Neutral Citation Number: [2010] EWHC 225 (Admin)

Case No: CO/3202/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2010

Before :

THE HONOURABLE MR JUSTICE BEATSON

- -

Between :

THE QUEEN ON THE APPLICATION OF BOROUMAND	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

MR H. SOUTHEY and MR G. HODGETTS (instructed by **Paragon Law**) for the **Claimant**
MR T. EICKE (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing at Birmingham Civil Justice Centre on 8 December 2009
Further written submissions received on 19 and 25 January 2010

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Judgment

Mr Justice Beatson:

1. The claimant is a citizen of Iran whose application for asylum was refused and whose appeal rights were exhausted by 17 March 2005, but on 5 April 2007 the Tribunal allowed his appeal against the Secretary of State's decision to make a deportation order against him. The Tribunal decided that, there was a real risk that, if returned to Iran, he would face the death penalty and that returning him would put the United Kingdom in breach of its obligations under Article 1 of Protocol 13 of the European Convention on Human Rights ("the ECHR"). Accordingly, deporting him would be unlawful under section 6 of the Human Rights Act 1998. In the light of the decision of the Tribunal, on 24 May 2007 the claimant was granted discretionary leave to remain in the United Kingdom for six months until 24 November 2007. That leave has since been renewed for further periods of six months.

2. On 17 November, shortly before his initial six months leave was due to expire, the claimant made a further application for leave to remain. He maintains that he is

entitled to be granted "subsidiary" or "humanitarian" protection pursuant to Article 2 of Council Directive 2004/83/EC ("the Directive") and paragraph 339C of the Immigration Rules (HC 395), and that under current policy should be granted leave to remain for five years rather than for periods of six months. His application was rejected in a decision made on 17 November 2008 and maintained on 18 February 2009. The Secretary of State did so on the ground that the claimant is excluded from entitlement to humanitarian protection because of his conviction for a "serious crime", causing grievous bodily harm with intent, for which he was sentenced to three and a half years imprisonment at the Crown Court in Nottingham. This judicial review, launched on 2 April 2009 challenges that decision. On 15 June His Honour Judge Purle QC granted permission on the papers.

3. By the date of the hearing, there were only two issues. The principal issue is whether the Secretary of State is either required or entitled to exclude the claimant from humanitarian protection and the grant of five years leave to remain although he did not raise the question of exclusion from humanitarian protection in the context of the claimant's appeal against the decision to make a deportation order and the Tribunal did not consider this issue. I refer to this as "the exclusion from humanitarian protection" issue.

4. The second issue is whether the Secretary of State's decision to grant the claimant only six months discretionary leave to remain is a disproportionate interference in his private life under Article 8 of the European Convention because of the difficulties a person with such leave has, for example, in obtaining employment and opening a bank account, and because he cannot travel outside the United Kingdom without losing his status. Mr Southey, on behalf of the claimant, submitted that the disproportionality arises because the delay in determining applications to extend such leave will leave a person in the position of the claimant without status and documentation for considerable periods of time. He relied on the fact that it took the Secretary of State a year to deal with the claimant's application for an extension of his leave to remain. I refer to this as "the proportionality" issue.

5. Initially the application for judicial review also challenged the legality of the Secretary of State's policy regarding exclusion from humanitarian protection and the application of that policy in this case. It was submitted that the claimant's conviction for causing grievous bodily harm with intent did not amount to a "serious offence" and that the policy unlawfully construed "serious crime" by reference to a sentence of more than 12 months imprisonment: see [43]. In the light of a further decision by the Secretary of State contained in a letter dated 23 October 2009 these grounds were not pursued at the hearing. But the issue did not entirely disappear. Mr Southey accepted the decision in that letter that the claimant is excluded from humanitarian protection decision in this letter (see [21] – [22] below) is not *Wednesbury* unreasonable but submitted that it would have been open to the Tribunal to conclude that he was not. Mr Eicke, on behalf of the Secretary of State, submitted that it would not.

6. The evidence before me consists of statements by the claimant and Mr Lilley-Tams, a trainee at the claimant's solicitors both dated 26 November 2009, and one dated 4 December by Mr Welsh of the United Kingdom Border Agency's Criminal Casework Directorate. Mr Welsh has annexed two statements made on behalf of the United Kingdom Border Agency in another case to show how a person in the claimant's position can demonstrate to an employer that he is entitled to work. They are by Shola Akinyamojo (dated 26 February 2009) and Mr Forshaw, Assistant Director of the Agency (dated 8 September 2009). The second also deals with the policy for handling requests to travel by those in the claimant's position. Mr Lilley-Tams has annexed five email responses from other practitioners about the time it takes the Secretary of State to make decisions for extensions of discretionary leave.

The Factual Background

7. The claimant entered the United Kingdom clandestinely on 8 June 2004 and was arrested. He applied for refugee status on the ground that if he returned to Iran he risked being executed because he had been sentenced to death in 2000 for the murder of a man in 1999. The claimant accepts he was involved in an affray that resulted in a person being killed. However, he maintains his conviction was obtained on the basis of the confession obtained after he had been tortured, and that apart from the confession there was insufficient evidence against him.

8. The claimant's application for asylum was refused on 12 August 2004. The letter stated that the claim for protection under Article 3 of the ECHR was treated as a claim for humanitarian protection. The claimant appealed and the appeal was dismissed on 9 March 2005. The Adjudicator generally accepted the claimant's evidence that he was involved in an affray in which a person was killed (paragraph 37), but rejected the claimant's allegation that he had been tortured: paragraphs 36 and 43. The claimant did not appeal against this decision. Nor did he make any other claim for protection.

9. By the time his asylum appeal was dismissed, the claimant had been charged with attacking another applicant for refugee status living in the same hostel. He attacked the man with a knife with a nine-inch blade and inflicted very serious injuries. This attack led to the conviction and sentence of three and a half years imprisonment for causing grievous bodily harm with intent to which I have referred. The conviction and sentence were on 24 June 2005

10. When sentencing the claimant, the judge observed that, although he had no previous convictions in the United Kingdom, he was here because he left Iran "having been convicted of murder there, using a knife on somebody" and "this is not the first time

you have committed serious violence using a knife". This was a reference to the conviction in Iran for murder for which the claimant was sentenced to death.

11. In a letter dated 9 October 2006 the Secretary of State notified the claimant that she had decided to deport him to Iran on the basis that his deportation would be conducive to the public good. The letter relied on the conviction for malicious wounding, and stated that there was no record of any appeal against the conviction or sentence and that the Secretary of State was satisfied that deportation would not breach Article 8 of the ECHR and the Human Rights Act 1998. The letter did not say that, if the conclusion regarding the 1998 Act was wrong, the claimant would not be entitled to humanitarian protection. It did say that the claimant had not sought to make out a case that the Secretary of State should exercise her discretion not to deport him.

12. The claimant appealed against the decision to deport him. He relied on both the Refugee Convention and the ECHR. The appeal came before a two-judge panel of the Tribunal. It promulgated its decision dismissing the appeal on 22 December 2006. The Home Office Presenting Officer argued that the Claimant was excluded from humanitarian protection by reason of his conviction in the United Kingdom. Mr Eicke was not able to say why the issue was raised but submitted that it was not relevant to the issues under appeal. The Tribunal made no express finding regarding humanitarian protection. Mr Southey suggested this was because it had concluded that deportation would not violate the ECHR.

13. The claimant sought reconsideration of the Tribunal's decision. Reconsideration was ordered on a number of grounds. The Tribunal which reconsidered the appeal stated (paragraph 10) that, in the light of *AH (Scope of s. 103A reconsideration – Sudan)* [2006] UKAIT 0038, the proceedings before it were a reconsideration of the appeal as a whole and were not limited to the grounds upon which reconsideration was ordered. It raised and considered a further ground; that notwithstanding the death sentence imposed on the claimant in Iran, the appeal had been dismissed without considering the impact of Protocol 13 to the ECHR. It was accepted on behalf of the Secretary of State (see paragraph 18) that this meant that the decision contained "a clear material error of law". It was also accepted that there would be a real risk that he might be executed if returned to Iran. The Secretary of State did not, however, put in a response to the claimant's appeal setting out her position on humanitarian protection, i.e. that that the claimant was excluded from that category.

14. In paragraph 27 of its reconsideration decision, dated 5 April 2007, the Tribunal stated "that the only question of fact to be established in the … appeal, is whether there would be a real risk that the [claimant] might be executed as a consequence of his conviction for murder in Iran". In the light of the Secretary of State's recognition that this was so, the Tribunal had no difficulty in concluding that he would be. It accordingly allowed his appeal against the deportation order on the ground (paragraph

30) that to return him to Iran would be contrary to Article 1 of Protocol 13 to the ECHR. The decision did not address the issue of humanitarian protection or indeed refer to it.

15. In the light of the reconsideration decision, in a letter dated 24 May 2007, the Secretary of State granted the claimant limited discretionary leave to remain in the United Kingdom for a period of 6 months "for reasons not covered by the Immigration Rules". The claimant's Immigration Status Document was enclosed with this letter.

16. After receiving discretionary leave to remain, the claimant obtained and was in employment between approximately May 2007 and February 2009. He had three jobs, the last as a supervisor at a company operating a number of juice bars. He lost that job in February 2009 after telling his employer that he had been convicted for harassing his former girlfriend and sentenced to a 100 hour community penalty order: see his statement paragraphs 5-8. I deal with his evidence on the difficulties he has encountered because of the nature of his status and the need to apply for extensions of leave every six months at [23] – [24] below.

17. In a letter dated 17 November 2007, less than a week before the expiry of his six months leave on 24 November, the claimant's solicitors applied for an extension to his leave to remain. They stated that he was "now entitled to receive humanitarian protection leave which would remain in place for a period of five years". The Secretary of State acknowledged receipt of this application in a letter dated 21 November but there was no substantive response to the application for twelve months. In a letter dated 17 November 2008 the United Kingdom Border Agency stated the claimant was not entitled to humanitarian protection because his conviction for causing grievous bodily harm with intent was a "serious offence" which, pursuant to paragraph 339D of the Immigration Rules, HC 395, excluded him from a grant of humanitarian protection under paragraph 339C(iv) of the Rules (set out at [39] below). In the time the application was under consideration his solicitors (on 5 December) provided the Secretary of State with a letter from the Nottingham Probation Service and (on 21 January 2008) wrote a chasing letter. The solicitors said the letter from the Nottingham Probation Service, which stated the claimant was too scared to re-offend, and posed a low risk of harm, supported his application because to exclude him from humanitarian protection there must be serious grounds for believing he represents a danger to the community.

18. The UK Border Agency's letter dated 17 November 2008 rejecting the claimant's application for humanitarian protection also stated that since removing him would continue to pose a risk of breaching Article 3 of the ECHR he would be granted a further 6 months discretionary leave to remain, his case would continue to be reviewed at 6 monthly intervals, and that there was no right of appeal against that

decision. He was asked to provide six passport-sized photographs so status papers could be prepared.

19. The claimant's solicitors did not provide the photographs. They sent a letter before claim dated 22 December 2008 challenging the continuing failure to grant him 5 years leave to remain as a person entitled to humanitarian protection. They stated that "the Secretary of State did not raise the issue of humanitarian protection exclusion within the appeal proceedings", and "did not pursue an appeal to the Court of Appeal as was her right". The letter states that as a consequence the claimant "had a legitimate expectation to be granted humanitarian protection in line with the findings made by" the Tribunal. The solicitors relied on the decision of the Court of Appeal in *TB (Jamaica) v Secretary of State for the Home Department* [2008] EWCA Civ 977 to support their contention that the Secretary of State was acting in a way which is not compatible with the Tribunal's decision. They state that the decision "made it clear that the failure of the Secretary of State to pursue a person's exclusion from refugee status, without having pursued the matter in the appeals Court was unlawful".

20. After a chasing letter from the claimant's solicitors dated 13 January 2009, the Secretary of State, in a letter dated 18 February, maintained the decision to exclude the claimant from humanitarian protection by virtue of his conviction and sentence for malicious wounding. With regard to what had been said about the AIT's reconsideration decision, it was stated "the appeal was made in respect of a decision to make a deportation order against Mr Boroumand and therefore consideration of humanitarian protection did not form part of the appeal". The letter also stated that the provisions of paragraph 339D(i) of the Immigration Rules (see [42] below) are "mandatory".

21. Following the grant of permission to apply for judicial review, the Secretary of State considered the circumstances of the claimant's case afresh. In a letter dated 23 October 2009 the Secretary of State maintained his decision that the claimant is excluded from humanitarian protection. The reason given was the claimant's convictions for "serious crimes", namely his conviction for murder in Iran and his conviction for malicious wounding in the United Kingdom. The letter stated the conviction for malicious wounding amounted to a "serious offence"; (a) because of the length of the sentence imposed, three and a half years, which "clearly exceeds the 12 month minimum applied by the Secretary of State", and (b) in the light of the remarks made by the judge when sentencing him.

22. The letter also observed that since the conviction for malicious wounding the claimant had been convicted on two occasions and was at that time the subject of further criminal proceedings. One of these was the conviction for harassing his former girlfriend to which I have referred: see [16].

23. The evidence submitted on behalf of the claimant was served five months after permission was granted. It mainly concerns what I have referred to (see [4]) as "the proportionality issue": the impact on the claimant of having leave granted for only six months at a time and having to reapply for extensions.

24. I have referred (see [16]) to the claimant's employment until February 2009. Since then he has not been able to find a job. He states (statement paragraphs 9-14) that he has made many applications and has been interviewed for a number of jobs, including at Boots, a pork factory, John Lewis, and Next. He says he was not offered the jobs when those interviewing him became aware of his status, either because he did not have original documents or because they considered his leave was too uncertain and for too short a period. He also refers to difficulties in opening a bank account and obtaining a credit or debit card, and the consequential effects of this. He states he is unable to set up a direct debit which means he cannot make a contract for a mobile telephone, or set up internet services at home. However, he also states (statement paragraph 15) that he had a bank account which was closed because of an unauthorised overdraft. He has also had difficulty in registering with a GP and is unable to travel to see family members outside the United Kingdom because his six-month period of leave will lapse if he leaves the country and because of his financial situation as a result of the difficulty he has had in getting work.

25. I have referred (see [18]) to the defendant's request to the claimant's solicitors in November 2008 that they provide photographs of him for his status documents. The solicitors' first response to this request was two months later on 29 January 2009 when they wrote asking where the photographs should be sent. The UK Border Agency replied on 28 February providing an address. However, the photographs were only provided on 26 November 2009, nine months later, seven months after these proceedings were launched, and twelve months after the request. Mr Lilley-Tams accepted (statement paragraphs 1 and 4) that the failure to act on the November 2008 request was an error. He also said he had not forwarded the photographs when he received the address because he was "distracted by the Secretary of State's assertion in his letter that the claimant could appeal" to the Tribunal and because of "some confusion" as to "whether it would be appropriate to legitimise the Secretary of State's decision" to grant only six month's leave by forwarding the photographs.

The Legislation and Regulatory Provisions

26. Council Directive 2004/83/EC of 29 April 2004 ("the Directive"), which has direct effect, sets minimum standards for the qualification and status of third party nationals or stateless persons as refugees or as persons who otherwise need international protection. It refers to the protection of those who are not refugees but who otherwise need it as "subsidiary protection". The Directive obliged member states to bring into force laws implementing it by 9 October 2006. The changes to the Immigration Rules

HC 395 to do this are set out in paragraphs 339C and 339D. There is further guidance as to the position in the Home Office's Asylum Policy Instructions on Humanitarian Protection, which set out the government's policy as to the circumstances in which it would be appropriate to grant humanitarian protection and various procedural matters.

27. Article 3 of the Directive enables member states to introduce or retain more favourable standards for determining who qualifies as a refugee or a person eligible for "subsidiary" (i.e. "humanitarian") protection insofar as those standards are compatible with the Directive.

28. Article 5 provides that a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since a person left the country of origin.

29. The introduction to the Home Office's Asylum Policy Instructions states that it is important that claims should be considered for asylum first, then for humanitarian protection, and finally for discretionary leave.

Asylum and refugee status:

30. Article 2(d) of the Directive defines "refugee status" as "the recognition by a member state of a third party national or a stateless person as a refugee". It is stated in paragraph 14 of the preamble to the Directive that "the recognition of refugee status is a declaratory act".

31. Paragraph 334 of the Immigration Rules provides:

> "An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> …
>
> (ii) he is a refugee…
>
> (iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;
>
> (iv) he does not, having been convicted by a final judgment of a particularly serious crime,… constitute danger to the community of the United Kingdom…"

"Subsidiary" or "humanitarian" protection:

32. The Directive makes provision for "subsidiary protection". The Immigration Rules, reflecting the language of paragraph 9 of the preamble to the Directive, refer to "subsidiary protection" as "humanitarian protection". The Home Office's Asylum Policy Instructions on Humanitarian Protection sets out the policy as to the circumstances in which it would be appropriate to grant humanitarian protection. The introduction states:

> "[W]here an asylum applicant does not qualify for refugee status, the caseworker should always consider whether they qualify for a grant of humanitarian protection and, if not, consideration should be given as to whether they qualify for discretionary leave".

It also states:

> "…where an individual claims that although they are in need of international protection they are not seeking asylum **and** the reasons given clearly do not engage our obligations under the Refugee Convention … then this should be accepted as a standalone claim for Humanitarian Protection."

33. The section of the Policy Instructions dealing with "granting or refusing humanitarian protection" states:

> "An asylum claim will always be deemed to be a claim for Humanitarian Protection. Therefore where it is decided that an applicant does not qualify for Humanitarian Protection the [reasons for refusal letter], as well as setting out why the asylum claim has been refused, should provide reasons why humanitarian protection is being refused.
>
> …
>
> Where we are refusing humanitarian protection but granting discretionary leave, the reasons for refusing to grant humanitarian protection should still be addressed in the letter."

34. The relevant provisions of the preamble to the Directive concerning this category of protection are:

> "(9) [Third country nationals or stateless persons] who are allowed to remain in the territories of the member states for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.

> (24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.
>
> (25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in member states."

35. Article 2 of the Directive provides *inter alia*:

> "(e) 'Person eligible for subsidiary protection' means a third party national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country….
>
> (f) 'Subsidiary protection status' means the recognition by a member state of a third country national or a stateless person as a person eligible for subsidiary protection."

36. By Article 15 of the Directive "serious harm" consists of, the death penalty or execution, torture, or inhuman or degrading treatment or punishment, or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict.

37. Chapter VII of the Directive deals with the content of international protection. By Article 24, member states shall issue to refugees a residents permit which must be valid for at least 3 years absent compelling reasons of national security or public order and subject to the power of revocation in Article 21(2) and (3). By Article 24(2) states are required to issue the beneficiaries of subsidiary protection status a residents permit which must be valid for at least 1 year and renewable, absent compelling reasons of national security or public order.

38. The Home Office's Asylum Policy Instructions on Humanitarian Protection state that "a grant of five years' leave will be a sufficient grant of leave for those granted humanitarian protection save in the most exceptional circumstances", for example the situation of a vulnerable person with special needs. The Home Office's policy is that

those granted leave to remain on humanitarian protection grounds on or after 30 August 2005 will normally be granted five years leave in the first instance. This is more generous than the one year's leave required by the Directive and the three years leave under the Home Office's previous policy.

39. The qualifications for humanitarian protection are dealt with in Paragraph 339C of the Immigration Rules. Paragraph 339C provides:

> "A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> …
>
> (ii) he does not qualify as a refugee…
>
> (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering harm and is unable, or owing to such risk, unwilling to avail himself of the protection of that country; and
>
> (iv) he is not excluded from a grant of humanitarian protection.
>
> Serious harm consists of:
>
> (i) the death penalty or execution…"

40. The Policy Instructions provide that:

> "[W]here there are substantial grounds for believing that a person, if returned, would face a real risk of the death penalty being imposed and carried out they will qualify for Humanitarian Protection, subject to the section below on Exclusion Criteria."

41. Both the Directive and the Rules provide that certain categories of person are excluded from "subsidiary" or "humanitarian" protection. Article 17 of the Directive provides:

> "1. A third party national or stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
>
> (a) he or she has committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes;

> (b) he or she has committed a serious crime;
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as to set out in the preamble and Articles 1 and 2 of the Charter of the United Nations;
>
> (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
>
> …
>
> 3. Member states may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the member state has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the member state concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes."

42. Paragraph 339D of the Immigration Rules substantially follows the wording of Article 17. It provides:

> "A person is excluded from a grant of humanitarian protection under paragraph 339C(iv) where the Secretary of State is satisfied that:
>
> (i) there are serious reasons for considering that he is committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
>
> (ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;
>
> (iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom; and
>
> (iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment were it committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime."

43. In *R(C) v Secretary of State for the Home Department* [2008] EWHC 2448 (Admin) at [26] it was held that, notwithstanding the word "and" in sub-paragraph (iii), the categories in paragraph 339D are not cumulative requirements so that the word "and" should be read as "or". The Policy Instructions state that a "serious crime" for the purpose of the exclusion criteria in this paragraph of the Rules is:

> "One for which a custodial sentence of at least 12 months has been imposed in the United Kingdom; or

> A crime considered serious enough to exclude the person from being a refugee in accordance with Article 1F(b) of the Convention…; of
>
> Conviction for an offence listed in an order made under section 72 of the Nationality, Immigration and Asylum Act 2002… particularly serious crimes."

44. Paragraphs 339F and 339G of the Immigration Rules make provision for refusal and revocation of humanitarian protection:

> "**339F** Where the criteria set out in paragraph 339C is not met humanitarian protection will be refused.
>
> **339G** A person's humanitarian protection granted under paragraph 339C will be revoked or not renewed if the Secretary of State is satisfied that at least one of the following applies:
>
> (i) the circumstances which led to the grant of humanitarian protection have ceased to exist or have changed to such a degree that such protection is no longer required …
>
> [Sub-paragraphs (ii) – (vi) of paragraph 339G empower the revocation or non-renewal of the grant of humanitarian protection to a person who should have been or is excluded from it because of the reasons set out in paragraph 339D.]
>
> In applying (i) the Secretary of State should have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm…"

Appeals to the Tribunal

45. Section 82(1) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") as amended provides that "where an immigration decision is made in respect of a person he may appeal to the tribunal". By section 82(2)(j) a decision to make a deportation order under section 5 of the Immigration Act 1971 is an "immigration decision within section 82(1)". Section 82(2) does not provide that a decision that a person is not entitled to humanitarian protection is an "immigration decision" within section 82(1).

46. By section 85 of the 2002 Act:

> "(1) An appeal under section 82(1) against a decision shall be treated by [the Tribunal] as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
>
> (2) If an appellant under section 82(1) makes a statement under section 120, [the Tribunal] shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.
>
> (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
>
> (4) On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision…"

47. Section 86 provides:

> "(1) This section applies on an appeal under section 82(1), 83 or 83A.
>
> (2) The Tribunal must determine—
>
> (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
>
> (b) any matter which section 85 requires it to consider.
>
> (3) The Tribunal must allow the appeal in so far as [it] thinks that –
>
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules), or
>
> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently."

48. Where a person is exercising a right of appeal against a decision to curtail or revoke leave, section 3D of the Immigration Act 1971 extends the leave to prevent a person becoming an over-stayer while exercising a right of appeal against the decision to curtail or revoke leave.

Discussion

(1) Exclusion from humanitarian protection

49. Mr Southey's primary submission was that, having failed to take the point that the claimant is excluded from humanitarian protection before the Tribunal, the Secretary of State cannot do so at a later time. His argument was structured as follows.

50. The first stage is that because claimant's case in his appeal against the decision to deport him relied on Articles 1 and 3 of the ECHR, the appeal implicitly involved a claim for humanitarian protection. Mr Southey relied on the observation of the Court of Appeal in *QD (Iraq) v Secretary of State*[2009] EWCA Civ 620 at [20] that Article 15(a) and (b) reflect the provisions contained in the sixth and thirteenth protocols to the ECHR and Article 3. He submitted (skeleton argument 3.19) that "as a consequence a claim for humanitarian protection is implicit in any claim for protection under Articles 1 or 3". Mr Southey also relied on the statement in the Home Office Policy Instructions (see [32]) that caseworkers considering an asylum claim who conclude that a person does not qualify for refugee status are required to consider humanitarian protection and that, where a person claims "international protection" but does not claim refugee status, that claim should be accepted as a claim for humanitarian protection. He submitted that as a consequence of this it is clear from the policy that any claim for protection under Articles 1 or 3 will be treated as a claim for humanitarian protection unless the applicant is granted refugee status before the application is determined. He pointed to the Home Office's position at the first appeal, that the claimant was not entitled to humanitarian protection, and the submissions made on the basis of that position, and said that would have been irrelevant if the Tribunal was not determining whether the claimant was entitled to humanitarian protection when it determined his appeal against the decision to deport him to Iran.

51. The second stage of Mr Southey's case concerns the consequences of regarding the claimant's case before the Tribunal in the appeal against the deportation decision as implicitly involving a claim for humanitarian protection. He submitted that the Secretary of State and the Tribunal had to deal with this implicit claim. Neither did. In the reconsideration hearing the Secretary of State did not argue, and the Tribunal did not decide, that the claimant was excluded from humanitarian protection. It followed that the Secretary of State was not subsequently entitled to conclude that he was excluded.

52. Mr Southey submitted that, in the light of the authorities, it was incumbent on the Secretary of State to bring forward her entire case when faced by the claimant's appeal to the Tribunal. He relied on *R (Boafo) v Secretary of State for the Home Department* [2002] EWCA Civ 44, 1 WLR 1919, *Secretary of State for the Home Department v TB (Jamaica)* [2008] EWCA Civ 221, [2009] INLR 221, and *R (E) v Secretary of State for the Home Department* [2008] EWHC 2446 (Admin). This was, he submitted, equivalent to the requirement of the "one-stop" procedure that requires an appellant to raise all available grounds of appeal at the same time. That procedure

was recently considered in *AS (Afghanistan) and NV (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 1076 where a majority of the Court of Appeal gave effect to its aim of requiring appellants to bring forward their entire case and thus to prevent successive applications. I consider this case at [81] –[83] below. Mr Southey argued that the case for requiring the Secretary of State to bring forward his entire case was stronger given the inequality of resources between the Secretary of State and the average appellant in the Tribunal. He referred to the observations in *GH (Afghanistan) v Secretary of State for the Home Department* [2005] EWCA Civ 1603, [2006] INLR 108, at [17], although those observations were made in a different context.

53. Mr Southey relied on the observations in these cases that, if the Secretary of State is not required to bring forward her entire case at the Tribunal, the appellant will be deprived of the Tribunal's decision on the merits of his case and relegated to the remedy of judicial review which is less advantageous, in particular in relation to questions of fact. He submitted that, where, as in this claimant's case, whether the claimant is excluded from humanitarian protection is the central issue, avoiding a full fact based review may not comply with the right to an effective remedy afforded by Article 47 of EU's Charter of Fundamental Rights and may also violate common law principles as to access to the court: see *R v Lord Chancellor, ex p. Witham* [1998] QB 575, 585D.

54. Mr Southey submitted that in this case the claimant was deprived of a real benefit. Despite the legality of the Secretary of State's decision dated 23 October 2009 that he was excluded from humanitarian protection, in this case it would have been open to the Tribunal to come to a different conclusion. This was because the conviction for malicious wounding was not as serious as a crime against peace and the other crimes referred to in Article 17(1)(a) and (c) of the Directive and paragraphs 339D(i) and (ii) of the Immigration Rules, or the crimes committed by persons who, by Article 1F(a) of the Refugee Convention, are excluded from the benefits of that Convention. Mr Southey's reasoning is effectively that the *ejusdem generis* rule applies to the sub-categories in Article 17(1) of the Directive.

55. As for the conviction for murder, what is needed to exclude a person from humanitarian protection are "serious reasons" for considering that person to be guilty of the offence. Mr Southey submitted that, since evidence obtained by torture is not admissible in England (*A v Secretary of State for the Home Department* [2006] 2 AC 221), it was open to the Tribunal to conclude that there were not serious reasons for concluding that the claimant committed murder.

56. I reject the first of these submissions. Article 1F(b) of the Refugee Convention permits those guilty of serious non-political crimes to be excluded from refugee status. Professor Hathaway's *Rights of Refugees under International Law* includes

"wounding" in the list of crimes which are normally understood to fall within Article 1F(b)'s concept of "serious" criminality.

57. The language of Article 17 and paragraph 339D and their provision that a person "is excluded" from eligibility for "subsidiary" and "humanitarian" protection if there are serious reasons for considering it falls within one of the specified categories appears to be mandatory. In view of this, whatever the status of the conviction for murder in view of the allegation of torture, in the light of the length of the sentence for the malicious wounding and what the sentencing judge said, I do not consider it would have been open to the Tribunal to conclude that the claimant was not excluded from humanitarian protection.

58. Furthermore, I do not consider that the fact that the claimant's remedy is by way of judicial review, in the circumstances of this case, deprives him access to an effective remedy. Mr Southey accepted that Article 6 of the ECHR does not apply directly but relied on Article 47 of the Charter. The underlying facts in this case are not in dispute. The only issue is whether the indisputable convictions for malicious wounding and murder qualify as "serious crimes" within the Directive and, in respect of the murder, whether, if the confession was obtained by torture, that means there are no "serious reasons" for considering that the claimant was guilty of the offence. Both are issues of law and policy which a court exercising the judicial review jurisdiction is able to assess fully and, if necessary, require the Secretary of State to reconsider the matter. Even where Article 6 applies directly, the decision of the Strasbourg Court in *Crompton v United Kingdom* 27 October 2009 shows that in a case such as this, where the underlying facts are not in dispute and a reviewing court is able to assess and determine the issues fully, judicial review will be regarded as offering an effective remedy. Moreover, the position of the Luxembourg jurisprudence is that there will be compliance with the requirements of the right to an effective remedy if an EU national has access to the same remedies as those available against acts of the administration generally in the member state: see joined cases C-65/95 and C-111/95 *R v Secretary of State for the Home Department, ex p. Shingara and Radiom* [1997] ECR I-3343 at [31].

59. My conclusions on these matters do not affect Mr Southey's other submissions. There are two essential foundations to those other submissions. The first that is a claim for humanitarian protection is implicit in any claim for protection under Articles 1 or 3 (skeleton argument paragraph 3.19) including one made in an appeal against a "minded to deport" decision. The second is that the authorities on which he relies preclude the Secretary of State from now asserting that the claimant is excluded from humanitarian protection.

60. As to the first of these foundations, the Directive and the provisions of the Immigration Rules implementing it contemplate that a person may fall into one of

three categories. He may be a refugee: Article 2(d) and paragraph 334. Alternatively, while not a refugee, he may be entitled to subsidiary or humanitarian protection: Articles 2(e) and 15, and paragraph 339C. Thirdly, even if not a refugee and not entitled to subsidiary or humanitarian protection because he has committed a serious crime (Article 17 and paragraph 17), he may not be subject to removal from the United Kingdom because he would face a real risk of suffering serious harm if returned to his country of origin.

61. The consequence of these three categories is that a decision that removal would be unlawful does not implicitly involve determining into which category a person falls while he is within the United Kingdom. Neither the Directive nor the Strasbourg jurisprudence requires any particular status to be granted to a non-refugee whose removal from the United Kingdom is prevented by the United Kingdom's human rights obligations. The only immediate obligation on the United Kingdom is not to remove that person. While, as Mr Southey submitted (skeleton argument paragraph 3.2.1.2), a decision to make a deportation order would plainly not be in accordance with the law if the claimant was entitled to humanitarian protection, it does not follow that as a consequence the Tribunal was required to determine whether the claimant was entitled to humanitarian protection. The decision that a deportation order could not lawfully be made does not require a decision as to the category of non-removable person into which the claimant falls.

62. I do not consider that the decision in *QD (Iraq)'s* case can bear the weight that Mr Southey places on it. The Court of Appeal stated that Articles 15(a) and (b) of the Directive reflected the provisions of the Sixth and Thirteenth Protocols of the ECHR and Article 3. Article 15 is in Chapter 5, headed Qualification for Subsidiary Protection, and is concerned with the definition of "serious harm". While affording humanitarian protection to a person who risks facing such harm if returned will safeguard that person's rights under Articles 1 and 3, it does not follow that any claim for protection under those provisions constitutes a claim for humanitarian protection. It is possible for a person to be protected without having that status by not returning him to a state in which he risks treatment that would violate his rights under those provisions.

63. It is, moreover, important to consider the particular background in this case. After the refusal of the claimant's application for asylum and the dismissal of his appeal, he did not seek a further appeal or apply for leave to remain on the basis of any other claim for protection. The Home Office's Asylum Policy Instructions treat humanitarian protection as a fall back where a claim is made for a protection status. The decision made on 9 October 2006 to deport the claimant was not a rejection of any claim by him for protection but a decision that his deportation from the United Kingdom would be conducive to the public good. A decision to make a deportation order is, by section 82(2)(j) of the 2002 Act an "immigration decision" within section 82(1). The claimant accepts that it is that decision which gave rise to a right to appeal under section 82(1) of the 2002 Act in this case.

64. The claimant also did not explicitly seek humanitarian protection either as part of his earlier claim or before either of the Tribunals which dealt with his appeal against the decision to deport him. There was, as Mr Eicke submitted (skeleton argument paragraph 55), "at no stage any application for protection under the ECHR (which the Secretary of State rejected and against which the claimant appealed) into which an application for leave to remain on the basis of humanitarian protection could be implied". In any event the grant or refusal of humanitarian protection is not in itself an "immigration decision" within section 82(2) of the 2002 Act which gives rise to a right of appeal.

65. Mr Southey's submission involves accepting that a ground of appeal against a decision to deport taken some 18 months after the failure of the claimant to apply for any status following the rejection of his claim for refugee status implicitly raises a claim for humanitarian protection because of his reliance on the ECHR. In the circumstances of this case, however, this would be the second implicit claim. I do not consider that, where an implicit claim of this sort was made in the context of the claimant's earlier application which was rejected by both the Secretary of State and an Adjudicator, and where the claimant has made no further appeal either against the refusal of refugee status or on the basis of an entitlement to humanitarian protection, and did not make any other claim, his appeal against the decision to deport some eighteen months later, raises a new implicit claim to humanitarian protection.

66. I turn to the second essential foundation to Mr Southey's submissions. There are two and possibly three strands in the decisions on which he relied. These are that the Secretary of State is not allowed to: (a) ignore a ruling without appealing (see *R* (*Boafo)* [2002] 1 WLR 1919 at [25-[26], *R v Secretary of State, ex p. Mercin* [2000] INLR 511, at 218 and *Secretary of State for the Home Department v TB (Jamaica)*), [2009] INLR 221 at [30], [31]); (b) act inconsistently with the Tribunal decision (*TB (Jamaica)* at [36]); and (c) take a point which has not been taken before the Tribunal or referred to by it (*TB (Jamaica)* at [28], [30], and [32]).

67. In *TB (Jamaica)'s* case, after the Secretary of State indicated that she intended to deport TB, he claimed asylum and maintained that removal would breach his human rights. The Secretary of State refused his claim. Her refusal did not state that if otherwise qualified by Article 33(1) of the Refugee Convention, he was excluded by Article 33(2). Article 33(1) prohibits a state from expelling or returning a refugee to territories when his life or freedom would be threatened on a Convention ground. Article 33(2) provides that the benefit of Article 33(1) may not be claimed by a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

68. The Tribunal allowed TB's appeal. Its decision thus entitled him to remain in the UK as a refugee. The Secretary of State later took the point that TB was excluded from the Convention by virtue of Article 33(2). Stanley Burnton LJ, with whom Rix and Thorpe LJJ agreed, held:

> "the Secretary of State was bound by the decision of the Immigration Judge and that her subsequent action was unlawful on the ground that it was inconsistent with that decision". (see [36])

He also stated ([31]) that the Immigration Judge's finding that TB's criminal conviction did not justify interfering with his Article 8 rights was inconsistent with him constituting a danger to the community.

69. The position in *TB (Jamaicia)*'s case differs from that in the present case. When the Tribunal allows an appeal against a refusal to grant asylum, it recognises that the individual in question (here TB) is a refugee, and thus entitled to refugee status and the rights and benefits that flow from it (see Preamble, paragraph 14 and Article 2(d)). The preamble to the Directive states that the recognition of refugee status "is a declaratory act". As the outcome of the appeal, therefore, constitutes the recognition of a particular status, and, as the Secretary of State is bound by the ruling, save in an appeal it is not open to her to raise any issues concerning the individual's exclusion from that status later. In a case such as this, however, a decision by the Tribunal does not, for the reasons I have given (see [60] – [61] and [63] – [65]) constitute the recognition of a particular status. In the absence of a positive determination as to the category into which a person falls while he is within the United Kingdom, the Tribunal's decision leaves open two alternative possibilities.

70. I turn to the decision in *E*'s case [2008] EWHC 2446 (Admin). E was an Alevi Kurd. His claim for asylum was refused in December 1997 and his appeal was dismissed by an Adjudicator approximately 12 months later. As this was before October 2000 when the Human Rights Act came into force, the human rights issues were not directly considered by the Adjudicator. Leave to appeal to the IAT was refused (see *ibid* at [4]). In June 2005 E was convicted and sentenced to 18 months imprisonment for offences of threats to kill committed in October 2004.

71. On E's release he was detained and, in February 2006, he applied to remain on the basis that his removal would breach his human rights under Articles 3 and 8 of the ECHR: see [2008] EWHC 2446 (Admin) at [8]. The claim was refused by the Secretary of State but, in June 2006 an Immigration Judge allowed E's appeal on the ground that he was credible and would be at risk if returned to Turkey: see *ibid* at

[10]. The Immigration Judge considered that E's conviction and imprisonment did not deprive him of the protection of Article 3. In his decision he stated:

> "[T]here was of course no recommendation for deportation by the trial judge but perhaps more importantly the issue was never raised by the respondent in his letter of refusal… If the respondent had felt that the appellant's conviction was in any way relevant the matter should have been raised either before me or in the letter of refusal. The plain fact is that it was not." (See [2008] EWHC 2446 (Admin) at [35])

72. Neither E's eligibility for humanitarian protection nor whether he was excluded from the category by reason of his conviction were considered by the Tribunal. He was not offered any form of discretionary leave in the light of the Tribunal's decision until after he instituted judicial review proceedings. At that time he was given six months discretionary leave and informed of the reasons that the Secretary of State did not grant him humanitarian protection.

73. In *E's* case [2008] EWHC 2446 (Admin) at [36], HHJ Jarman QC, relying on the decisions in *Boafo* and *TB (Jamaica)*, held that, because no point in relation to E's conviction was taken by the Secretary of State at the hearing before the Immigration Judge and no application was made to seek reconsideration, the Secretary of State acted unlawfully in subsequently denying E humanitarian protection. He stated that this was clear from the reasoning of the Court of Appeal in *TB (Jamaica)*'s case.

74. The learned judge did not refer to the difference between a finding by the Tribunal that a person has refugee status, as was the case in *TB (Jamaica)'s* case, and a finding that a person who is not a refugee may not be removed. The decision in E's case proceeds on the basis that the Secretary of State did not take the point that E was excluded from humanitarian protection in the Tribunal and did not apply for the Tribunal decision to be reconsidered.

75. It is instructive to compare the judgment in E's case with that in *R (C) v Secretary of State for the Home Department* [2008] EWHC 2488 (Admin), decided by HHJ Jarman QC on the day after his decision in E's case. In C's case the Secretary of State had not relied upon exclusion from humanitarian protection in the Tribunal. It appears, however, that the Tribunal referred to Article 33 of the Refugee Convention (see *ibid* at [31]) and to humanitarian protection and that "the claim was rejected by both the Adjudicator and the Tribunal": see *ibid* at [34]. In *C*'s case it was held that the Secretary of State's subsequent refusal to grant humanitarian protection and five years leave was not unlawful.

76. The judge accepted Mr Grodzinski's submission on behalf of the Secretary of State (see *ibid* at [31]), that the case was to be distinguished from *TB (Jamaica)'s* case because *C*'s refugee claim had failed and the question "what length of leave should be given to the claimant as a result of a finding that to return him to China would be a breach of his Article 3 Convention rights" was "not an issue which was dealt with, or could have been dealt with, by the Adjudicator or by the [Tribunal]" (emphasis added). The judge also accepted the submission that there was nothing inconsistent between the Tribunal decision and what the Secretary of State had decided since the Tribunal's decision.

77. In both decisions the learned judge referred to passages from Stanley Burnton LJ's judgment in *TB (Jamaica)'s* case which refer to inconsistency: in *E's* case he referred to *TB (Jamaica)* at [31] and in *C's* case to *TB (Jamaica)* at [36]. In neither case did the judge emphasise the inconsistency point. In *E's* case his focus appeared to be on the fact that the humanitarian protection point had not been taken by the Secretary of State. In *C's* case it appeared to be that the issue of humanitarian protection and discretionary leave was referred to by the Adjudicator and the Tribunal. However, in *C's* case he accepted (see [34]) that the case was to be distinguished from *TB (Jamaica)* for the reasons advanced by Mr Grodzinski. Those reasons included the absence of inconsistency and that the question of what length of leave should be given to the claimant was not one which could have been dealt with by the Adjudicator or the Tribunal.

78. Mr Eicke submitted that the judge's failure in *E's* case to have regard to the distinction between asylum appeals which if successful can only lead to one form of status and human rights appeals which, by definition, do not require the grant of any particular status mean that I should not follow that decision. Alternatively, he submitted that *C's* case is indistinguishable in that the conviction for the serious offence, the murder in Iran, was at the heart of the appeal to the Tribunal in the present case. With respect to the latter, as in *C's* case the claimant's conviction in Iran formed the basis of his claim to asylum and human rights protection but this case differs from *C's* case because humanitarian protection is not referred to in either of the decisions of the Tribunal. In paragraph 27 of the reconsideration decision it is stated (see [14] above) that the only question of fact to be established was whether there is a real risk of execution on return to Iran.

79. So is the test whether the point was taken or referred to before the Tribunal or whether the decisions are inconsistent? I consider that it is the latter. Both *E* and *C's* cases are based on the decision in *TB (Jamaica)*, and Stanley Burnton LJ's judgment was clearly based on inconsistency rather than notions of abuse of process or failure to take a point. Moreover, although in *E's* case HHJ Jarman QC referred to the fact that the Tribunal had rejected humanitarian protection, he accepted Mr Grodzinski's submissions and the thrust of those submissions was the absence of inconsistency. It is to be noted that in *E's* case only limited submissions were made by counsel on behalf of the Secretary of State, who had initially been instructed only to seek an

adjournment because the Secretary of State had agreed to reconsider *E's* asylum claim in the light of the finding of the Tribunal. The judge did not therefore have the benefit of the full submissions as to the difference between the position in that case and *TB (Jamaica)'s* case which he had in *C's* case.

80. I do not consider that Mr Southey is assisted by *AS (Afghanistan) and NV (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 1076. In those cases, see Arden LJ at [11], "the appellants, having been refused leave to remain in the United Kingdom and served with a one-stop notice, appealed against the decisions made on their application for leave to remain, and in addition put forward grounds in response to the one-stop notice served on them which were not related to the grounds on which they had been refused leave to remain" and made a second application based on the additional grounds. In both cases the Secretary of State had sent the documents regarding the second application to the Tribunal to be considered as part of the appeal against the refusal of the first application.

81. The Tribunals held they had no jurisdiction to consider the second application because section 85(2) of the 2002 Act entitles it to consider only any matter "which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against" and not matters relating to different grounds on which leave to remain might have been sought and granted. A majority of the Court of Appeal (Arden LJ dissenting) held that the Tribunals had erred. They did not consider that the notice was restricted to matters relating to the original grounds of the application in the decision appealed against. Moore-Bick LJ stated (at [81]) that the statutory provisions all pointed towards a procedural scheme in which the appellant is required to put forward all his grounds for challenging the decision against him for determination in one set of proceedings and the Tribunal is placed under a corresponding duty to consider them. Sullivan LJ stated (at [103]) that it is clear that the underlying legislative policy is to prevent successive applications which are likely to prolong the period in which a person's status is uncertain and undetermined. He held that the Tribunal had jurisdiction to consider all the additional grounds which an appellant had been required to state on pain of being prevented from basing any further appeal upon them ([110]).

82. *AS (Afghanistan) and NV (Sri Lanka)* concern bringing all an appellant's "grounds" for remaining in the UK to be considered at one Tribunal hearing and the statutory provisions governing appeals. In the present case the concern is not with a "ground" for remaining in the United Kingdom, it is with the nature of the discretionary leave to be given. Moreover, *AS (Afghanistan) and NV (Sri Lanka)* dealt with grounds for remaining explicitly raised by the appellants in those cases in their second applications. In the present case the ground relied on by Mr Southey is said only to arise by implication from the claimant's claim that he cannot be removed because to do so would put the UK in breach of the ECHR, Articles 1 and 3. Additionally, those cases were concerned with appeals pursuant to section 82(2) of the 2002 Act and a further application the refusal of which would have given rise to a right of appeal.

But, as I have observed, the grant or refusal of humanitarian protection is not in itself an "immigration decision" under section 82(2) of that Act which gives rise to a right of appeal.

83. Before leaving this part of the case, I note that on 17 January Mr Southey drew my attention to the judgment given on 14 January 2010 by Mr Robin Purchas QC in *R (Jenner) v Secretary of State for the Home Department* [2010] All ER (D) 82. There is as yet no approved transcript of the judgment but Mr Southey provided a copy of the LexisNexis summary. I invited the parties to make submissions on the implications, if any, of this decision for the present case. I have concluded that, in the light of the LexisNexis summary and the submissions I received from Mr Southey and Mr Eicke, the decision is not of assistance. The question in this case is whether a Tribunal which decides that a person's removal would put the United Kingdom in breach of its obligations under the ECHR but which does not explicitly consider the question of exclusion from or entitlement to humanitarian protection implicitly decides that the person is entitled to such protection or whether the Secretary of State is otherwise precluded from deciding to exclude the person from that category. But in *Jenner's* case the Tribunal explicitly decided that Jenner was entitled to humanitarian protection.

(2) The "proportionality" issue

84. The Secretary of State does not accept that the policy of only granting six months leave to remain necessarily constitutes an interference with the right to private life under Article 8. However, like HHJ Jarman QC in *R (C) v Secretary of State for the Home Department* [2008] EWHC 2488 (Admin) at [39] I am prepared to accept that the cumulative effect of the restrictions on a person with six months leave do affect the claimant's private life. The question is whether the operation of the system and the delay in determining applications to extend the leave mean that the policy operates in a disproportionate manner either in general or in the circumstances of this case.

85. In principle, if the Secretary of State is entitled not to give a person humanitarian protection because that person has committed a serious crime it is neither irrational nor disproportionate to limit the normal period of leave. Mr Southey accepted for the purpose of this case that there is nothing incompatible with Article 8 in granting leave for periods of six months provided, however, that applications are determined promptly. That is clearly correct. As HHJ Jarman QC stated in *C's* case:

> "… where, as here, the claimant has committed what is undoubtedly a serious offence, has been the subject of deportation and the only reason he has not been deported is the very commission of that offence, it is

> proportionate to adopt and implement a policy of giving discretionary leave to remain for periods of six months in order to review not only the claimant's conditions but also the conditions in the country to which deportation might be sought." (at [39])

86. Mr Southey submitted that a six month period of leave is not necessary to enable the defendant to review the conditions in the country to which deportation might be sought so that a person can be removed promptly if the situation changes because section 3(3) of the Immigration Act 1971 in effect permits the Secretary of State to revoke a person's limited leave to remain and paragraph 339G of the Immigration Rules provides for the revocation of humanitarian protection. He stated that it should be possible to maintain records of cases such as the claimant's that would be potentially affected by a change in the human rights situation in a particular country. Their immigration status could then be revoked if there were such a change. In a case in which there is stronger evidence of real difficulties caused by the period for which leave is granted this may be a factor that a court assessing proportionality will take into account. However, in the light of the evidence before me, this is simply not such a case.

87. There is insufficient evidence before me to assess how the policy operates in general, and there is a conflict between the evidence submitted on behalf of the claimant and that submitted on behalf of the Secretary of State. Mr Welsh referred to new arrangements put in place since 2008 for dealing with applications and the mechanism for employers to check the status and entitlement of those without papers. As to the former, his evidence is that under the new arrangements applications for extensions of discretionary leave in a case like the claimant's should be dealt with within two to three months of the Secretary of State accepting that a person cannot be deported. As to the latter, he annexed Mr Forshaw's statement to his. Mr Forshaw stated that in the two and a half years the United Kingdom Border Agency's Employer Checking Service has been available some 7,500 employers have used it and the Agency has undertaken 53,096 verifications for those employers. Although the large number of requests initially led to delays, according to Mr Forshaw most requests are now processed and communicated to the employer within five working days. Mr Lilley-Tams' evidence including the emails from solicitors and others representing those with limited discretionary leave shows a variety of periods for handling the cases. The time taken to process a case ranges from under three months to very significant periods although some of the longer periods predate the claimant's application.

88. I turn to the claimant's circumstances. He applied for an extension of leave on 17 November 2007, only a few days before the expiry of his previous leave on 24 November. In these circumstances it was almost inevitable that the extension would not be granted before the expiry of the previous leave. But it took a year to deal with his application. The Secretary of State is unable to say why such a delay took place. Mr Welsh suggests (see statement paragraph 8) that it might have been because at the time there was no dedicated team to deal with those who successfully appealed against decisions to deport them and because priority was given within the United

Kingdom Border Agency to removals. I have referred to his evidence that under the new arrangements applications should be dealt with within two to three months of the Secretary of State accepting that a person cannot be deported.

89. While the position in respect of the application is not satisfactory, the claimant's application was dealt with on 17 November 2008 but these proceedings were not started until 2 April 2009. This was almost five months later and well outside the three month period. No explanation was given for the delay in the documentation submitted with the application for permission, perhaps because the claimant and his advisers were focussing on the "exclusion from humanitarian protection issue". Moreover, the difficulties to which the claimant refers in the statement he filed some seven months later do not relate to the period in which he was awaiting the outcome of his November 2007 application. He was in employment between May 2007 and November 2008 and had not lost his bank account. His difficulties appear to have arisen after February 2009. Insofar as they arose at that time because he was unable to provide status papers, it is not open to him to complain that the absence of status papers has caused him practical difficulties. His representatives failed to provide the requested photographs for some nine months after being given the address to which they were to be sent and some twelve months after the request: see [25] above. I do not consider that the other matters relied on by the claimant suffice to show that granting leave for six months has operated disproportionately in his case.

90. As to the claimant's difficulties with employment, he obtained employment very soon after the initial grant of six months discretionary leave and lost his job in February 2009 because of his criminal conviction. Notwithstanding the undoubted difficulties encountered by him since February 2009, the evidence is that by then the defendant had a mechanism in place for employers to check the status and entitlement of those without papers which has been used by a large number of employers. The evidence submitted by the claimant did not say whether the employers had used the mechanism, and there is no evidence from any of the companies which interviewed him to the effect that that they would only employ those with original documents or that a six months period of leave was too short and too uncertain. Moreover, despite his status, as I have noted, he was in employment between May 2007 and November 2008.

91. As to the difficulties in opening a bank account, the claimant was able to open a bank account when he had less status than he does now. That bank account was closed by the bank because of his unauthorised overdraft: see [24]. The claimant has provided no support for his statement that his difficulties relate to his status rather than to his banking history. Similarly, in relation to his complaint that he cannot travel. Mr Southey submitted that the claimant has not made an application because he does not meet the criteria of the exceptional circumstances that will lead the Secretary of State to permit a person with six months leave to travel abroad. The submission made on his behalf that his position has created a disproportionate interference with his private life in this respect is, however, significantly weakened by his failure to apply, making

a case for travel and to seeing what the Secretary of State's response is. It is, in any event, not clear whether his inability to travel is solely the result of his status. In his statement he also refers to his financial position as a bar. Finally, in relation to this, although the claimant states that he would like to travel to Turkey to meet his family from Iran, he gives no explanation as to why members of his family cannot travel to the UK to see him.

92. In the circumstances of this case, and in the light of the evidence before me, I reject the submission that the effect of the time taken to determine the claimant's applications for extensions to his discretionary leave constitute a disproportionate interference with his private life.

93. This application is dismissed.