appeal out of time against the adjudicator's decision. When the application for leave did come to light it was dealt with in an incorrect manner. The Deputy President of the IAT treated the error of the appellant solicitor's as a reason to refuse extension of time. In fact, as the law has now been clarified, the appellant should not have been fixed with responsibility for the failure of his lawyers: see *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13 at paragraph 46. Therefore, the application for leave to appeal out of time was refused on an incorrect basis. At the same time another opportunity to consider the appellant's entitlement under the Minors Policy was lost.

39. In the summer of 2005 the appellant attained the age of 18. He moved out of foster care into independent living. He maintained his relationship with Ms Nguyen. He did a variety of jobs, such as waiter and chef. As the appellant had no lawful status in this country, he was not permitted to work, so he faced all the obstacles of an illegal immigrant seeking to earn his living.

40. If the Minors Policy had been operated correctly, the appellant would have had leave to remain in this country until 10th July 2005. Thereafter, he could have applied for that leave to be extended. The application might possibly have been granted. Alternatively, even if the application had been refused, the appellant could have lawfully remained in the UK and continued to work whilst pursuing an appeal against the refusal. The appeal process would probably have continued for a number of years.

41. I do not for one moment suggest that the errors in dealing with the appellant's immigration status either justify or excuse his offending. Nor did the fact that he had no legal entitlement to work compel him to resort to cannabis production. On the other hand, it does seem to me that when the Secretary of State was considering how to exercise his discretion under section 3(5)(a) of the 1971 Act and paragraph 364 of the Immigration Rules, the Secretary of State ought to have taken into account the past history of mishaps and their effect upon the appellant.

42. I am reinforced in this conclusion by the review of authorities set out in Part 4 above. Those decisions confirm that the Secretary of State should take into account the effect

of past failures to apply his own policy and that the Secretary of State should also bear in mind the need to correct injustice.

43. The offence which the appellant has committed, although serious, is not as grave as many of the offences resulting in deportation which come before this court. Although possible, it is not inevitable that the Secretary of State would have reached the same decision in September 2008 if he had taken all relevant factors into account.

44. I therefore conclude that the Senior Immigration Judge fell into error in paragraphs 14 to 17 of his decision. The right course now is to allow the appellant's appeal and to remit the matter to the Secretary of State so that he can re-take the decision under section 3(5)(a) of the 1971 Act and paragraph 364 of the Immigration Rules.

45. Accordingly, the appellant succeeds on his first ground of appeal.

Part 6: The Second Ground of Appeal

46. The second ground of appeal concerns the approach by the Senior Immigration Judge to the appellant's rights under Article 8 ECHR. The Senior Immigration Judge, like the Immigration Judge and the Secretary of State, concluded that deporting the appellant to Vietnam would not interfere with the appellant's family life. This was because Ms Nguyen could accompany the appellant to Vietnam and they could continue their family life in that country, where both of them had lived as children.

47. Such discussion as there was in the various decisions about the balancing exercise under Article 8.2 was discussion of a fall back position. I find it hard to criticise the decision that was reached concerning Article 8. However, I will make no comment about what decision should be made under Article 8 in the future. I am told that the appellant and Ms Nguyen now have a child aged 5 months. That circumstance may give rise to new submissions and further issues in any future consideration of the effect of Article 8.

48. In the result, therefore, I conclude that the appellant succeeds only on his first ground of appeal and that this matter should be remitted to the Secretary of State for a fresh decision. For all the above reasons, in my view this appeal should be allowed.

Lord Justice Patten :

49. I agree with Jackson LJ that the second ground of appeal fails but I take a different view about the first ground of appeal.

50. The Secretary of State accepts that when the Appellant applied for asylum in 2002 a proper assessment of the reception arrangements likely to be available to him in Vietnam would have revealed that they were inadequate. This was the conclusion reached in respect of his brother on his own application for asylum and it should have been applied to both children. In these circumstances, the Secretary of State should have applied the Minors Policy to the Appellant and granted him ELR until his 18th birthday in July 2005.

51. This initial error was compounded by the subsequent failure of the IAT to allow an appeal out of time against the refusal of the asylum claim. The consequence was that from 2005 the Appellant had exhausted the appeal procedures available to him and

had no right to remain in the UK unless he was able to obtain discretionary leave to do so.

52. By then he was 18. It would have been open to him to have made an application for such leave either on the grounds that he wished to study here or on any other grounds available to him at the time. But instead he effectively disappeared from view until he was arrested and subsequently convicted in 2007 of the offence for which the Secretary of State now seeks to deport him. During that intervening period he had no right to work but he did in fact work in various restaurants and a nail bar.

53. Had the Minors Policy been applied to him either in 2002 on arrival or during the appeal process against the rejection of his asylum claim the Appellant would have reached his 18th birthday with the benefit of ELR. That would have given him the opportunity to make an application for an extension of his leave as someone who had enjoyed the benefit of the policy and not merely as a failed asylum seeker. He would therefore have enjoyed the automatic extension of his leave from the date of the application to the decision and an in-country right of appeal under s.82(2) of the Nationality, Immigration and Asylum Act 2002. But the Minors Policy would not of itself have assisted him to obtain any extension of his leave because it stated in terms that:-

> "(ii) we will normally grant leave to remain until their 18th birthday to children who were between the ages of 14 and 17 years at the time we decided to refuse them. We will normally expect children in this category to leave the UK at the end of their leave, or sooner if satisfactory arrangements for return can be made."

54. The decision of this court in *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 is authority for the proposition that the Secretary of State, when making an immigration decision, should take into account the loss of any procedural or substantive advantages which the applicant may have suffered due to some earlier error of law. *AA (Afghanistan)* was a case in which that loss was substantial because the appellant had been denied the potential right to an in-country appeal against any refusal of a variation of leave to remain. In this case what the Appellant has lost by the earlier failure of the Secretary of State and the appeal process to apply the Minors Policy was the opportunity to have made an application for an extension of leave prior to his 18th birthday and to pursue an in-country right of appeal if unsuccessful. Had that been done the Appellant, it is said, could have worked legally until his immigration status was resolved and this is likely to have avoided his falling into crime which is the cause of his present difficulties.

55. I am very far from convinced that the principle underlying the decision in *AA (Afghanistan)* can be used in the way it is deployed in this case in order to justify the Appellant's subsequent criminal conduct. But even if I am wrong about that the problem with this argument is that it has no evidential basis. At no stage in the appeal against the deportation decision has the Appellant ever suggested that his lack of status and his consequent inability to work lawfully was a contributory factor to his subsequent involvement in crime. Nor is it apparent that an application to remain after 2005 would (if made) have been successful. The Minors Policy would not have assisted the Appellant for the reasons I have given and there are no obvious other

factors which would have made a refusal of an extension of leave disproportionate having regard to Article 8.

56. When therefore the Secretary of State came to consider the Appellant's possible deportation in the light of his criminal conviction a consideration of the failure to apply the Minors Policy could not have mitigated the seriousness of his conduct in relation to the balancing exercise which had to be performed. The earlier failure to apply the policy was therefore irrelevant to the decision which the Secretary of State had to make.

57. Moreover, even if the Appellant had (contrary to the facts) made a successful application for leave to remain so that he was lawfully present in the UK up to 2007 this would not have prevented his deportation for what the sentencing judge regarded as a serious drugs offence.

58. I am therefore unable to agree with Jackson LJ that the Secretary of State reached her decision on an erroneous basis. There was no case advanced that the Appellant had been disadvantaged by the failure to apply the policy and its consequences and no evidence to support such a case. I cannot therefore see how it can be said that the exercise of her discretion under s.3(5)(a) of the 1971 Act and paragraph 364 of the Immigration Rules was vitiated by a failure to consider a material factor in the form of the case which is now advanced.

59. I would therefore dismiss this appeal.

Lord Justice Ward:

60. A series of errors deprived this appellant of ELR which arguably would have been extended when he attained majority and would still have prevailed at the time of his offence. For me the crucial issue is whether this failure of policy is a relevant factor which ought to have been weighed in the balance by the Secretary of State when considering whether it was conducive to the public good to send this young man back to Vietnam. In my judgment it was. As set out at [29] above Keene L.J. held in *AA (Afghanistan)* at [25]:

> "But, again, there can be no doubt that he has suffered a disbenefit as a result of the legal errors made in this case, and that is something which the Secretary of State ought now to take into account."

In *EB (Kosovo)* cited at [30] above Lord Bingham said:

> "Delay [and in this case I think one can substitute "errors on the part of the Secretary of State"] may be relevant … in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

Finally in *R (S, H, Q) v SSHD* [2009] EWCA Civ 334 Goldring L.J. said at [45]:

> "Firstly, in refusing ILR when he reconsidered the case, the Secretary of State failed to have regard to a legally relevant factor, namely the correction of injustice caused by the previous unlawful failure to apply the policy."

61. If this was a relevant factor, then it is accepted that the Secretary of State did not have regard to it. That would render his decision unlawful unless the error was wholly immaterial. I cannot possibly say that it was immaterial. Precisely how the appellant would have behaved had he been given the status to which he was entitled is a hypothetical question but the fact is that he has lost the opportunity to live lawfully in this country and to work lawfully whilst he was here. It seems to me a little unfair to hold against him the fact that he has never suggested that his lack of status was a contributory factor to his subsequent involvement in wrongdoing when he, like the Secretary of State, was blissfully unaware of his entitlement and only learnt of it at a very late stage in these proceedings when the point was for the first time advanced on his behalf. I imagine he would have behaved differently but it matters not what I imagine for it is a decision the Secretary of State must take. I would therefore allow the appeal and allow the Secretary of State to acknowledge the errors for which he is responsible and in the light of them to decide whether or not to deport this young man.