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Case Nos: CO/95/08, CO/1037/08,CO/423/08,
CO/894/08,CO/426/08, CO/1760/08

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2008

Before :

MR JUSTICE UNDERHILL

- -

Between :

HAMIDULLAH GHALEB
ABBAS KHAN
AMANULLAH MANDUZAI
MOHAMMED NIAZI
IBRAHIM RAHMANI
HAMAYON WALIZADA — **Claimants**

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

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

Nicola Greaney (instructed by **the Treasury Solicitor**) for the Defendants

Amanda Jones (instructed by **Malik & Malik**) for the Claimants

Hearing dates: 25th September 2008

- -

Judgment
As Approved by the Court

Mr Justice Underhill :

INTRODUCTION

1. There are before me six applications for judicial review. They have been chosen as lead cases in order to resolve issues arising in a larger number of claims. The main issue is common to all six and to the other cases in the group; but there are case-specific issues in some of them which, though they share a family resemblance, require separate consideration. I will deal with the common issue first.

THE COMMON ISSUE

How the Issue Arises

2. The Claimants are from Afghanistan. They came to this country on various dates in the course of 2000 and claimed asylum. In each case asylum was refused after a substantial delay: the earliest that a decision was made in any of the cases was 10th July 2002 and the latest was 21st July 2004. (I note in passing that the fact that the applications were refused does not mean that they were necessarily initially unmeritorious: in the intervening period the Taliban regime had been ousted.) None of them has, however, been removed from the country.

3. In the case of each of the Claimants, under the policies relating to Afghan asylum-seekers which were in force until 18th April 2002 they could, if their applications for asylum had been considered promptly have expected (subject to any unusual features of their cases) to be granted, at the lesst, four years' exceptional leave to remain ("ELR"), which would in practice have meant that they would have received indefinite leave to remain ("ILR") at the end of that period. Although the facts of their individual cases have yet to be considered, it is accepted that the reason

why most asylum-seekers in their position did not have their claims considered before those policies changed was that in early 2001 the Secretary of State decided to put all outstanding asylum claims on the back burner in order to concentrate resources on meeting targets for dealing with new asylum claims agreed under a Public Service Agreement entered into in January 2001: I will call this "the PSA policy".

4. In *R (S) v Secretary of State for the Home Department* [2007] Imm A.R. 781 ([2007] EWCA Civ 546), which was decided on 19th June 2007, the Court of Appeal held that an Afghan asylum-seeker in the same position as the Claimants whose application for ILR had been refused had been unlawfully treated. The effect of its judgment (though, as will appear, not its form) was that he was entitled to be given ILR. In summary, the Court held that the PSA policy had been arbitrary and unfair, to the extent of being unlawful, in its effect on asylum-seekers whose claims were pending and that in exercising his discretion subsequently as to whether to grant ILR the Secretary of State was obliged to take into account the need to put right the consequences of that earlier unlawfulness.

5. The Secretary of State has accepted the decision in *S*, and she accepts that the consequence is that all asylum-seekers similarly affected by the PSA policy should be entitled to ILR, subject only to consideration of

(a) whether the opportunity to benefit from the policies under which they could have expected to receive ILR or ELR had been lost as a result of the individual's own actions (e.g. where the delay had been caused by his failure to cooperate with the asylum process) and

(b) whether they pass the character and background checks which are applied to all applicants for ILR.

The Secretary of State's position is now set out in a published document entitled "*CRD Guidance on R (S) policy*".

6. Each of the Claimants has submitted representations to the Secretary of State via their solicitors (in each case the firm of Malik & Malik) seeking ILR on the basis of the decision in *S* (though some already had outstanding representations based on the same point and/or on other grounds). None of those representations has yet been considered by the Secretary of State. It follows from the Secretary of State's acceptance of the decision in *S* that each of the Claimants will, when those representations do in due course come to be considered, be granted ILR unless they fall at one of the two hurdles identified above. Ms. Greaney, who appeared before me for the

Secretary of State, accepted that the proportion of applicants in the Claimants' position who would be refused on one or other of those grounds was likely to be small, though not negligible; but it is impossible to say what the position would be in any of the Claimants' particular cases until they had been considered.

7. What gives rise to these applications is the delay in considering the "post-*S*" representations. Well over a year has now passed since the decision of the Court of Appeal and, as I have said, none of the Claimants has had his application for ILR considered. Nor is there any firm indication as to when they will be considered, save that (as I shall set out in more detail below) the Secretary of State hopes and expects to have dealt with them by March 2010 at latest. It is important to appreciate that the situation of failed asylum-seekers who remain in this country after their applications have been refused is, to say the least, unenviable. They are not allowed to work. If they nevertheless take work, they will be doing so illegally and will be liable to exploitation and deprived of the benefits of the employment protection legislation. They are not entitled to statutory benefits, save that they may if destitute apply for the limited support available under the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005. Their entitlement to NHS treatment is ambiguous but at best limited. If they wish to leave the country temporarily - for example to see family members from whom they will now have been parted for many years – they are liable to lose their entitlement to have their outstanding claims considered. They are, to borrow a phrase from the 1998 White Paper on asylum entitled *Fairer, Faster and Firmer*, in "a cruel limbo of worry and uncertainty for the future". The delay since the decision in *S* is of course only the culmination of a much longer period of delay: all the Claimants have now been here for at least seven years. If the position were simply that they had been refused asylum and had chosen to remain in the country without leave, that situation could be said to be of their own making. But the position in their cases is that it is accepted that, but for the effect of the Secretary of State's past unlawful policy, they would very likely have received leave to remain many years ago and that they are very likely to be granted ILR when their cases are eventually considered: that puts matters in a very different light.

8. However, the delay from which the Claimants are suffering is an aspect of a much larger problem. For reasons which are now well-known and into which I need not go, from the early 1990s a huge backlog of unresolved asylum cases was allowed to develop, and that was indeed exacerbated by the effects of the PSA policy. The Claimants' cases have not been dealt with because they form part of that backlog. In July 2006, in response to pressure in Parliament and elsewhere to grapple with the problem, the Secretary of State announced a new strategy for dealing with the problem of what were described as the "legacy" cases (estimated at that date as

numbering between 400,000 and 450,000). The principal elements in that strategy can be described as follows:

(1) A new "Case Resolution Directorate" ("CRD") within the UK Border Agency (previously the Border & Immigration Agency) ("the Agency") has been established to deal specifically with the legacy cases. Its objective is to clear the backlog entirely within a period of five years – that is, by mid-2011. It took some time to set the Directorate up and get the necessary systems in place but it has been fully operational from late 2007.

(2) The CRD is required to identify as a priority cases falling into four specified categories namely:

(i) cases in which the individuals concerned may pose a risk to the public;

(ii) cases relating to individuals who are in receipt of public support;

(iii) cases in which it is likely that a decision will be made to grant leave to enter or remain in the UK;

(iv) cases where the individuals can more easily be removed.

Cases in those priority categories, once identified, will be dealt with first. No one category has priority over the other, and precisely in what order particular priority cases are dealt with will be decided by individual casework managers as a matter of administrative management rather by reference to any substantive criteria – save that cases in category (i) are to be "accorded a significant weight" when deciding the order in which cases should be considered. The remaining, non-priority, cases will not be dealt with until all the priority cases have been disposed of. The present estimate is that the priority cases will all have been resolved by March 2010 and the remainder by mid-2011.

(3) It is recognised that there may be a need to take "truly exceptional or compassionate cases" out of order: in particular, that might be appropriate where cases have been "seriously mishandled" or where there are "compelling compassionate circumstances". Guidance as to the operation of this exception has now been developed and published.

9. The Secretary of State has said that cases covered by the decision in *S* – to which I will refer as "*S*-type" cases – will be treated as cases where leave to remain is likely to be granted and thus as falling into priority category (iii). These are not only Afghan cases. Similar ILR/ELR policies were in place also for asylum-seekers from Angola, Burundi, Iraq, Liberia, Rwanda, Sierra Leone and Somalia. The *S*-type cases are not the only cases in category (iii). As explained in a full and helpful witness statement from Emily Miles, the Director of CRD (amplifying her evidence before Collins J in the *FH* case referred to below), there are in principle a number of situations that might lead to applications for ILR being likely to succeed, but the main other types as identified to me were:

(a) so-called "*Rashid* cases" – see *R (Rashid) v. Secretary of State for the Home Department* [2005] Imm. A.R. 608 ([2005] EWCA Civ 744) – being another category of cases in which an unlawful practice on the part of the Secretary of State led to asylum-seekers, in this case from Iraq, being unfairly deprived of the opportunity to obtain leave;

(b) cases where the applicant appears to satisfy the long residence requirements under paras. 276A-D of the Immigration Rules;

(c) some cases where families are entitled to the benefit of the "seven-year child concession" or have otherwise over a long period established a family life in the UK such that removal would be contrary to art. 8 or otherwise inappropriate.

There is also a group, which I was told is comparatively small, of persons previously admitted as unaccompanied children and who remain under 18.

10. The numbers in the various priority categories cannot yet be estimated with any accuracy: the very process of identifying priority cases, let alone dealing with them, is time-consuming and is not yet complete. But very broadly speaking the priority categories taken together are thought to represent some half of the backlog: that is why it will take so long to deal with them all. (It should be noted, however, that the figure of 400,000-450,000 quoted in 2006 is thought now to be substantially over-estimated: early work has shown a high proportion of files to be duplicated or otherwise erroneously included in the total.) So far as category (iii) is concerned, the *S*-type cases and the *Rashid* cases are both thought to number "many thousands"; and the two groups together constitute the majority of the cases in this category (that is, they outnumber the cases identified as (b) and (c) in para. 9 above).

11. The strategy announced in 2006 was regarded as unacceptable by many failed asylum-seekers whose claims did not fall within any of the priority categories. On 20th June 2007 Collins J. heard applications for judicial review brought by a group of such claimants. Evidence was put before him in the form of a witness statement from Ms. Miles explaining the new strategy. He gave judgment on 5th July 2007 dismissing the claims – *R (FH) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin). He was not persuaded that, given the difficult situation in which the Secretary of State found herself, her policy could be said to be irrational. He recognised, however, the very difficult situation of the claimants, facing as they did a further long period of uncertainty, and at para. 29 of his judgment he said this:

> I would only add a footnote. Since a substantial delay is, at least for the next 5 years or so, likely to occur in dealing with cases such as these, steps should be taken to try to ensure that so far as possible claimants do not suffer because of that delay. They should be informed when receipt of an application is acknowledged, as it must be, that there will likely to be a wait which could be for x months (or years). Thus they should be asked not to pursue the Home Office unless circumstances have arisen which make a communication necessary, for example, a new development or a need which has arisen for some sort of discretionary action. One serious and matter of complaint has been the continual failure of the Home Office to respond to or even acknowledge receipt of correspondence. Measures should be taken to minimise any prejudice to applicants occasioned by the delay. Thus those who were being given support should continue to receive it, those who were able to work should continue to be permitted to do so and there should be favourable consideration of desires to travel outside the United Kingdom for short periods (as, for example, in a case such as FH) without affecting the validity of the application. Applicants should not suffer any more than is inevitable because of delays which are not in accordance with good administration even if not unlawful.

12. It should be emphasised that the claimants in *FH* were not in any priority category. Collins J. did not therefore have to consider the position of applicants for ILR benefiting from the judgment in *S.* However, there was before him some discussion of *S*, which had been decided only the previous day (though, as Collins J. noted, he and the parties were very familiar with the issues, since he had decided *S* at first instance and counsel before him had argued it in the Court of Appeal). At para. 22 of the judgment Collins J. said this:

> Mr Jay [counsel for the Secretary of State] submitted that the situation in these cases differed fundamentally from that in *S* since there was no detriment occasioned. In *S*, the delay had denied the claimant the grant of ILR which would, had his initial claim been dealt with within a reasonable time and not unfairly put into the backlog, have been made. In reality, as it seems to me, the unlawful approach had led to the delay and it was the delay which in its turn has caused the loss of ILR. Thus the delay was unlawful. If the system in these cases was responsible for an unlawful delay, the claimants are entitled to redress and at least to a declaration that their claims must be considered forthwith. As I have said, detriment has resulted from the delay.

13. In summary, therefore, the Claimants are applicants for ILR who the Secretary of State recognises are likely – but not certain - in due course to be given leave to remain, but whose cases

have not yet been considered and may not be for another year or more. The decisions in both *S* and *FH* are an important part of the background to their claims but they do not directly cover them.

The Parties' Cases

14. It is the Claimants' case that the state of affairs described above is so unfair to them as to be unlawful. It has been held in *S* that asylum-seekers in their position have been unlawfully prejudiced by the effect of the Secretary of State's earlier PSA policy. The Court of Appeal held that it was incumbent on the Secretary of State to exercise her discretion whether to grant ILR in a manner which would remedy that injustice, i.e. – subject to the points identified in para. 5 above - by granting them ILR. Miss Jones, for the Claimants, submitted that it follows from that reasoning that the Secretary of State was obliged to afford that remedy forthwith. The position of the "*S*–type" applicants was different from that of failed asylum-seekers in the other priority groups, and - more particularly - from that of other applicants for ILR in category (iii). No doubt all had suffered delay; but in the case of the Claimants and others in their position the delay had already caused them a specific injustice, which it was the Secretary of State's duty immediately to remedy. On that basis the "priority" which the Claimants were being accorded under the present policy was inadequate: they had already suffered a year's delay since the decision in *S*, on top of the prior unlawful delay, and the prospect of having to wait for a further year or more was unacceptable. They should accordingly now be granted "super-priority" (my phrase, not Miss Jones's). Specifically, Miss Jones submitted that I should direct that each of their cases now be considered, and a decision reached, within a period of no more than three months. She submitted that there was every reason to believe that a decision within that period would be achievable. She pointed out that the CRD had apparently resolved some 100,000 cases in its first year, which implied a rate of some 1,750 per week: thus even if the *S*-type cases amounted to 5,000, or something of that order, that would not be an impossible burden to discharge. It was common ground that cases of this kind are not inherently difficult to identify, because they can be recognised simply from the country of origin of the asylum-seeker and the dates of his or her application and decision when read against the dates of the various country-specific ILR/ELR policies. Miss Jones also pointed out that when the *Rashid* cases had first been identified a particular unit within the Agency had been set up to deal with them (though that has now been subsumed into the CRD): something similar could be done for these cases.

15. In addition to that central submission, Miss Jones had three supporting points:

(1) She referred to the observation in para. 22 of the judgment of Collins J in *FH*, which I have set out at para. 12 above, that *S*-type applicants for ILR were entitled to have their claims heard "forthwith". She acknowledged that the remark was obiter; but she drew support from the fact that not only Collins J. but apparently counsel for the Secretary of State appeared to recognise that *S*-type cases would require special treatment.

(2) She submitted that *S*-type cases should be characterised as cases of "serious mishandling" and thus fall to be treated as "truly exceptional" within the meaning of the guidance referred to at para. 8 (3) above.

(3) She submitted that the situation in the present case was analogous with that considered by the Court of Appeal in *R v Secretary of State for the Home Department, ex p. Phansopkar* [1976] QB 606, in which it was held that the Secretary of State was obliged to set up two "queues" – one for those who were entitled leave to enter, subject only to administrative arrangements, and another for those whose cases required an exercise of discretion.

16. It is the Secretary of State's case that the decision in *S* does no more than require her to reconsider the cases of applicants in the Claimants' position with a view to the grant of ILR. No doubt, given the history, she should also do so as soon as she fairly can; but there is nothing in the reasoning of the Court of Appeal that requires her to do so "forthwith". In Ms. Greaney's submission the decision as to the degree of priority to be accorded to the *S*-type cases was a matter for the discretion of the Secretary of State, and her decision could only be challenged on grounds of irrationality. I was referred to the many well-known authorities in which the courts have recognised that in situations where resources are limited they should only exceptionally allow challenges to ministers' decisions on what are often extremely difficult and delicate choices – see, e.g., *R v. Cambridge Health Authority, ex p. B* [1995] 1WLR 898; *R (Paulo) v. Secretary of State for the Home Department* [2001] Imm. A.R. 645; and indeed *FH* itself (see at para. 11). It was, she submitted, reasonable for the Secretary of State to take the view that, while *S*-type cases should enjoy priority under the new legacy arrangements, they should not be given the kind of super-priority sought by the Claimants; and that the fact that they had previously been the victims of an unlawful decision on her part (or that of her predecessors) did not entitle them as of right to such treatment.

Conclusion

17. Much as I sympathise with the Claimants' predicament I believe that Ms. Greaney's submission is correct.

18. The first point to make is that the only explicit consequence of the decision in *S* is that persons in the Claimants' position are entitled to be considered for ILR: it says nothing as such about how quickly that consideration should take place. Of course, as Carnwath LJ said in *S* (at para. 51), albeit in the different context of an earlier period of delay:

> No doubt it is implicit in the statute that applications should be dealt with within "a reasonable time".

But, as he continued:

> That says little in itself. It is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers.

FH has confirmed that when resources are scarce "a reasonable time" is, alas, not inconsistent with a very long delay, subject only to the Secretary of State having a fair and rational system of priorities.

19. As for the argument that the Claimants are in a fundamentally different position from other applicants because they have suffered a legal wrong, the Court of Appeal in *S* was careful to emphasise that the Claimant was not entitled to ILR by way of a direct legal remedy. The Court was exercised by some observations of Pill LJ in *Rashid* which appeared to suggest that the Court could itself declare that the claimant was entitled to ILR. As to that, Carnwath LJ said this, at para. 46 of the judgment:

> The key in my view must lie in [Pill LJ's] emphasis on the scope of the remedial powers of the Secretary of State … . Although he seems to have expressed the result as an exercise of the court's remedial discretion, the court itself had no power to grant ILR. Nor, on a conventional analysis, did it have power to direct the Secretary of State to grant ILR. The power and the discretion rested with the Secretary of State. It was not open to the court to assume that function (cf. *R v Barnet LBC, ex p Shah* [1983] 2 AC 309, 350F-G). However, it was open to the court to determine that a legally material factor in the exercise of that discretion was the correction of injustice. That proposition did not require express statutory authority. It was implicit in the principles of fairness and consistency which underlay the whole statutory scheme. Further, in an extreme case, the court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion.

Likewise Moore-Bick LJ said this, at para. 72:

> Like Carnwath LJ, I do not find it altogether satisfactory to approach the question simply as if the court were being invited to grant a remedy in respect of an unlawful act committed some years earlier because the question that ultimately has to be decided on this appeal is not whether that earlier decision was unlawful but whether the later decisions were unlawful. However, I agree that the Secretary of State's earlier unlawful decision, its consequences for the claimant and the injustice that would be caused to him if he were to be removed from this country are factors that have to be taken into consideration when deciding whether to grant discretionary leave to remain.

20. Accordingly the *S*-type applicants have no absolute right to relief which creates a difference of kind between their cases and those of others in the backlog. The issue is thus simply whether the Secretary of State's decision to give them priority but not super-priority (absent proof of any "truly exceptional" circumstances) is rational.

21. To start with, I can see no basis on which it could be said that cases in category (iii) were necessarily entitled to a higher priority than cases in the other three categories. In the case of all four categories there are strong reasons why their cases should be dealt with as soon as possible: that, after all, is why they are treated as priority categories in the first place. The reasons why that is so differ from category to category and there is no objective measure by which one kind of reason could be said to weigh more heavily than another: these are quintessentially "political" judgments. Indeed Miss Jones did not really focus her argument in that direction; and Mr. Malik Saleem of Malik & Malik accepted in a witness statement filed on the Claimants' behalf that category (i) at least should in fact have higher priority.

22. Miss Jones's principal point was that the *S*-type cases should have a higher priority than the other cases *within* category (iii). She relied on the fact that they had been the victims of a past unlawful policy. She also submitted that their situation was worse than that of the other groups in the category because of the restrictions which I have summarised in para. 7 above. But that argument largely breaks down on the facts. The *Rashid* cases equally have been the victims of a past unlawful policy and any "super-prioritisation" would have to be accorded to them also. As I have said, between them the *S*-type and *Rashid* cases represent the majority of the category; so that the advantage to be gained by prioritising them within the category would be comparatively limited. It is true that the others in the category – essentially groups (b) and (c) as identified in para. 9 – have not been victims of past unlawfulness; but, once it is established (see above) that this is not an absolute difference but no more than a material factor, I do not see why the Secretary of State was obliged to treat it as a factor which necessarily distinguished them from others who

have had a very long wait for a decision which is likely to be made in their favour. They, like the Claimants, will equally have suffered wholly inordinate delays in considering their cases; and – contrary to Miss Jones' submission - most of them will as failed asylum-seekers be suffering precisely the same kind of restrictions as the Claimants. There is a limit to the extent to which it is useful to create fine distinctions between people all of whom have been badly treated.

23. As to the particular points identified at para. 15 above:

(1) Collins J in *FH* was not concerned with the issue of prioritisation and I do not think that the observation on which Miss Jones relies can be treated as being directed to the issue before me. The distinction which both he and Mr. Jay recognised between *S*-type and "ordinary" legacy cases is of course reflected in the prioritisation which they are already being given.

(2) It is evident that the "serious mishandling" sub-category of "truly exceptional cases" was not designed to accommodate an entire class such as the *S*-type cases. As Ms. Miles observes in her witness statement, if it were treated as applying to large categories of cases this would be self-defeating and would prejudice the CRD's ability to expedite truly urgent and exceptional cases.

(3) The *ratio* of *Phansopkar* has no application to the circumstances of the present case. The applicant in that case had an absolute right to enter the UK, subject only to being supplied with the necessary documents. In the present cases the Claimants only have a right to be considered for ILR, and there is a real chance that they will be held not to be entitled to it.

24. I should add that even if I had been satisfied that the Secretary of State's treatment of the Claimants' cases as a group was unlawful I should have been very hesitant about granting them more than declaratory relief. Miss Jones' calculation that it should be possible to deal with all the *S*-type cases within three months by giving them super-priority overlooks the fact that they could not rationally be distinguished from the *Rashid* cases. But in any event it is purely arithmetical. For better or for worse, the CRD strategy is in place and is fully operational. It does not take much administrative experience to appreciate that the disruption involved in moving at short notice from one established system of priorities to a wholly new one would be very great. The evidence before me does not justify the conclusion that it would be wholly impossible for the CRD to meet a target of dealing with all the *S*-type and *Rashid* cases – numbering many thousands – within, if not three months, at least a period much shorter than the current estimate; and Ms. Greaney in her submissions did not go further than to say that the difficulties involved would be "huge". If the

injustice were sufficiently great those difficulties would have to be faced. But, without in any way minimising the Claimants' plight, I am not convinced that that is so. Despite all the problems which they face, they are not, or need not be, destitute. Their claims will be accelerated if truly exceptional circumstances are shown. There is now at last real light at the end of the tunnel. It must be appreciated that it is unlikely that most of them will in fact have to wait until March 2010: that is the estimate for completing dealing with all the priority cases, and individual cases may be reached at any time between now and then. I doubt whether it would be justifiable to impose a huge degree of disruption, which would impact not just on the CRD and its staff but more importantly on the other cases which it has to handle, in order to reduce the Claimants' remaining waiting time by a period of months.

THE INDIVIDUAL CASES

25. Even if I am to dismiss the application in so far as it depends on the common point, the question remains whether any of the individual cases fall into the "truly exceptional" category referred to at para. 8 (3) above. In one case – that of Mr. Manduzai - the Secretary of State accepts that it does. In that case the Claimant has provided evidence which has satisfied the Agency that his mother is seriously ill in Pakistan and that his case should be considered out of order so that, if ILR is granted, he can obtain the necessary travel documents to visit her and be able to return. Shortly before the hearing the Treasury Solicitor wrote to the Claimant as follows:

> My client has considered this case further and is of the view that it is exceptional based on its particular facts, including, in particular, the medical evidence submitted by the Claimant in relation to his mother's serious medical condition. My client is therefore prepared to prioritise this case accordingly and agrees to make a decision as soon as reasonably practicable and, in any event, within three months of today's date, if possible.
>
> It would appear that this claim is therefore essentially academic. Nevertheless my client is of the view that it should remain as a lead case since it was selected as a lead case on the basis of it facts and in addition now provides a useful example to the Court of the type of case that is prioritised by the Secretary of State.

That assurance was acceptable to the Claimant and no relief is accordingly sought in his case, although it has remained formally before me for the reason given by the Treasury Solicitor.

26. As to the other five cases, no argument of this character was addressed to me in the cases of Mr. Ghaleb and Mr. Khan. I proceed to consider the cases of Mr. Niazi, Mr. Rahmani and Mr. Walizada. All of these depend on a particular type of alleged exceptional circumstance, namely that a close relative is seriously ill abroad. The "definition" of such cases in CRD's published guidance reads as follows:

> Where the claimant has a close relative abroad who is seriously ill and there is nobody in the home country to care for the relative, and
>
> - You have seen medical evidence that the illness is serious and
>
> - You are satisfied that the ill person is a close relative of the claimant or is an adult dependant.

The guidance continues:

> Close relatives are a parent, grandparent, child, grandchild, brother or sister. A serious illness might include a terminal illness, or a life-threatening condition, for example, a recent severe heart attack. An adult dependant may be someone with severe physical impairment who is over 18 years old and has nobody available care for them. You must see supporting medical evidence in every case.

Oddly, there is no reference to spouses, but it is plain that the guidance covers them also.

Niazi

27. On 30th August 2007 and 5th September 2007 Malik & Malik wrote to the Immigration and Nationality Directorate chasing progress in Mr. Niazi's case. Both letters included brief references to a "relative" who is said to be "in need of medical treatment": the second letter refers to the relative as "him". On 16th November 2007 they wrote again intimating an intention to bring proceedings for judicial review. The letter is very extensive and mostly deals with matters of law, but on the final page there appears the following short paragraph:

> Finally, we have recently come to know that our client has received a medical report confirming that his wife is seriously ill and that she is receiving a medical treatment. A copy of the medical report dated 5th August 2007 confirming same is attached for your ease.

The attachments are not in fact a medical report in the conventional sense, and the copies supplied are imperfect. However they appear to show that a patient called Fatima Niazi, giving her husband's name as Mohammed Ishaq Niazi (i.e. the Claimant's name), was admitted to the Department of Neurosurgery in the Hayatabad Medical Complex in Peshawar at the beginning of September 2007 on the basis that she was "mentally affected". The history stated on the discharge

summary refers to her "mentally position" being "not good". Under the heading "condition at the time of discharge" the following appears:

> I found that the patients had several family problems in the past. This mental condition has been seriously affected … He is not seen his husband for the last eight years … I advised his husband to come soon as possible because his wife is damaged to the brain … .

28. On 29th April 2008 Malik & Malik wrote to the Treasury Solicitor asking that Mr. Niazi's case be now considered as a matter of urgency. Various points were made about the background, but they relied in particular on the ill-health of his wife. They enclosed what was described as "a medical certificate" and, elsewhere, "a medical report" which were said to confirm that his wife was seriously ill in Pakistan and that he needed to travel abroad as a matter of urgency. Again, the enclosures do not include either a report or a certificate in the ordinary sense of those terms: rather, they consist of a number of pages of copy medical notes, some but not all on printed forms of the Hayatabad Medical Complex. Again, these are not at all easy to decipher, but they appear to show that Fatima Niazi was admitted to hospital at least between 10th and 12th April 2008 and was seen by a psychiatrist. One note says "mentally condition has been seriously affected", and another seems to read "last one year seriously brain affected". There is a slightly fuller note which, however, is impossible to construe in full. It appears to begin "mentally position is not good – also missing her husband and [?]"; there are then some further words which are indecipherable in detail but the gist of which may be that her condition would be helped if her husband were available to care for her. There is no indication that any physical illness has been diagnosed. The patient appears to have been prescribed some medication, but it is not clear what it is.

29. There was no letter from the Secretary of State or the Treasury Solicitor dealing with any of those letters until 12th September 2008, when the Agency wrote purporting to deal with no fewer than four letter dated between 30th August 2007 and 29th April 2008. That delay is very regrettable, particularly in the light of Collins J's strictures in *FH* (see para. 11 above). Such delay is indeed a feature of most of these six cases. The Treasury Solicitor has acknowledged that it is unacceptable and has apologised. Ms. Greaney told me that the problem was in fact a consequence of these cases being chosen as lead cases. In any event, the letter of 12th September, so far as relevant, reads as follows:

> For the following reasons it has been decided that your client's case is not exceptional.
>
> It is considered that although a claim has been made that your client's wife in Pakistan is seriously ill, the evidence provided does not show that the illness is terminal or life-threatening, and that the person in question is a close relative.

The evidence, dated 10th April 2008, is not in the form of a medical report and does not provide a formal diagnosis or prognosis. It fails to explain what future treatment and care is needed, or the qualifications of the person who wrote the unsigned, hand written, note attached.

The evidence dated 3rd September 2007, is likewise absent a diagnosis or prognosis. It simply states that your client's wife is "damaged in the brain." This evidence contains reference to her "conditions at the time of discharge" indicating that the condition did not require her to remain in hospital.

Therefore even when taken at its highest, and with careful regard to the particular circumstances of your client's claim, the evidence is not sufficient to show that there are compelling circumstances in your client's case.

It is noted that your client first claimed to have a relative in need of medical treatment by way of a letter from yourselves dated 30th August 2007. This letter gave no details of the name, relationship or condition of the relative in question, however a subsequent letter from yourselves, dated 5th September 2007 stated *"our client wishes to visit him."* The Secretary of State was furnished with more details by way of a letter from yourselves dated 16th November 2007. This letter included medical evidence dated 3rd September 2007.

No explanation has been given as to how your client's wife came to be in Pakistan, what her status there is, how she is accessing medical treatment, how your client came to learn that she was in Pakistan, how contact was established, how the medical evidence itself reached your client. If your client were to claim that he encountered his wife during his trip to Pakistan in 2002 then it must be questioned as to why he failed to mention this fact at his appeal hearing; in fact despite the visa being a family visit visa, "*the appellant denied having family in Pakistan and said that he just went there because he felt upset and it was easy to communicate with people there. I find this explanation unsatisfactory.*" [Adjudicator's determination 27th May 2004 paragraph 25.]

It is further noted that the patient is recorded as Fatima Niazi as being 25 years old, making her year of birth circa 1975. In 2008 this would make her 33 not 38 as indicated on the medical evidence.

Your client has also failed to provide any explanation as to how his wife came to be in Pakistan. His Asylum claim is mostly silent as to her, provided the above biographical details in the self completion questionnaire and only referred to her in his substantive Asylum interview briefly in answer to questions 52 & 53.

> Q52 After you were injured and taken to Kabul did you the money?
>
> A52 I gave it to my wife before I was taken back to hospital. When my wife returned to Kabul she had the money with her.
>
> Q53 Who lived with you in your house in Charkar
>
> A52 Just one brother, my mother, my kids & wife.

No explanation has been given as to why he never sought to have her and his children sent to join him in Pakistan before he journeyed on to the United Kingdom. There is no indication that he has actively sought to contact her or his children since he fled Afghanistan and nothing to show whether or not he did so when he visited Pakistan.

> Therefore, considering the ease with which documents can be obtained in Pakistan *[Country of Origin Information Report July 2008 Pakistan para 18.05 & 18.06]* and having regard to the facts outlined in paragraphs 11-13 above, together with all the known facts of your client's claim, the evidence provided has not been accepted as independent corroboration of the claimed condition/illness.
>
> In conclusion it is not considered there is an urgent need for your client to travel to Pakistan at this time such as to necessitate consideration of his outstanding application/submissions.

30. It is clear from that letter that all the available material – which goes beyond anything that was shown to me – was thoroughly considered by the Agency; and I was not addressed on the details of the reasoning in it. While not all the points made seem to me particularly strong, there is in my view an adequate basis for the view that the Claimant had not demonstrated that his wife was so ill that it was right to consider his case out of turn so that he could travel to see her in Pakistan. There must be a limit to the extent to which it is reasonable to expect staff of the Agency to comb through the kind of fragmentary material supplied in this case in order to form some kind of judgment as to the medical condition from which the relative is said to be suffering. It may be that the true position is that the Claimant's wife is indeed suffering from some form of serious mental illness – perhaps a severe depression - and needs the presence of her husband; and on that basis the Secretary of State might regard the case as falling within the spirit of her guidance (though it does not appear to fall within the letter). But that has simply not been established.

31. It was suggested that it was irrational for the Secretary of State to refuse "exceptionality" in the case of Mr. Niazi when she had allowed it in the case of Mr. Manduzai; but in the latter case the quality of the evidence, and the seriousness of the Claimant's mother's condition, were of a very different character. I do not under-estimate the difficulties for asylum-seekers in this country of obtaining "Western-style" medical reports about sick relatives in Pakistan or elsewhere; but unless the Agency receives material of better quality than was provided in this case I do not see how it can be criticised for not accepting that it shows the kind of medical condition that would bring the case within the current policy.

Rahmani

32. On 16th November 2007 Malik & Malik wrote to the CRD applying for ILR in the light of the decision in *S.* The letter contained the following short paragraph:

> Finally, we have recently come to know that our client has received a medical report confirming that his mother is seriously ill and that she is receiving a medical treatment. A copy of the medical report confirming same Kuwait Hospital Peshawar, is attached for your ease.

The enclosed report was on the paper of the Kuwait hospital and reads as follows:

> Dear respectful authorities
>
> Farida Rahmani according to the registration Number 432/12 dated 25/09/2007 who was admitted at the Kuwait Hospital at the medical ward.
>
> Although doctors have tried their level best, but, couldn't succeed in curing her. The patient is still sick, how ever she has no one in this country to take care of her.
>
> The patient's condition is getting worst by the day pasts.
>
> She is seriously sick and is in need of family member. She only has told us that she has a son by the name of the Ibrahim Rahmani. Now she is suffering from depression.
>
> Now we are asking her son that where ever he is. He should come to Pakistan to her mother because; her medical condition is getting worst.
>
> We hope that her son will come to Pakistan as soon as possible.

33. There was no substantive response to that letter, or, in particular, to the aspect of it relating to the Claimant's mother's alleged illness. On 28th April 2008 Malik & Malik wrote to the Treasury Solicitor asking for priority to be given to the Claimant's application for ILR for two reasons. One was that he was destitute. The other was as follows:

> Our client has provided a medical report from Cromwell Hospital confirming that his mother is seriously ill and he therefore needs to travel abroad as a matter of urgency. This medical report was provided by our client's friend, Mr Abdul Waheed Qazizada who recently travelled back from Pakistan. We enclose herewith a copy of the medical report and his passport copy confirming his journey dates.

A witness statement from the Claimant was also enclosed. This referred to the earlier report from the Kuwait hospital in Peshawar and complained of the failure of the Home Office to respond. The certificate from the Cromwell Hospital in Peshawar was in the following terms:

> Dear Respectful Authorities
>
> According to the registration number PA389/10 Dated 12 Feb 2008 Farida Rahmani who was admitted to Cromwell Hospital Medical ward.
>
> Although doctors have tried their level best but, couldn't succeed in curing her. The patient is still seriously ill, how ever she has no next of kin to take care of her, the patient condition is getting worst by the day pasts. She is suffering from depression which makes her life harder to live.
>
> She only has told us that she has a son by the name of Ibrahim Rahmani who lives in England.

> Currently her son friend Abdul Waheed Qazizada who recently visited us has brought some picture and film of her son which made her calm, mean while we ask her son that he should come to Pakistan to her mother because, her medical condition is getting worst.
>
> We hope that her son will come to Pakistan as soon as possible.

It will be observed that the wording is remarkably close to that of the certificate from the Kuwait Hospital from September 2007.

34. It was not until 8th September 2008 that the Agency replied to Malik & Malik's letter of 23rd November 2007; and a letter was sent the following day replying to the letter of 28th April 2008. In both cases the delay is deplorable; but the explanation is the same as that to which I have already referred at para. 29 above. Both letters acknowledged the Secretary of State's power to consider cases out of order where they are "truly exceptional" but conclude that the Claimant's case does not fall into that category. The letter of 8th September says this:

> For the following reasons it has been decided that your client's case is not exceptional.
>
> 5.1 It is considered that your client's case falls outside of the provisions of the Asylum Policy Instruction. Although a claim has been made that your client's mother abroad is seriously ill, the evidence provided does not show that the illness is terminal or life-threatening. It is noted that the letter from Dr Story of the Kuwait Hospital is vague, containing neither diagnosis nor prognosis. There is nothing in it to the nature of the patient's illness, the cause, or any treatment being provided. The letter does refer to the patient suffering from depression but the severity of the depression has not been clinically outlined, nor has it been made clear whether the depression was the primary reason for the hospitalisation or a secondary condition arising. Therefore, even taking this letter at its highest, the Secretary of State does not except that there are exceptional circumstances.
>
> 5.2 It is noted that the letter from Dr Story of the Kuwait Hospital is vague, containing neither diagnosis nor prognosis. It does not list his qualifications and is undated, although it does refer to the date of admission and was submitted with an airmail envelope from Pakistan (date of postage illegible). Considering the ease with which documents can be obtained [Country Information July 2008 Pakistan COIR para 18.05 & 18.06]. It has not been accepted as independent corroboration of the claimed condition/illness.
>
> In conclusion it is not considered there is an urgent need for your client to travel to Pakistan at this time such as to necessitate consideration of his outstanding submissions.

The letter of 9th September makes virtually identical points about the letter of 23rd April, but it cross-refers also to the earlier report from the Kuwait Hospital.

35. I have no difficulty in holding that the Secretary of State was fully entitled to regard the medical evidence on which the Claimant relies as inadequate, essentially for the reasons given in the letter of 8th September. I will add that the remarkable similarity in wording between the

certificates produced by the two hospitals was calculated to reinforce the doubts expressed as to the authenticity of both certificates.

Walizada

36. On 4th October 2007 Malik & Malik wrote to the Immigration and Nationality Directorate asking for Mr. Walizada's case to be reconsidered in the light of the decision in *S*. The penultimate paragraph of the letter reads as follows:

> In addition, our client recently received a letter via post from his family friend. The letter informed our client that his mother is suffering from a medical condition and therefore he wishes to travel abroad to see her. It is imperative that he receives the decision to his application as soon as possible so that he is able to travel abroad and is able to see his mother. We are enclosing the original medical report of our client's mother for your reference.

The enclosure is on the paper of a Dr. Said Abdul Habib (Rahmani), described as an "MD Internist (physician and paediatrician)". It is dated 17th September 2007. It reads:

> Dear Mr. Homayon Walizada,
>
> I want to inform you that your mother Mrs. Jamila Walizada is suffering Acute Myocardial Infarction and she receives [details of medication are then given, but they are indecipherable save that they include aspirin]. Now she needs you, because she is alone. Please visit her in the nearest future.

That certificate was referred to again in Malik & Malik's pre-action protocol letter dated 9th December 2007.

37. There does not appear to have been a reply to the letter of 4th October, but the Agency addressed the letter of 9th December by a letter dated 6th February 2008. So far as relevant, it said this:

> You have also claimed that your client's mother is seriously ill in Pakistan and is now lonely and would need the company of your client. Mr. Homayon Walizada has not provided substantial evidence to support his claim that his mother's condition is so severe as to warrant his return. His mother's claim to merely being lonely is not sufficient reason to warrant a grant of leave so that he can travel to visit her in Pakistan.

It is surprising that that letter does not refer explicitly to Dr. Habib's report, and the observation that the Claimant had not provided "substantial evidence to support his claim" might suggest that the Agency had not seen the report (either because it was not in fact enclosed or because they had

overlooked it). On the other hand, the reference to the Claimant's mother being "lonely" appears to derive from that report. It seems probable therefore that the author of the letter had seen the report but did not regard it as "substantial". Although it would have been better if he had addressed its contents more explicitly, I cannot say that that is an unreasonable response. Although the reference to "acute myocardial infarction" might suggest a life-threatening condition, the remaining contents of the certificate are inconsistent with such a diagnosis; and the doctor appears to be a general practitioner rather than a specialist. There is no indication that the Claimant's mother has received any hospital treatment.

38. On 25th April 2008 Malik & Malik wrote to the Administrative Court Office in the following terms:

> Our client has instructed us that his application for Judicial Review be expedited and the oral hearing be listed as soon as possible. This is in view of the fact that his mother is suffering from heart disease in Pakistan. He has also received a letter from the doctor who clearly suggests that his presence with is urgently required to assist her. This letter from Dr. Said Abdul Habib (Rahmani) is enclosed herewith for your reference, which clearly confirms the same.
>
> Our client therefore, wants to travel to Pakistan to see her mother who has no one to look after her whilst she is suffering from this heart disease. We therefore, enclose herewith an application for urgent consideration form N463 duly completed requesting an oral hearing at the earliest possible in view of the fact that this matter needs early determination.

The letter was accompanied by a form N463 and was copied to the Treasury Solicitor. The letter from Dr. Habib which is referred to is dated 4th February 2008 and reads as follows:

> Mr. Homayon Walizada, your mother is suffering from ischemic heart disease and she needs you. Please join her as soon as possible.

39. The Treasury Solicitor replied on 2nd May 2008 pointing out that neither the form N463 nor Dr. Habib's letter had been enclosed: it asked for them to be sent. The letter also observed, somewhat tartly:

> This is one of very few of the cases raising the issue of prioritisation based on R(S) where you have not in fact written to me or my colleagues previously raising the issue of your Client's need to travel apparently based on the medical health of a relative currently residing in Pakistan.

That was not of course correct, since Malik & Malik had submitted the earlier report to which I have referred. I was however interested in the observation that claims of this character were being made routinely in all or most of the *S* cases. Miss Jones told me that that observation was not

correct. Her instructions from Mr. Saleem were that such applications had been made in only about ten or fifteen of the 35 or so *S*-type cases in which his firm was instructed.

40. On 6th May 2008 Malik & Malik replied purporting to enclose the missing materials. The Treasury Solicitor replied pointing out that they had sent the wrong enclosure. They have heard nothing since. The Secretary of State has not therefore had the opportunity to consider Dr. Habib's second letter.

Conclusion

41. I do not, for the reasons given, believe that the Secretary of State's decision not to treat these three cases as "truly exceptional" can be said to have been irrational or unlawful.

Footnote: Permitting Applicants for ILR to Travel

42. One question which strikes anyone considering the individual cases reviewed above is whether it is really necessary for the Secretary of State to insist that the only way of accommodating applicants for ILR in the Claimants' position who want to travel abroad, to see a sick relative or for any other good reason, is to have their substantive applications considered out of turn. If that is indeed necessary, one can see why it should only be done in "truly exceptional" cases; but why can such applicants not simply be allowed to leave the country temporarily on the basis that this will not prejudice their applications ? Even if there are good reasons for a general rule that leaving the country is incompatible with the maintenance of a claim to ILR, the special circumstances of applicants caught in the present backlog might be thought to justify a more relaxed approach. Precisely this point was made by Collins J at para. 29 of his judgment in *FH*: see para. 11 above.

43. The Secretary of State evidently expected that the Claimants would raise this issue before me, and it is addressed in the Acknowledgment of Service and the witness statement of Ms. Miles: the gist was that the option adumbrated above, attractive as it may seem, is not in fact possible for a variety of reasons, some legal and some practical. In the event, however, Miss Jones did not argue the point: the individual cases addressed above were argued only on the basis that the Secretary of State was obliged to expedite consideration of the substantive application for ILR. Ms. Greaney encouraged me nevertheless to deal with the matter in my judgment and to endorse the reasons put forward by the Secretary of State. Miss Jones expressed herself neutral on whether I dealt with the issue; but she was certainly not prepared to argue it herself. Not having had the

question tested by adversarial argument, I am not prepared to take the course urged on me by Ms. Greaney. I am, however, prepared to say this much. It was clear to me from Ms. Miles' evidence and Ms. Greaney's submissions that the question of allowing applicants for ILR to travel, in advance of any decision on their application, is much less straightforward than it may seem at first sight. Depending on the circumstances of the particular case, there may be quite formidable practical and statutory obstacles which can only be overcome – if at all – with considerable difficulty and modifications to existing practice. But I am not prepared to make a blanket finding excluding the possibility that in a particular case the Secretary of State may have to face those difficulties if she is unable or unwilling to side-step them by expediting decision of the substantive application for ILR.