Asylum and Immigration Tribunal

KL (Article 8-Lekstaka-delay-near-misses) Serbia & Montenegro [2007] UKAIT 00044

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 December 2006	**On 18 May 2007**

Before

Senior Immigration Judge Storey
Mr G F Sandall
Mrs W Jordan

Between

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S McLoughlin, from TRP Solicitors
For the Respondent: Mr J Singh, Home Office Presenting Officer

The judgment of Collins J in Lekstaka [2005] EWHC 745 (Admin) established that on Judicial Review of a refusal of the Immigration Appeal Tribunal of permission to appeal to it that claimant's case was arguable, but did not decide the merits of that case nor establish general propositions applicable to other cases.
As now clarified by AA (Afghanistan)[2007] EWCA Civ 12 and SB (Bangladesh) [2007] EWCA Civ 28, the loss of a right of appeal (e.g. by being denied a grant of ELR as a minor) does not amount to a particularly significant "disbenefit" unless there are practical disadvantages that can be demonstrated in the individual case (e.g. being prevented from working or being denied needed assistance under the Children Act 1989).
Although the reliance placed by TK (Immigration Rules-policy-Article 8) Jamaica [2007] UKAIT 00025 on the "truly exceptional circumstances" test has been shown by Huang [2007] UKHL 11 to be wrong, its guidance on "near-misses" remains valid. Even when an individual's circumstances fall squarely within the rationale of a relevant immigration rule or policy and so accord with its spirit albeit not its letter, a "near-miss" does not of itself mean that an expulsion decision constitutes a disproportionate interference with an appellant's right to respect for private and/or family life.

DETERMINATION AND REASONS

1. The appellant is a national of Serbia and Montenegro, born on 18 May 1983. He seeks reconsideration of a determination of an adjudicator, Mr R.D. Lewis, notified on 18 May 2003 dismissing his appeal against a decision giving directions for his removal and refusing to grant him asylum. His application to the Immigration Appeal Tribunal for permission to appeal was refused (by Mr J Fox, a Vice President) but succeeded on judicial review. Noting that "[t]his is what I imagine will be one of the last extant claims for judicial review of a refusal by the Immigration Appeal Tribunal of permission to appeal", Collins J quashed Mr Fox's refusal of permission to appeal and remitted the matter to the Tribunal for fresh consideration to be given. On 16 February 2006 the Asylum and Immigration Tribunal made an order for reconsideration.

2. The decision refusing the appellant asylum was made as long ago as 6 November 2002 and the determination was promulgated on a date prior to 9 June 2003. Accordingly the jurisdiction of the Asylum and Immigration Tribunal, who are required by transitional provisions made under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to treat the appeal as reconsideration, is not limited to error of law. However, since Collins J in remitting the appeal on judicial review did so on the basis of an arguable error of law, it is appropriate that we first address whether the adjudicator's determination was legally flawed.

3. The appellant's immigration history is of some moment in this case. He left Kosovo in January/February 1999 and went to Macedonia before arriving in the UK on 9 November 1999 and applying for asylum the same day. He was then 16. The respondent did not, however, consider his asylum claim until an interview which took place on 29 October 2002. As already noted the eventual refusal decision was made on 6 November 2002.

4. The basis of the appellant's claim was that he had been forced to flee his home area in Gjakova, Kosovo as a result of the Serbian campaign against ethnic Albanians. His parents decided he should leave and go to Macedonia. Subsequently he learnt that his father and paternal uncle had been killed and their family home destroyed. The whereabouts of his mother and siblings was unknown. When he came to the UK he joined his uncle and aunt and his cousin. They had fled Kosovo earlier in the war, arriving some time in 1998; they had been recognised as refugees in May 1999. Since his arrival they have treated him as their son. As a student attending college he has formed a social network of friends. He now has a British girlfriend.

5. Despite some misgivings the adjudicator accepted that the appellant's account was credible. In the light of the appellant's withdrawal at the hearing of his asylum grounds of appeal and the statement of the appellant's representative that the appellant would rely only on Article 8, the adjudicator went on to analyse the appellant's Article 8 claim. He found that the appellant's relationship with his uncle, aunt and cousin amounted to family life within the meaning of Article 8. He set out his analysis of the appellant's claim at paragraph 36:

> "I find, however, that the respondent's action seeking to remove the appellant is in accordance with the law and has the legitimate aim of the maintenance of immigration controls. I have also considered whether removal by the respondent is proportionate in a democratic society to the legitimate aim to be achieved. I have taken into account the

> background evidence, which has been placed before me. The appellant has lost his father and all contact with his mother. He has formed a family relationship with his uncle's family and had developed bonds with his aunt and cousin. The appellant is now a young adult of 20 years of age. He is fit and healthy and there is no evidence that he is suffering from any psychiatric disorder because of the experiences he has undergone. The facilities available to him in Gjakova as shown in the report, are adequate for a young adult male and there are many NGOs working in the area. He will not be left to manage on his own. It is a sad fact of the troubles in Kosovo that many young men find themselves in the position of the appellant but there is no reason why he should not be able to resume an ordinary life there. Considering all these factors, I conclude that the decision to return is proportionate to the legitimate aim to be achieved."

6. The application for permission to appeal raised three main grounds. First it was submitted that the adjudicator had given no consideration to the fact that the respondent had delayed three years in reaching a decision on his asylum claim. Second, it was contended that the adjudicator had not properly recognised that the appellant had no family left in Kosovo and would not be able to establish family life there. Third, it was argued that it was not reasonable to expect the appellant's uncle and aunt and cousin in the UK to follow him to Kosovo as they have been granted refugee status and his uncle was severely disabled having been shot at by Serbian forces.

7. In amplifying these grounds, Mr McLoughlin stated that it could not be right in general terms, that by sitting on his hands the Secretary of State can make his case stronger. As time passes, the appellant's Article 8 rights should be seen as growing stronger, not weaker. He argued further that the adjudicator had also failed to take into account the fact that the appellant's UK family had a refugee background and that the relationship between the appellant and his uncle was akin to father and son. Mr McLoughlin said it was also important that we bear in mind the opinions about the appellant's Article 8 claim expressed by Moses J (as he then was) and Collins J in the course of the judicial review proceedings. The latter had noted as relevant the European Court of Human Rights judgment in Jakupovic v Austria [2004] 38 EHRR 27 in which it had been said in the context of an Article 8 expulsion case that there would have to be very weighty reasons to remove a minor to a war torn country. Collins J had also emphasised the fact that the appellant experienced a "near-miss" under both immigration rules and policy.

8. Moses J in his 4 March 2004 decision granting permission to apply for judicial review stated:

> "4. I do hope somebody can look at this particular case again and the claimant can stay with the only family he has. He is only 20, fit though he may be, and the idea of sending him back to Kosovo when he had been in this country since the age of 16, certainly gives pause for further thought. I hope somebody can look at this case again before it disappears without trace."

9. From the subsequent letter from the respondent dated 24 April 2004 it would appear that these sentiments led the Secretary of State to review the appellant's case, but that it was decided to maintain the refusal.

10. In the judgment by Collins J on 18 April [2005] EWHC 745 (Admin) (hereafter "the Lekstaka case") it was stated:

"36. One must of course also bear in mind that to remove the claimant to Kosovo would not only interfere with his family life which the Adjudicator had found to exist – and which clearly did exist – but would effectively bring it to an end. There has been a suggestion that he could keep in touch and could visit as and when he was able, it not being suggested that it would be reasonable to expect the uncle and his family to relocate to Kosovo in order to be with the claimant there. In theory that, I suppose, is possible. In reality it is a forlorn hope, partly because it presupposes that the claimant would have the means to enable him to travel to visit for any length of time; and secondly that an accommodating Entry Clearance Officer would grant him the necessary clearance to enable him to do so, because the ECO would have to be persuaded that he qualified within the terms of the visit rules. It would mean that he intended to return after the period of his visit and was able to maintain himself without working during the period when he was to be a visitor to this country. Whether he would succeed in so persuading the Entry Clearance Officer is as it seems to me, a moot point. In any event, there is no doubt that he would be in a very unhappy situation, were he to be returned to Kosovo. That of course is not in itself determinative. There are many, undoubtedly, for whom return is a most unhappy state of affairs. But there are not, I suspect, many whose family life is such as this claimant's.

37. If one looks back and wonders whether he would have qualified at an earlier stage, one finds, first of all that had he been a son, as opposed merely to being a nephew, he would, on the face of it, have been able to gain entry as such a dependant had he applied before he reached the age of 18. Certainly it is difficult to conceive that there would have been any bar under the Rules. He certainly would have qualified. Equally had he been a son, a dependant, as opposed to a nephew, and had the family not been granted asylum, he would have qualified to enter under the family policy. Furthermore, it was policy to allow the family of refugees who were granted that status to join them in this country and he would have qualified on that basis too as the dependent son, if he had applied to come before he reached the age of 18.

38. Mr Beard submits that it is not appropriate and not proper to look back in that way and to ask what would have happened if the situation had been somewhat different. But it seems to me that one is entitled to see whether, in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter. It does in my view quite plainly fall within the spirit because, albeit only a nephew, he has no other family - his father having been killed and his mother having disappeared – and he has been treated by his uncle as if he were indeed the son of the family and that in my judgment is certainly capable of constituting an exceptional state of affairs.

39. The Adjudicator does not in terms spell out the consequences of his findings. He does not go into the question of whether the matter was exceptional in any detail. This is not surprising because the exceptional test was not the test which the courts had decided on at the date that the Adjudicator reached his decision. I have already indicated that I have some concern at the Adjudicator's approach referring to many young men finding themselves in the true position of this appellant and how his position and condition was perhaps rather different from that which might apply in other cases.

40. That, coupled with Mr Fox's reference to law [a reference to Mr J Fox, a Vice President prematurely applying an error of law jurisdiction], does create concern that the proper approach may not have been adopted in this case. I am quite satisfied that there is a real chance of success, looking at the overall facts, if the matter goes back to the Tribunal to review and reconsider the situation in this case."

11. Collins J was of course analysing the appellant's case in accordance with the Court of Appeal's guidance in Huang [2005] EWCA Civ 105. Since then (and after the hearing of this case) the House of Lords has given its judgment in Huang [2007] UKHL 11. The latter

makes clear, inter alia, that the test of "truly exceptional circumstances" is not a legal test. Whilst we must bear this new guidance in mind when deciding this case, it seems to us that the essential question at the heart of this case has always been, and remains, whether the decision to remove amounted to a disproportionate interference with the appellant's right to respect for his private and family life. Collins J's judgment was primarily –and properly- concerned with the factors that had to be considered when assessing the issue of proportionality in this case. It sees the following as factors of particular relevance : that the appellant was effectively an orphan; that he had come to the UK when he was a minor; that he had become a de facto son of his uncle; that removal to Kosovo would effectively bring his family life to an end; that there was an essentially refugee character to his UK family; that the appellant, if he had been treated as a dependent son when still a minor, would have been eligible to remain in the United Kingdom both under the Immigration Rules and under relevant policy; and further that, by making no decision on the appellant's asylum appeal until he had turned eighteen, the respondent had denied the appellant the benefit of a grant of exceptional leave to remain which he would otherwise have had.

12. Mr McLoughlin urged us to regard the observations made by Collins J in Lekstaka as demonstrating that the appellant's Article 8 claim was entitled to succeed on its merits, although they were only made in the context of a judicial review decision finding that permission to appeal should have been granted. In this regard he emphasised that Lekstaka had since been cited with approval in a number of merits decisions of the Asylum and Immigration Tribunal.

13. For the respondent Mr Singh accepted that the adjudicator had not addressed the delay issue, but this did not, he submitted, amount to a material error of law. He further maintained that the Secretary of State had not "sat on his hands" regarding this case; a considerable amount of time had been taken up by the appellant pursuing legal remedies. To the extent that there was delay on the part of the respondent, that was in part attributable to a change in policy introduced on 12 February 2002 regarding asylum applicants who reach 18 without having had their asylum claims resolved. The policy specified that such persons should be interviewed as adults. It was a matter for the respondent, said Mr Singh, what policies he adopted in relation to unaccompanied minors who claimed asylum. Whilst he did not seek to argue that the adjudicator was wrong to find an existent family life between the appellant and his uncle (and uncle's family) in the UK, even though he was no longer a minor, Mr Singh said it was properly seen as relevant by the adjudicator, when assessing proportionality, that the appellant was a young adult with no health problems. It was not the case that asylum seekers at the relevant time needed ELR in order to be able to work. When considering, as Collins J seemed to think had to be done, whether it was reasonable to expect the appellant to go abroad, and apply for entry clearance if he wished to rejoin his uncle's family as a dependent relative or seek to enter in some other capacity, it had to be kept in mind that family life could be maintained by occasional visits or other forms of contact (telephone etc.) The aunt and uncle's refugee status related to the period when Milosevic and the Serbs were carrying out armed attacks on ethnic Albanians in Kosovo.

Our assessment

14. The adjudicator accepted that the appellant had established a private and family life in the United Kingdom on the basis of his close relationship since November 1999 with his uncle, aunt and cousin as well as his ties of friendship with others. That, as we understand it, is not in dispute. In any event, in view of the close emotional and financial dependency

of the appellant on his uncle and aunt since he came to this country aged 16, we consider that the adjudicator was quite entitled to find that his ties with them went further than normal emotional ties between an uncle and aunt and their nephew, even though he had become an adult by the time of the hearing: see Kugathas [2003] EWCA Civ 31.

15. Deciding the case as he was in May 2003, the adjudicator did not use the language which has been adopted since by the House of Lords in Razgar [2004] UKHL 27 and by the Court of Appeal case of Huang, [2005] EWCA Civ 105. However, the cases the adjudicator cited, Nhundu and Chiwera 01/TH/0613) and Mahmood [2001] Imm AR 229, reflect principles which remain well established in the case law as elaborated in Razgar and reaffirmed (with one caveat) by the House of Lords judgment in Huang [2007] UKHL 11.Hence we do not consider that the adjudicator can be said to have applied wrong legal principles simply because he dealt with the appellant's case pre-Razgar. Nevertheless we of course have to consider whether he erred in law by applying the guidance set out in Razgar and Huang [2007] UKHL 11 and other leading cases. Several other cases have been decided since we heard this appeal, in particular HB (Ethiopia) [2006] EWCA Civ 1713, Rudi & anor v SSHD [2007] EWHC 60 (Admin), AA (Afghanistan) [2007] EWCA Civ 12, SB (Bangladesh) [2007] EWCA Civ 26 and AG(Eritrea) [2007] EWCA Civ 407. We considered whether to invite the parties to make submissions on Huang [2007] UKHL 11, AG (Eritrea) and these other recent cases, particularly as SB and AA make specific reference to the judgment of Collins J in the Lekstaka case, but concluded that was unnecessary, in view of the conclusions we had already reached on the material before us.

16. It is not in dispute in this case, so far as we understand it, that the decision giving directions for the appellant's removal constituted an interference having grave consequences for the appellant and that the decision nevertheless pursued a legitimate aim and was in accordance with the law. In other words, this is a case which turned solely on the proper answer to be given to Lord Bingham's question 5 in Razgar, relating to whether the interference was proportionate to the legitimate public end sought to be pursued.

17. We observe at the outset that we have to decide the Article 8 issue as to its merits on the law and the facts. We are not concerned with whether there is an *arguable* error of law. We underline this because of the emphasis Mr McLoughlin has sought to place on the judgments of Moses J and Collins J in earlier proceedings. We accept that both judges did include in their judgments comments touching on the merits of the appellant's Article 8 claim and that, being comments made by judges of the Administrative Court, they deserve our careful consideration; but, as Collins J was at pains to state at several points, the Administrative Court findings on the judicial review proceedings were in respect of arguability only.

18. We consider that the adjudicator materially erred in law although not in all the ways contended for by Mr McLoughlin. Particularly given the frequent reliance placed on the Lekstaka case in other appeals raising Article 8, it is of some importance that we pinpoint where we think there was error and where we think there was not.

19. We shall deal first with ways in which we do *not* accept that the adjudicator erred. We do not find that he overlooked that the appellant if removed to Kosovo would not be able to establish family life there. It seems to us that he fully recognised this but did not consider that it meant that the appellant would be unable to cope as a result. His finding was that the disruption of the appellant's UK family life would not gravely affect him because he was a fit and healthy young adult who (by virtue of what was shown by the background

evidence about facilities in his home area) "will not be left to manage on his own". He observed that "[it] is a sad fact of the troubles in Kosovo that many young men find themselves in the position of the appellant ...". These words have been criticised by Collins J, but it is important not to read more into that criticism than was intended. We do not think that Collins J meant to suggest that there was anything wrong in the adjudicator attaching weight to the fact that the appellant was not a vulnerable individual at the date of hearing by virtue of any psychological, health or other special problems. It seems to us that what concerned Collins J was that by this remark the adjudicator appeared to rely on a stereotype rather than to focus on the appellant's particular circumstances. In that regard we agree: taken as an overall summary of the impact on the appellant of his removal to Kosovo, these words failed to take sufficient account of specific characteristics of the appellant's circumstances, the fact that he was effectively orphaned before arriving in the United Kingdom when aged 16 being one of them; and certain policy-related aspects concerning how his appeal was handled by the Home Office, being another.

20. We do not see that the adjudicator anywhere sought to rely on the view that the appellant's uncle and his uncle's family could accompany him to Kosovo. Indeed it seems to us that his analysis of paragraph 36 is predicated on the fact that the appellant's removal would disrupt his UK family life relationships.

21. With one caveat (which we shall come when considering "near-misses" under immigration rules and policy), we reject the contention that the adjudicator failed to take into account the fact that the appellant's UK family had a refugee background. He specifically noted at paragraph 23 that the aunt and her son "fled to the United Kingdom and were granted refugee status on 27 May 1999". Nor do we see any error in the adjudicator not attaching significant weight to the fact that the appellant's aunt and/or niece had been granted such status. As Mr McLoughlin himself observed, his uncle and aunt had been recognised as refugees in May 1999, in light of the real threat they faced *at that time* from the Serbian regime. No other basis of fear has been identified. In such circumstances it cannot seriously be suggested that with the fall of Milosevic and the installation of KFOR and UNMIK supervision in Kosovo in June 1999, that his uncle and aunt continued to have a fear of persecution. Mr McLoughlin may well be right that neither the uncle nor aunt have been subject to any decision to apply Refugee Convention cessation clauses to them, but that is not the point. Purely focussing on the position of the uncle and aunt and their natural son, there was no evidence that they continued to have a well-founded fear of persecution or face a real risk of serious harm or ill-treatment.

22. We do not consider that the judgment of the European Court of Human Rights in Jakupovich v Austria [2004] 38 EHRR 37 had any great bearing on the facts of the appellant's case. Jakupovich concerned the proportionality of the removal of someone who was a minor. It is true that this case also highlights the relevance of conditions in the country of return where the latter has been ravaged by war: in Jakupovic the country concerned was Bosnia. However, the adjudicator plainly took account of the situation in Kosovo and its recent history. He did not assume that the country was now entirely free of problems.

23. In the passage from the judgment of Collins J in the Lekstaka case it will be noted that he appeared at one point to set some store by the fact that the appellant would have dim prospects of succeeding in an application made from abroad for entry clearance to return to the UK. His reasoning appears to have been, not so much that the appellant would have lacked the potential option of applying for entry clearance (e.g. as a family visitor or as a

student, or, if his circumstances were to worsen, as a dependant relative of his uncle and aunt); rather it was because of the practical consideration that the appellant would not have the financial means. In any event, it has now been clarified by the Court of Appeal in SB, echoing very much the opinion of Brown LJ in Ekinci [2003] EWCA Civ 765, that the question of good or bad prospects of success in an entry clearance application is not to be taken into account as part of the Article 8 balancing exercise in expulsion cases. At [21]-[27] Waller LJ stated:

> "21. On this second point, we consider that Ms Greaney was realistic to state, as she did in her skeleton argument, that "whether or not the applicant would satisfy the requirements for entry clearance was not a matter which the [Tribunal] ought to have taken into account". Although there are arguments (and first instance decisions) which support the opposite view, that statement seems to be right as a matter of principle, in terms of fairness and good practice, and in the light of authority.
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> 22. So far as principle is concerned, the issue of whether the applicant satisfied the requirements of paragraph 246 of the Immigration Rules would be for an entry clearance officer in Bangladesh to determine, if and when an application under that paragraph is made. In the absence of a requirement to that effect, it is not an appropriate issue for determination, when no such application has been made, by a tribunal deciding a different question, at a different time, in a different country, and in different circumstances. It would also seem somewhat paradoxical if the stronger an appellant's perceived case for entry clearance under the Immigration Rules the more likely he or she is to be removed. Yet, subject to the first point mentioned in paragraph [20] above, on the basis of the reasoning of the Tribunal in this case, that would be the inevitable consequence.
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> 23. As to practicality, it would be unfortunate, in terms of time effort and expense, if a tribunal, when deciding whether a claim for leave to remain was truly exceptional, had to consider, almost as a matter of course, how likely an appellant, if removed from the United Kingdom, would be to succeed on a subsequent putative application for entry clearance to come back to this country. Yet, as we see it, such an exercise would have to be carried out in many, possibly most, appeals of the present type, if that issue was potentially relevant. And, if such an exercise is carried out, it is hard to see how a tribunal is to decide the weight or effect of such a factor if it decides that the prospects of success of such an application to enter are debatable or speculative.
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> 24. There is also a real risk of unfairness to an appellant if such a factor is taken into account. Thus, the views expressed in paragraphs [66] and [67] by the Tribunal in this case may turn out to be wrong, either because an entry clearance officer takes a different view of the facts or the law, or because the Immigration Rules change, or because the facts change.
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> 25. There are decisions of this court which appear to us to establish that an appellant should not be able to resist removal on the ground that he or she would have a very poor prospect of coming back pursuant to an application for entry clearance. We have in mind *Ekinci v Secretary of State for the Home Department* [2003] EWCA Civ 765, at paragraphs [16] and [17], and *Chikwamba v Secretary of State for the Home Department* [2005] EWCA Civ 1779, at paragraphs [42] to [46]. (See also *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840 at paragraphs [25] and [26], on a slightly different, but similar, point). The "bizarre and unsatisfactory result" of an appellant being more likely to resist removal the weaker his future putative case for entry clearance was a strong factor in the reasoning (see paragraph [17] in *Ekinci*, quoted in paragraph [45] in *Chikwamba*). As mentioned in paragraph [37] above, the converse applies here.
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> 26. We accept that the question of whether an appellant's circumstances are truly exceptional in an Article 8 case can fairly be said to be affected by the perceived strength or weakness of

her prospects of getting back here if removed. That certainly appears to have been part of the thinking of Jackson J in *R v Secretary of State for the Home Department ex p Hashim* (unreported, 21 January 2000) and Collins J in *Lekstaka* ... [2005] EWHC 745 (Admin).

27. However, we consider that the arguments the other way are stronger. It is not as if there is any logical or practical impediment to excluding from a tribunal's consideration the prospects of a successful putative future entry clearance application, in a case such as this. *It merely involves limiting the scope of the inquiry as to whether the appellant's circumstances are truly exceptional, and limiting it in a way which can fairly be said to be justified for the reasons we have mentioned.* In any event, there are the decisions of this court to which we have referred. In that connection, Hashim was disapproved on this point in paragraph [26] of Mahmood, and *the observation of Collins J, relied on by the Tribunal here, was something of a throw-away point (as discussed in paragraph [36] of his judgment), which does not appear to us to have been essential to his decision*". [emphasis added]

24. Indeed it may be thought that Collins J's observations (and there are other Tribunal cases which have ventured comments of a similar sort) illustrate very well the reason why, as SB has confirmed, they cannot form any operative part of the Article 8 balancing exercise: such considerations really depend far too much on speculation and premature evaluation of individual circumstances.

25. It is not to be thought, however, that SB purports to say that it is wrong to take into account the *existence* of an option of applying for entry clearance. As Mahmood and Ekinci establish, if such an option exists, then removal will not be disproportionate unless there are exceptional circumstances which excuse a person from being required to pursue it and in this way take a place in the queue. What is disapproved in SB (echoing Ekinci) is evaluating that option's *prospects of success.*

26. However, despite having rejected several of Mr McLoughlin's contentions and having discounted as a factor of any relevance the appellant's prospects of applying from abroad for entry clearance, we have concluded that he is right to identify two respects which taken together give rise to a material error of law. These relate to: (1) the adjudicator's failure to take into account the fact of Home Office delay and the impact that had on the appellant's immigration status; and (2) his related failure to take into account the significance of the fact that the Home Office had chosen not to consider the appellant's case at an earlier stage on the basis that he was in fact a dependent son.

27. In relation to the issue of Home Office delay, it is plain that the adjudicator wholly failed to treat the factor of a delay of some 3 years in the processing of the appellant's asylum claim as a relevant factor. Nevertheless since Mr Singh has urged us not to treat this error of law as a material one, we need to examine it rather more closely.

Relevant principles of case law relating to delay

28. In analysing the significance of the delay factor in an expulsion case such as this, it is important to first bear in mind the recent clarification of the significance of delay in the context of Article 8 given by the Court of Appeal in HB (Ethiopia) [2006] EWCA Civ 1713. Buxton LJ sets out the relevant principles as follows:

"The law in relation to delay: a summary

24. I draw the following conclusions from the authorities, binding on us, discussed above.

(i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within Article 8(1). That however is a question of fact, and to be treated as such.

(ii) The application to an Article 8 case of immigration policy will usually suffice without more to meet the requirements of Article 8(2) [Razgar]. Cases where the demands of immigration policy are not conclusive will be truly exceptional [Huang].

(iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in Shala and Akaeke); and persons who have no such right.

(iv) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [Akaeke], to enforce those procedural rules [Shala; Akaeke].

(v) Where the applicant has no potential rights under the specifically immigration law, and therefore has to rely on his rights under Article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under Article 8(2), but it must have very substantial effects if it is to influence the outcome [Strbac at paragraph 25].

(vii) And further, it is not clear that the court in Strbac thought that the failure to obtain ELR on asylum grounds because of failure to make a timely decision could *ever* be relevant to a decision on the substance, as opposed to the procedure, of a subsequent Article 8 claim. Certainly, there is no reason in logic why that fact alone should affect the Article 8 claim. On this dilemma, see further paragraph 8 above.

(viii) Arguments based on the breakdown of immigration control or of failure to apply the system properly are likely only to be of relevance if the system in question is that which the Secretary of State seeks to rely on in the present proceedings: for instance where a procedural rule of the system is sought to be enforced against the applicant [Akaeke]. The same arguments do not follow where appeal is made in Article 8 proceedings to earlier failures in operating the asylum system.

(ix) Decisions on proportionality made by tribunals should not, in the absence of errors of principle, be interfered with by an appellate court [Akaeke]."

29. This guidance appears to us to remain correct, except insofar as it appears to rely on the test of "truly exceptional" as being a legal one: see (ii). If, in order to give effect to Huang [2007] UKHL 11, the following words are added to the beginning of the last sentence of (ii) above, "There is an expectation that...", there can be no quarrel with it.

30. The significance of delay as a factor when coupled with failure to grant a person limited leave to remain under a policy has been further analysed by the Court of Appeal in the recent case of AA (Afghanistan). At [21]- [25] Keene LJ stated:

21. Mr Gill contends that the appellant has been denied the advantage of an in-country right of appeal on an application to vary leave and is in a more precarious position as a result. This is not a mere technicality. It means that the appellant would have had legal rights available to him which he has now lost. Moreover, there was some change in his circumstances, because there was evidence put before the AIT that in June 2005 he became engaged to a British national, and this new factor and any other changes could have been put forward during such an appeal process.

22. I recognize the importance to be attached to the loss of the potential right to an in-country appeal against any refusal of variation of leave to remain. It is true that the chances of such an appeal eventually meeting with success may have been slim: on this I see the force of the points made by Mr Waite about the substantive merits of such an appeal. Nonetheless, it is to be borne in mind that such an appeal process would have afforded the applicant the advantage of an independent judicial consideration of those merits as they stood at the time. That is a significant advantage when compared with the arguments which could be put forward on a judicial review of a decision by the Secretary of State that no new asylum or human rights claim had been advanced. The appellant has lost that advantage because of the errors of law by the adjudicator and the AIT.

23. He cannot, of course, now be restored to the position he would have been in, had he been granted discretionary leave to remain until his 18th birthday. Mr Waite is right to emphasise that. But the loss which the appellant has suffered is a consideration which the Secretary of State should consider in the exercise of his discretion as to whether the appellant should now be granted any further leave to remain and, if so, for how long.

24. The same seems to me to be true of another disbenefit suffered by the appellant as a result of the errors of law. In written submissions accepted by the court after the close of oral argument, the intervener has made the point that if the appellant had enjoyed discretionary leave to remain until his 18 birthday, any application by him made before that leave expired to extend it would have resulted in an automatic extension of leave until the application (and any consequential appeal) had been decided or withdrawn. That is the consequence of section 3(C) of the Immigration Act 1971. Moreover, while lawfully in this country because of such an automatic extension of leave, he would have been entitled to work and to obtain various forms of assistance under the Children Act 1989. Neither of those benefits is available to an overstayer.

25. Legally the propositions seem to me to be sound. Once again, the appellant cannot now obtain these benefits as of right: as is said on behalf of the Secretary of State, this court cannot put the appellant into the position in which he would have been, had discretionary leave been granted. But, again, there can be no doubt that he has suffered a disbenefit as a result of the legal errors made in this case, and that is something which the Secretary of State ought now to take into account. I accept that the conferring of the benefits relied on by the intervener (and adopted on behalf of the appellant by Mr Gill) may not be the purpose of a grant of discretionary leave - in that Mr Waite seems to be right. But such a grant nonetheless has those potential consequences and they cannot be ignored."

31. Whilst Carnwath LJ did not agree that the "purely procedural advantage" of being able to make a further appeal was a material factor, he agreed with Keene LJ that it could be, if there were practical advantages accruing to AA during his minority and the possibility of prolonging them after he had become an adult. He stated at [49]:

"The further submissions of the Medical Foundation, as intervener, have provided examples of how the grant of exceptional leave would have carried with it practical advantages during the claimant's minority, and the possibility of prolonging them after he had become an adult.

> The other members of the court are, I understand, satisfied that these points are sufficient to raise at least an arguable case that the claimant has lost benefits of real substance, and that the loss of those possible benefits is a matter which could be material to the Secretary of State's decision whether to grant exceptional leave. Although I do not feel confident that we have been able to examine the basis of those submissions in sufficient detail, I do not propose to dissent from that conclusion."

32. At [60] Waller LJ agreeing with Keene LJ stated that "the loss of such potential advantages (procedural or substantive) is a factor which should be taken into account by the Secretary of State".

33. In addition to HB (Ethiopia) and AA(Afghanistan) there has also been recent guidance in SB (Bangladesh) dealing in part with the issue of delay in the context of "near misses" under immigration rules or policies. It is convenient, however, if we come to that later on. How does the above guidance apply to the appellant's case?

34. We find it a little odd to begin with that Mr McLoughlin should set so much store by the delay point, when it was effectively abandoned in the skeleton arguments prepared by the appellant's counsel who argued the case at the judicial review hearing before Collins J, but, since his arguments are supported by case law principles, we cannot reject them for that reason.

35. The crux of Mr McLoughlin's argument about delay is that if the Home Office had got around to processing his asylum application earlier the appellant would have been granted exceptional leave the remain, at least until his 18th birthday, and that this would have enabled him to gain the benefit of having limited leave to remain and to take employment. In support of this argument he drew our attention to the existence at the relevant time of a Home Office policy to grant exceptional leave to remain to minors until their 18th birthday unless the Secretary of State was satisfied that adequate reception and care facilities were available in the country of origin (since April 2003 this has continued but now in the form of a policy for granting Discretionary Leave to Remain (DL): see AA (Afghanistan) [14]).

36. Qualifications need to be made to the scope of the argument raised here. In the first place we would observe that Mr McLoughlin has rightly not suggested that if this particular appellant's asylum claim had been processed earlier he would have been granted asylum. The appellant's asylum claim was always based on fear of Serbian repression. By the time he made his application for asylum (9 November 1999) the Milosevic regime had already fallen. The appellant's withdrawal before the adjudicator of his asylum grounds of appeal was clear recognition of this (pre-arrival) material change of circumstances in Kosovo.

37. Secondly, the fact that the appellant's asylum claim was not processed for some three years was not, on the evidence, wholly due to simple neglect on the part of the Secretary of State. It is known that the period running from when the appellant arrived (November 1999) until when he turned 18 (May 2001) coincided with one during which the Home Office was having to deal with an "unprecedented rise in the number of asylum seeking unaccompanied minors" (Rudi [71]). Further, in Ajanku v SSHD EWHC 2515 Admin, a delay of 3 years 7 months on a claim made by an unaccompanied minor in 1997 was held not to be so egregious as to be in itself unlawful especially as the decision had not been chased (see also Ouseley J's reference to this case in Rudi [71]).

38. Thirdly, so far as any suggestion of detriment or (to use the phraseology of HB (Ethiopia) paragraph 22(v)) "substantial effects" is concerned, the only effect identified by Mr McLoughlin (beyond the mere fact that the appellant would have had limited leave to remain until he was 18) was the fact that he was thereby denied the right to work. Mr Singh has suggested that at the relevant time asylum claimants were not prohibited from working, but was unable to confirm that. But whether or not that was the case, this appellant's Article 8 claim has throughout been based on his being a de facto son of an uncle and aunt who have been supporting him so he could pursue his education and studies. He has never asserted that he wished to become economically independent of his uncle and aunt even before he reached eighteen. In addition, by virtue of the good care he received from his uncle and aunt, the appellant was plainly not in need of assistance under the Children Act.

39. Even if the effects on this particular appellant's situation were not substantial, it remains necessary to attach some weight to the fact that despite having made an asylum claim in 1999, the Home Office never considered him under its policy of granting ELR to unaccompanied minors which would (as Mr Singh conceded) have resulted in him been granted ELR until his 18th birthday in May 2001. Furthermore, we see no force in Mr Singh's contention that the delay can be partly explained by a change of Home Office policy in February 2002 resulting in no interview of minors until they turned 18. By that date the appellant had already turned 18 and indeed was nearly 19.

40. We do not see that anything said by the Court of Appeal in AA (Afghanistan) establishes or seeks to establish that loss of the potential right to an in-country appeal against any refusal of variation of leave to remain should be regarded as a factor of either decisive or any great significance except in cases where some practical disadvantage or disbenefit can be demonstrated (such as the loss of the ability to take work or receive assistance under the Children Act 1989). Nevertheless even if the loss of the potential right to an in-country appeal is the only factor arising in a particular case, that is still a relevant consideration to be weighed in the balance.

41. The circumstances of the appellant in AA (Afghanistan) are not on all fours with this appellant. By virtue of the fact that the appellant in this appeal lived with his uncle's family and whilst a minor was pursuing education, there has been no suggestion that he wanted to work and there was no need in his case to consider assistance under the Children Act 1989. Hence, if the appellant were solely or primarily relying upon the factor of delay and/or the potential loss of an in-country right of appeal on an application to vary leave, we would not have seen the failure of the adjudicator to take it into account as amounting to a material error of law, especially since in his case neither the loss of the potential right to work or potential assistance under the Children Act was salient.

42. However, the issue of delay in his case needs to be considered in combination with others. This appellant, unlike AA, arrived here having effectively been orphaned and has since formed close family ties in the United Kingdom; and he was not considered as to whether he stood to benefit from the Home Office policy of granting ELR to minors. Another distinguishing factor of particular significance in this case relates to the appellant's "near-misses" under the Immigration Rules and under Home Office policies.

43. When turning to examine the adjudicator's alleged failure to consider the appellant's situation under immigration rules and policies which could have been applied to him analogously, we must be wary of spotting fault where there was none. To the extent that Mr

McLoughlin sought to argue that the adjudicator overlooked the fact that the appellant's relationship with his uncle was analogous to that of father and son, we do not accept that. The adjudicator noted that the appellant's aunt treated him as her own son (see paragraph 20) and his finding that family life existed between the appellant and his uncle and aunt implicitly recognised this. Equally, it is perfectly clear that the adjudicator fully took into account that the appellant was sixteen when he came to the UK and had effectively lost his own family in Kosovo through the death of his father and the disappearance of his mother: see paragraph 35. If there is fault on the part of the adjudicator it is not in his apprehension of the facts concerning the appellant's circumstances, but in his overlooking of the relevant policy dimensions. We have already seen that he failed to consider a policy which was directly applicable to the appellant (the ELR policy relating to unaccompanied minors). Here we are looking at his alleged failure to consider immigration rules and/or policies which analogously impacted on the appellant.

Relevant principles of case law on "near-misses"

44. Before proceeding further it will be helpful to set out the main propositions regarding near-misses that can be extracted from case law. It is apparent from higher court decisions, SB in particular, that there have been cases that have been taken by practitioners to assert opposing positions. In particular the case of R (Shkembi) v SSHD [2005] EWCA Civ 1592 and that of Mongoto v SSHD [2005] EWCA Civ 751 have been contrasted. In the former it was held in effect that a policy which did not strictly apply could supply through its rationale an exceptional case for an immigration judge to consider on appeal. In the latter it was held, in relation to the Family Exercise policy, that where there was a lawful policy to assist limited categories of entrants, it would be quite wrong for the courts to build expectations approaching enforceable rights for the benefit of those to whom the policy did not apply. In Rudi Ouselely J appeared to align himself with the Mongoto approach, stating at [79]:

> "An Immigration Judge would have to approach the Family Exercise on the footing that the Claimant fell outside it and that its scope was lawful. Much of the rationale could apply to many whose lives had developed over the prolonged periods for which they remain in this country either without a decision or before removal action. But the approach in *Mongoto* to those who fall outside the scope of a particular policy to my mind precludes an Immigration Judge in effect expanding it to cover near misses or those to whom aspects of the rationale could apply. I accept that there may be cases in which the rationale for a policy may inform the judge of the significance of a particular point; there may be lacunae, but that is very different from treating a policy as the basis for extension by analogy or comparison. That is not what *Shkembi* decided. There is not a near miss penumbra around every policy providing scope for its extension in practice to that which it did not cover, and this case is not a near miss but wholly outside the Exercise. The rationale for the exercise does not apply to the Claimant, although some of the points made about its purpose could apply to any who have stayed for a while in this country after their appeals on all grounds have been dismissed."

45. In SB Waller LJ stated:

> "30. In paragraph [64], the Tribunal first said that, applying the approach of Collins J in *Lekstaka*, the fact that the appellant "only just failed to qualify for admission" was a fact to be counted in her favour. They were right to take that view. We agree with the view expressed by Collins J in *Lekstaka* in paragraph 38 that:

> "... one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter."

That seems to us to be the right approach. As Simon Brown LJ said in *Ekinci* at paragraph 16:

> "Even if strictly he fails to qualify so that the ECO would be prohibited from granting leave to enter, given the obvious Article 8 dimension to the case the ECO would refer the application to an Immigration Officer who undoubtedly has a discretion to admit someone outside the Rules. And if entry were to be refused at that stage, then indeed a s. 59 right of appeal would certainly arise in which, by virtue of s. 65(3), (4) and (5) the adjudicator would have jurisdiction to consider the appellant's human rights."

31. The ultimate test is, of course, that set out in paragraph 59 of the judgment of the Court given by Laws L.J. in *Huang...*":

46. It seems to us that the above cases are not in conflict. (The reliance at [31] of SB on the test of truly exceptional circumstances, cannot survive Huang [2007] UKHL 11, but we do not see that this makes any substantive difference to the guidance given by SB in any other respect: we are fortified in that view by what Carnwath LJ states at [16] of AG (Eritrea)). None of them is authority for the proposition that the immigration rules or policies can be rewritten by judges. Integral to each of them is the distinction between (1) cases in which the rationale for a rule or policy applies fully to the case in question although the rule or policy does not technically cover it; and (2) cases in which the rationale for such a rule or policy does not apply or applies only loosely. Even if a case comes within (1) all three higher court decisions recognise that at most a "near miss" is a factor which has to be taken into account. Just because a case comes within (1) does not mean that that a decision amounts to a disproportionate interference with legitimate public ends. (If we are wrong to consider that Ouseley J's reasoning can be reconciled with Court of Appeal authority, then, of course, the latter must prevail, but we see nothing said in SB or any other case which takes matters further than Ouseley J envisages in Rudi).

47. Whilst dealing with case law we should make clear our view about the continuing value of the recent reported Tribunal case of TK(Immigration Rules-policy-Article 8) Jamaica [2007] UKAIT 00025. Although the reliance placed by the Tribunal in TK on the "truly exceptional circumstances" test has since been shown by Huang [2007] UKHL 11 to be wrong, its guidance on "near-misses" remains valid. Even when an individual's circumstances fall squarely within the rationale of a relevant immigration rule or policy and so accord with its "spirit" albeit not its "letter", a "near miss" does not of itself mean that an expulsion decision constitutes a disproportionate interference with an appellant's right to respect for private or family life.

48. The distinction drawn in paragraph 46 above has importance in the appellant's case since the Immigration Rules give effect to the purpose of family unity by providing, inter alia, for the admission for settlement of children of parents who are present and settled in the United Kingdom (paragraphs 297-298 in particular) and the only really problematic (see below paragraph 48) requirement which the appellant failed to meet under these provisions and under policy, was being a dependent nephew rather than a dependent son. Yet on the facts it was accepted by all, including the adjudicator, that the appellant enjoyed family life analogous to that of a natural son. We reiterate yet again: the uncle had become

a father to a boy who was effectively an orphan. That we take to be the reasoning which lay behind the comment by Waller LJ at [30] of SB:

> "We agree with the view expressed by Collins J in *Lekstaka* in paragraph 38 that:
>
> > "... one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter."
>
> That seems to us to be the right approach."

49. Given that we see the factor of "near-misses" to be of some significance in this case, it is important we be more precise as to how we see the appellant stood to benefit from the Immigration Rules and policies if they had been applied to his case analogously. We do not mean to assert, in relation to the Immigration Rules, that he would have been entitled to indefinite leave to remain under the Rules relating to children on arrival (paragraph 297) or entitled to limited leave to remain under Rules relating to refugee children (paragraph 352D) on arrival. His uncle and aunt were present and settled in the United Kingdom but when he arrived in the UK he was not already their de facto son, as it was not known at that stage whether his mother and sisters would be located in Kosovo or elsewhere. As we understand it, his uncle and aunt only came to stand in loco parentis for his parents after he arrived in the UK: the close tie between them, akin to natural parents-son, was not pre-existing. Even accepting (as seems evident) that it developed quickly, it was not there at the outset (the appellant had not lived with his uncle and aunt in Kosovo, although they were close neighbours). Thus it cannot be said that when he arrived in the UK he was "accompanying or joining" parents. Nor for similar reasons could he have met the requirement of paragraph 352D (iv) that he was "part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum". Further, as someone in the UK, he would have been required by the relevant after-entry Immigration Rules for under-18 children (paragraph 298) to hold a valid entry clearance. (So far as paragraph 352D is concerned, however, paragraph 352E specifically omits the entry clearance requirement as one to be met when considering "[l]imited leave to remain in the United Kingdom as the child of a refugee..."). Nevertheless, so far as we understand it, had the Home Office accepted he was a de facto son (once he had settled in with his uncle and aunt) his application for leave to remain would not have been refused under paragraph 298 or 352D solely on the basis of his lack of a valid entry clearance or failure to have been part of the family of a person granted asylum prior to arrival in the UK. To that extent, but to that extent only, Collins J is right to say that he missed out on a potential benefit under the Immigration Rules.

50. As regards the "One-off exercise" policy, once again, whilst the appellant did not come within its terms, that was only because of the fact that the appellant was not the natural son of his uncle and aunt. It was not because his relationship to these two lacked substance. It is difficult to see an objective justification for treating his case differently simply because he was not a son de jure. Further the appellant, having arrived in the United Kingdom prior to 2 October 2000 was someone who would in this way have come within the terms of the policy in its original form; he would not have needed to rely on its extension over time to other categories of post-2 October arrivals.

51. When considering the significance of a "near miss" it will always be imperative to examine the surrounding circumstances. Is the underlying purpose of the rule or policy one which can be seen as covering the individual by analogy? How closely analogous are

the appellant's circumstances to those covered by the rule or policy? Is there an objective justification for a like case not being treated alike? Was there anything done by the appellant or those representing him to try and alert the Home Office to the relevance of an analogous rule or policy? These are some obvious questions which may arise. In the appellant's case we attach particular significance to the fact that at the time when relevant immigration rules and policies might have been seen to cover closely his situation by analogy, he was a minor who had made a claim for asylum on arrival and the action of his uncle and aunt in establishing and deepening family ties was one which was clearly in the best interests of the child, a consideration which United Kingdom legislation treats as a primary one: see AA (Afghanistan). Paragraph 351 of the Immigration Rules states that "[c]lose attention should be given to the welfare of the child at all times". The appellant's was not a situation where the family members concerned can be criticised for developing family ties at a time when it was known an appellant's immigration status was precarious.

52. From the above it will be clear that there were two relevant factors which the adjudicator failed to take into account when considering whether the decision appealed against represented a disproportionate interference with the appellant's right to respect for private and family life. The first was the factor of three years delay and its consequence that the appellant did not have an existent policy governing ELR unaccompanied minors applied to his benefit; this did not of itself to amount to a weighty factor. The other factor was of course that the appellant, on the adjudicator's findings of fact, was a de facto son and so there were provisions under the Immigration Rules and under Home Office policies which analogously (albeit not wholly so) applied to him. Taken together and viewed in the broader context of the fact that the appellant had come to the UK as an unaccompanied minor aged 16 having effectively lost his own mother and father, we consider that the adjudicator's failure to treat as significant Home Office inaction on the appellant's case gave rise to a material error of law.

53. Having decided that the adjudicator materially erred in law we considered whether we were in a position to decide the case for ourselves. We have decided that we are. Both parties agreed that we were in possession of all the relevant facts and materials and that no useful purpose would be served by adjourning it for a second-stage reconsideration. The only changes since the date of hearing before the adjudicator are ones which are not in dispute: namely that the appellant has now been in the UK over 7 years and that he continues to live with his uncle and aunt as part of their family, has not formed an independent life and is still pursuing studies.

54. We remind ourselves at this point that whilst existing case law establishes that delay is a relevant factor and that, in the case of a person who would have benefited from some kind of leave previously (had an existing policy being timeously applied to him), there may be some "disbenefit" (procedural and/or substantive), whether that is a factor which should carry any significant weight will depend on the individual circumstances. Similarly, the mere fact that a person appears to have missed out on the benefit of an existing immigration rule or concessionary policy on a narrow basis will not assist unless the appellant's substantive situation falls squarely within the rationale of the policy. One of the reasons why careful consideration of a person's situation under past immigration rules and policies is of particular importance in conducting the Article 8 balancing exercise, is that failure to apply the benefits of the rule or policy is a factor reducing the (normally preponderant) weight to be attached to the interests of the state in the maintenance of effective immigration control: see PO (Interest of the state-Article 8) Nigeria [2006] UKAIT 00087. A further point of importance is that although once a person has turned 18

and so can no longer benefit from immigration rules or policies relating to minors, past failures to consider him or her under such rules or policies can create significant "disbenefits", although here too much will depend on the particular circumstances of the case. Even so, none of these factors can in themselves establish that a decision to remove constitutes a disproportionate interference with an appellant's right to respect for private and family life. The primary focus when considering the proportionality of the interference has to be on the overall features (procedural and substantive) of a person's case.

55. It seems to us that considered cumulatively, the appellant's very unusual immigration history and the surrounding circumstances are such that the decision to remove him amounts to a disproportionate interference with his right to respect for private and family life. When he fled Kosovo he had a well-founded fear of persecution. At a time in his life when he was in an extremely vulnerable position, arriving in the United Kingdom having lost his family, his uncle and aunt took responsibility for his care and treated him as a dependent son. If the Home Office saw it as being in the best interests of the child to make a prompt decision on his asylum claim, they should have done so. Although he is now an adult he has continued to live with them as part of their family and they have sought to assist him in pursuing studies. For at least as long as the appellant was still a minor, his uncle and aunt cannot be criticised in any way for seeking to strengthen his new family life relationships in the United Kingdom and thus to ensure his welfare. Had a timeous decision been made on his asylum claim he would have received ELR until his 18th birthday. In his case that would not have created any practical advantages but it would at least have enabled him to apply, for so long as that leave was current, for variation of leave to remain. Of greater importance, had the Secretary of State considered his case timeously, consideration would have had to be given to his position under existing immigration rules (relating to settlement for children and limited leave for refugee children) and policies which analogously covered his situation. Although the appellant's current circumstances in terms of his physical and mental well-being are plainly not truly exceptional, the disruption that would be caused by him being required to return to Kosovo, coupled with the past denial to him of benefits (particularly under analogous immigration rules and policies) makes the decision a disproportionate interference with his right to respect for private and family life. Even though considered in isolation it could be said that there were no insurmountable obstacles to the appellant's uncle and his family accompanying him to Kosovo, with the elapse of time – now over 7 years - both this family and the appellant have become embedded in the United Kingdom in a way which would not have happened had more timeous consideration been given to the appellant's asylum claim. The failure to consider the appellant's circumstances under analogous immigration rules and policies significantly reduced the weight to be attached to the normally preponderant interest of the state in the maintenance of effective immigration control.

56. As already noted, the determination in this case was promulgated before 9 June 2003 and, as a result, our jurisdiction is not confined to that of error of law. It is necessary to ask therefore whether exercising that wider jurisdiction would justify a different decision on this appeal. That requires us to ask whether the decision of the adjudicator was sustainable: see Nationality, Immigration and Asylum Act 2002 (Commencement No. 4) (Amendment) (No. 2) Order 2003, E [2004] EWCA Civ [19] and CA [2004] EWCA Civ 1165 910], [11]. Since we have found that the adjudicator materially erred in law, it must follow that his decision is also unsustainable.

57. For the above reasons, the adjudicator materially erred in law and also reached an unsustainable decision. The decision we substitute is to allow the appellant's appeal on Article 8 grounds.

58. On the basis of the evidence before us in this case, we are satisfied that the appellant's circumstances are presently such that to remove him amounts to a disproportionate interference with his right to respect for private and family life.

Signed Date: 14 May 2007
Senior Immigration Judge Storey