Case No: C4/2004/2454

Neutral Citation Number: [2005] EWCA Civ 744
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MR JUSTICE DAVIS

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 16 June 2005

Before :

LORD JUSTICE PILL
LORD JUSTICE MAY
and
LORD JUSTICE DYSON

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
THE QUEEN ON THE APPLICATION OF BAKHTEAR RASHID	**Respondent**

- -

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

- -

MR R TAM & MR S GRODZINKSI (instructed by Treasury Solicitors) for the Appellants
MR R SINGH QC & MR R HUSAIN (instructed by The Refugee Legal Centre) for the Respondent

- -

Judgment

LORD JUSTICE PILL:

1. The Secretary of State for the Home Department, ("the Secretary of State") appeals against a judgment of Davis J given on 22 October 2004 whereby, upon judicial review, he quashed decisions of the Secretary of State refusing refugee status to Mr Bakhtear Rashid ("the claimant"). The judge also made a declaration that the claimant was entitled to the grant of refugee status and to indefinite leave to remain in the United Kingdom. The claimant's application for asylum had been refused by the Secretary of State on 11 December 2001 and the decision had been upheld by an adjudicator on 7 June 2002. Permission to appeal to the Immigration Appeal Tribunal ("IAT") had been refused on 12 July 2002.

2. The claimant is an Iraqi Kurd who sought asylum in the United Kingdom on 4 December 2001, relying on Article 1A(2) of the Refugee Convention of 1951 ("the Convention"). The successful claim for judicial review was made on the basis that, if at any time between his arrival and March 2003 the asylum policy which ought to have been applied had been applied, the claimant would have been granted asylum. When, in early March 2003, the claimant's advisers became aware of the relevant policy they requested a reconsideration of the application for asylum.

3. By the time the decision on the reconsideration was taken, the situation in Iraq had changed considerably as a result of the invasion by coalition forces and the removal of Saddam Hussein's regime. On 26 November 2003, the claimant's representatives were told that "the Secretary of State has not yet reconsidered your client's case in the light of M and A". In a decision letter dated 16 January 2004 asylum was refused upon what is accepted to be a defensible application of the post-war asylum policy. The judge described the question in the case as being, in essence, whether the Secretary of State's decision was "invalid on grounds of unfairness". The judge had in mind unfairness in the sense the word is used in authorities to which it will be necessary to refer.

4. The relevant policy was described by the Secretary of State in the letter of 16 January 2004:

> "…From October 2000, there was in existence within the Home Office a general policy that internal relocation to the former KAZ [Kurdish Autonomous Zone, sometimes described as 'Area'] from government controlled Iraq would not be advanced as a reason to refuse a claim for refugee status. This was based on the stance of the Kurdish authorities of not admitting to their territory those who were not previously resident in that area because of a lack of infrastructure and resources. "

5. The letter continued:

> "However the general policy described was not consistently applied, and caseworkers and presenting officers sometimes argued that internal relocation to the former KAZ for those from government controlled Iraq was a reasonable option if they had close ties to the area."

In the course of his submissions on behalf of the Secretary of State, Mr Tam said that enquiries had been made internally but that the Department had "never got to the bottom of how some caseworkers knew [of the policy] and some did not".

6. Having considered the current situation in Iraq, the letter went on to state that "the original decision to refuse asylum on 11 December 2001 was sound and is maintained". The Secretary of State is not:

> "..now compelled to ignore the current situation in Iraq and the non-existence of any well founded fear on the part of your client in any part of Iraq. To do so would run contrary to the principle established in *Ravichandran* referred to above. It cannot be characterised as an abuse of the Home Office's power (notwithstanding the existence of the earlier policy) to make its current decision as to your client's entitlement to refugee status, on the basis of the current situation in Iraq."

The principle in *Ravichandran* [1996] Imm A R 97 is that in asylum appeals, the position is to be considered by reference to the circumstances at the date of the hearing in question. It was held in the House of Lords in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 that, under Article 1 A(2) of the Convention, a claimant had to show a current well-founded fear of persecution for a Convention reason and an "historic fear" was not sufficient.

7. In justifying the decision, the letter goes on to state that the claimant was not "even aware of, let alone relied upon, the existence of the policy". There was no legitimate expectation that he must now be granted refugee status. It was also suggested that, in this particular case, relocation to the KAZ (Kurdish Autonimous Zone, sometimes described as 'Area') was appropriate in view of the fact that the claimant's sisters lived there. That point was subsequently abandoned by the Secretary of State.

8. In a letter dated 5 August 2004, the Secretary of State recognised:

> "(a) that there was a failure to follow the terms of the previous (but now redundant) policy that would, while Saddam Hussein's regime was still in power, have resulted in the grant of refugee status to Mr Rashid, (b) that prior to the military intervention to remove that regime, Mr M and Mr A were granted refugee status; (c) that it took several months to arrive at a final decision as to whether (the claimant) ought to be granted refugee status.. and (d) that during those months (the Claimant) would not have had the same rights as he would have enjoyed had he been granted refugee status."

The reference to M and to A is to two applicants whose position, in all material respects, was identical to that of the claimant. Their appeals to the Court of Appeal were due to be heard on 19 March 2003 but, shortly before the hearing, the existence of the correct policy was brought to the attention of those representing the Secretary of State in the appeals. By letter of 6 March 2003, A's legal representatives were told that the Secretary of State was not, "as a matter of policy, at the time of this case, relying on the availability of internal relocation" to the KAZ and that A would be

granted refugee status. The point which was to be argued in the appeals was a different one, whether in the words of the IAT in M (12 August 2002), the KAZ was "a state or state-like entity capable of providing protection that meets the "protection test" on the second limb of Article 1A(2) [of the Refugee Convention]." That point, submits Mr Tam, was (and still is) unresolved. If the availability of internal relocation to the KAZ was not relied on, the point did not of course arise, as the Secretary of State recognised in the cases of M and A.

9. Following a hearing lasting over two hours, at which the Secretary of State was represented by Counsel, permission to apply for judicial review had been granted to the claimant on 4 February 2003 by Harrison J. The case was ordered to be listed after the Court of Appeal hearings in M and A, the same point, the protection test, being in issue. The case was on all-fours with M and A, as recognised on behalf of the Secretary of State. On 12 March 2003, the Treasury Solicitor's representative wrote:

> "As no doubt you will have anticipated I was well aware of the developments in the cases …. in the Court of Appeal behind which this case is stacked."

It was stated that the claimant's case had "as a result of those developments, been referred back to a Senior Home Office case worker early last week for reconsideration."

10. On hearing of the grant to M and A, the claimant's advisers wrote to the Treasury Solicitor on 12 March 2003 asking for a grant of refugee status to the claimant, submitting that it would be unfair, and contrary to his legitimate expectation, to withhold refugee status having granted it to M and A. Their position, in material respects, was identical.

11. On 21 March 2003, it was announced that, because of the military action in Iraq, decision making on Iraqi nationals had been suspended as from the previous day and the suspension operated until 16 June 2003. The Secretary of State's decision was given in the letter of 16 January 2004 already mentioned. For completeness, I add that the first judicial review application had become redundant and was withdrawn. The present one was made on 24 June 2003 on the basis that the Secretary of State had failed to apply his policy to the claimant, that there had been a breach of the claimant's legitimate expectation, and conduct so unfair as to amount to an abuse of power.

12. The judge held that the decisions of the Secretary of State in the letters of 16 January 2004 and 5 August 2004 could not stand. He stated, at paragraph 45:

> "It seems to me that in the circumstances of this case, such decisions connote such a degree of unfairness as to amount to a misuse – a word I rather prefer to "abuse" – of policy as to require the intervention of the court."

Having referred to authorities, the judge added, at paragraph 65:

> "It will be clear from what I have already said that I take the view that the combination of (a) the unwarranted and

> unjustified failure on the part of the Secretary of State to apply his policy to the claimant at the time of his original asylum application when, had it been so applied, he would have been granted refugee status, and (b) the differentiation in treatment and consequent outcome accorded to Mr M and Mr A as compared to the claimant, and (c) the intervening moral detriment occasioned to the claimant, do, when all the factors are taken together, evince such a degree of unfairness as to amount to a misuse of power and to require the court's intervention."

At paragraph 69, the judge stated:

> "…I consider that the only proper decision that can be reached is to accord the claimant refugee status and the concomitant indefinite leave to remain. I am not inclined to make a mandatory order against the Secretary of State as Mr Husain has asked; but I am prepared to grant the appropriate declaratory relief for that purpose."

13. The failures in the Home Office in this case were startling and prolonged. The policy, which if applied would have led to a grant of asylum to the claimant, was in force from October 2000 until March 2003. It was in force for sixteen months following the claim for asylum in the present case. It applied when the claimant was interviewed on 7 and 8 December 2001, when his claim was refused on 11 December, when refusal was amended in a further letter of 14 May and, before the adjudicator, on 15 May 2002, where the availability of relocation to the KAZ was fully argued by the Home Office Presenting Officer. The IAT refused leave to appeal on grounds which included upholding the adjudicator's finding on internal relocation. In submissions to the IAT, both in M and in A, Presenting Officers relied on internal relocation. In obtaining leave to appeal in M (the IAT having found against the Secretary of State on the status of KAZ point), internal relocation was relied on by counsel instructed by the Secretary of State and, until late February 2003, that stance was maintained. A considerable number of people were thereby involved in relying on arguments which were contrary to the Secretary of State's policy. The error extended to instructions given to the Treasury Solicitor and to Counsel. That state of affairs is quite unexplained, though bad faith is not suggested.

14. Moreover, it then took ten months, from 12 March 2003 until 16 January 2004, for the reconsideration announced on 12 March 2003 to take place. Frequent reminders were sent on behalf of the claimant. The application for permission to apply for judicial review was adjourned from 27 November 2003, with the Secretary of State paying the costs, to allow further time for reconsideration to take place.

15. For the Secretary of State, Mr Tam accepts that the claimant should have had the advantage of the asylum policy in operation in 2001 and that he should have been granted refugee status. The decision at that time was unlawful and a court would at that time have granted relief. The position in Iraq did, however, change dramatically in March 2003. While refugee status had been refused on a false basis, the reconsideration, which rightly took place, took place at a time when there was no risk that the claimant would be persecuted in Iraq. He could not be granted refugee status

when, as is agreed, he did not satisfy the risk requirement. The timing was unfortunate for the claimant but the case is not unique in that respect, it is submitted. Decisions on asylum cases depend on the current situation in the state of origin and decisions will be different when the situation changes for the better. Delay in decision making which leads to the application being considered in the light of the changed situation cannot justify a decision based on the earlier situation, it is submitted, even if the delay resulted from administration error.

16. No promise of asylum had been given, it is submitted. This is not the usual case of legitimate expectation, it is submitted, where the unfairness to an individual of a promise not being fulfilled has to be weighed against the importance of the government's discretion to act in areas where there is a discretion. In this case the Secretary of State had to perform a fact-finding exercise and not exercise a discretion. If the claimant did not qualify, as a matter of fact, for asylum, at the time of decision in 2004, refugee status must be refused, it is submitted. The current policy was correctly applied and, because of the change in circumstances, the earlier policy avails nothing. The issue, submits Mr Tam, is as to the effect in January 2004, when the decision was taken, of the earlier unlawfulness. No principle of public law requires compensation for the past failure to afford the claimant the benefit of the earlier policy, he submits.

17. As to the delay in conducting the reconsideration, Mr Tam accepts that it was recognised, before the war, that the claimant was in the same position as M and A. It was publicly recognised at the permission application before Harrison J. Giving their cases priority, with the result that the decisions about them were taken before the war, was justified because of the imminence of the Court of Appeal hearing in those cases. The claimant's case was merely awaiting judicial review ("stacked" behind them, as the Treasury Solicitor put it) and was less urgent. Priority was justified as a matter of practical management, it is submitted. Moreover, the Secretary of State had to consider the claimant's entire case.

18. Mr Rabinder Singh QC, for the claimant, submits that the real issue in this case is abuse of power. The court should not be fixated with labels and should take an overall view. The issue is whether there was such conspicuous unfairness by the Secretary of State as to amount to an abuse of power. Bad faith is not alleged but, in terms of the consequences which should follow from the abuse, the distinction between bad faith and incompetence may not be significant. The claimant had a legitimate expectation that the correct policy would be applied in 2001 and 2002. It was not applied because of a catalogue of serious administrative errors, it is submitted.

19. Counsel submits that fairness as between applicants for asylum is an important consideration and the claimant should have been given the same treatment as the cases of M and A, with which his case was on all fours and had been linked procedurally. The combination of factors in this case results in conspicuous unfairness requiring the intervention of the court. Given the acknowledged failure of the Secretary of State to apply his own policy, the court should give relief even if the injustice is an historical injustice. The Secretary of State should not be permitted to perpetuate the consequence of his errors.

20. The concept of unfairness as an abuse of power was stated by Lord Templeman in *In re Preston* [1985] AC 835, at page 864. Lord Templeman stated:

> "The court can only intervene by judicial review to direct the Commissioners [Inland Revenue Commissioners] to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the Commissioners on performing their duties or exercising their powers an abuse of power by the Commissioners".

Lord Templeman cited the judgment of Scarman LJ in *HTV Ltd v Price Commission* [1976] ICR 170, where, at page 189, Scarman LJ stated:

> "It is a common place of modern law that such bodies [the Price Commission] must act fairly … it is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness".

21. In *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681, the Revenue refused to exercise a discretion in favour of the taxpayer. The circumstances were described in detail by Sir Thomas Bingham MR who stated that "the categories of unfairness are not closed, and precedent should act as a guide not a cage". The Master of the Rolls stated:

> "These points cumulatively persuade me that on the unique facts of this case the Revenue's argument should be rejected. On the history here, I consider that to reject Unilever's claims in reliance on the time limit, without clear and general advance notice, is so unfair as to amount to an abuse of power".

22. Simon Brown LJ, at page 693e, considered the submission that there had been a legitimate expectation and stated that Unilever could not make good the fundamental requirement for an unqualified and unambiguous representation. However, he went on to reject the arguments of the Revenue stating, at page 695a:

> "'Unfairness amounting to an abuse of power' as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in *R v ITC, ex p TSW*: 'The test in public law is fairness, not an adaptation of the law of contract or estoppel'."

23. Lord Hoffmann adopted Simon Brown LJ's expression "conspicuous unfairness" as amounting to an abuse of power in *Secretary of State for the Home Department v Zeqiri* [2002] Imm AR 296, at paragraph 44. Mr Rabinder Singh defines it as unfairness which is easy to see and "leaps up from the page."

24. In *R v Secretary of State for the Home Department ex parte Ahmed and Patel* [1998] INLR 570, Hobhouse LJ, at page 591h considered the principle of legitimate expectation stating that it is "a principle of fairness in the decision-making process". He stated that it is "a wholly objective concept and is not based upon any actual state of knowledge of individual immigrants or would-be immigrants;… however, the application of the principle must be based upon some objectively identifiable legitimate expectation as to how decisions will be made and discretions exercised."

25. In my judgment, there plainly is a legitimate expectation in a claimant for asylum that the Secretary of State will apply his policy on asylum to the claim. Whether the claimant knows of the policy is not in the present context relevant. It would be grossly unfair if the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of a policy, especially one unknown to relevant Home Office officials.

26. In *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, the decision challenged was the decision of a Health Authority to close a facility for the long-term disabled which the Authority had assured residents would be their home for life. That was a case which sat more comfortably with the conventional concept of legitimate expectation than does the present one. However, Lord Woolf MR, giving the judgment of the court, having stated that: "the doctrine of legitimate expectation has emerged as a distinct application of the doctrine of abuse of power", added at paragraph 71:

> "Legitimate expectation may play different parts in different aspects of public law. The limits to its role have yet to be finally determined by the courts … And without injury to the *Wednesbury* doctrine it may furnish a proper basis for the application of the now established concept of abuse of power".

27. The Master of the Rolls cited *Preston,Unilever* and other cases and stated, at paragraph 81: "Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine." He added, at paragraph 82, that "it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power".

28. In *R v Secretary of State for Education and Employment ex part Begbie* [2000] 1 WLR 1115, a balance had to be struck between giving effect to an expectation arising from an undertaking given by the Secretary of State in an educational context and compliance with the terms of a statute. Laws LJ recognised, at page 1129, that "abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law". Having considered the facts of the case, he stated, at page 1131E:

> "If there has been an abuse of power, I would grant appropriate relief unless an overriding public interest is shown, and none to my mind has been demonstrated. But the real question in the case is whether there has been an abuse of power at all. The government's policy was misrepresented through incompetence. It is not in truth a change of policy at all."

On the facts of that case, Laws LJ held that they did not "elevate the Secretary of State's correction of his error into an abuse of power".

29. Mr Tam submits that a generalised recourse to unfairness is insufficient to found relief. Circumstances had changed and the decision has been correctly taken by the Secretary of State in the changed circumstances. The claimant is not now entitled to refugee status. That being so, there is no principled basis on which indefinite leave to remain, which Mr Tam describes as a half-way house, can be obtained. The claimant has received the benefit of sanctuary in this country while he would have been at risk in Iraq and has no further entitlement. There is no continuing need for the benefit which should have been conferred by the decision maker.

30. Counsel accepts, by reference to *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, that detrimental reliance does not necessarily "render it unfair to thwart a legitimate expectation" (per Schiemann LJ at paragraph 31 citing, at paragraph 29, *Craig, Administrative Law,* 4th ed, at p619). Detriment in terms of loss of rights (and of income) during the period the claimant was deprived of refugee status is accepted by the Secretary of State but the real detriment is the loss is the right to remain in the United Kingdom which would have occurred but for the errors.

31. I find it difficult to understand how the failure to apply the correct policy to the claimant can have been persisted in for such a long period. Understanding is more difficult when we are told by Mr Tam that Iraq was at the material time a "top asylum country" in that there were many applicants from there. The situation there was of great public concern and I am unable to understand why a fundamental element in the asylum policy, the question of internal re-location to the KAZ, was unknown to all those who dealt with the claimant's case. No explanation has been offered save a faint suggestion that confusion, not created by the claimant, as to his place of residence in Iraq may initially have contributed to a misunderstanding. No explanatory signed statement has been submitted, as it often is when difficulties such as the present have arisen. Further, a bad point, subsequently recognised as such, was taken against the claimant's case on its own facts, namely that he had sisters in the KAZ.

32. As already noted, the errors were applied to the extent that the correct policy was not notified to the adjudicator, the IAT, counsel instructed by the Secretary of State or, until shortly before a Court of Appeal hearing, to the courts involved in the present case and those of M and A. While the gravamen of that failure is not primarily in unfairness to the claimant, it does demonstrate the gross nature of the errors as a result of which the adverse decision was taken in 2004.

33. Eventually, the correct policy emerged in the cases of M and A. The claimant's case had been "stacked" behind them. Aware as they must, or should, have been that the point involved in the three cases was identical, and of the possibility of a change of circumstances in Iraq, fairness required that the same treatment be given to the claimant. An early decision was required, given the length of time during which the asylum application had been under consideration. Mr Tam stresses the imminence of the Court of Appeal hearing as justification for giving priority to M and A. Such respect for the requirements of the court is of course admirable but the need for consequential fairness to the claimant was equally important.

34. I accept Mr Tam's submission that this is not the typical case of legitimate expectation which usually arises in the circumstances he has described. It is, as the judge recognised, and Mr Rabinder Singh rightly submits, a claim of unfairness amounting to an abuse of power, of which legitimate expectation is only one application. The abuse is based on an expectation that a general policy for dealing with asylum applications will be applied and will be applied uniformly. Serious errors of administration have resulted in conspicuous unfairness to the claimant.

35. Countervailing public interest has not been claimed (and indeed there is a public interest in those applying asylum policies being aware of the policies) save to stress the important point that the grant of refugee status depends on a current risk of persecution and is therefore taken on the basis of conditions currently prevailing in the country where the risk of persecution is alleged to exist (*Adan*).

36. I agree with the judge's conclusion that the degree of unfairness was such as to amount to an abuse of power requiring the intervention of the court. The persistence of the conduct, and lack of explanation for it, contribute to that conclusion. This was far from a single error in an obscure field. A state of affairs was permitted to continue for a long time and in relation to a country which at the time would have been expected to be in the forefront of the respondent's deliberations. I am very far from saying that administrative errors may often lead to a finding of conspicuous unfairness amounting to an abuse.

37. The court should not, in my view, make a declaration that the claimant is entitled to refugee status. That is a status conferred on the basis of criteria prescribed in an international treaty and should not be conferred if those criteria are not at the time of decision satisfied. The court should, however, having found an abuse, intervene to give such relief as it properly and appropriately can.

38. Mr Rabinder Singh has submitted, without dissent from Mr Tam, that indefinite leave to remain may be granted pursuant to the Secretary of State's residual or general power to grant leave under sections 3 and 4 of the Immigration Act 1971. (It may also be granted, under the Immigration Rules, in other circumstances.) A sample 'grant of asylum' letter has been submitted. The grant of asylum is mentioned and it is stated: "You have been granted indefinite leave to remain in the United Kingdom and this means that you are free to stay in this country permanently".

39. The court should, in my view, declare that the claimant is entitled to a grant indefinite leave to remain in the United Kingdom. That provides a remedy for the unfairness and is the appropriate response in the circumstances. It is inferior to refugee status on the present facts, Mr Rabinder Singh informs us, only in two ways. Consequential rights under the Refugee Convention are not created, a limitation, which is probably of little practical importance in the present case. Secondly, certain state benefits claimable on a grant of indefinite leave to remain are not backdated to the date of application for asylum as they are when refugee status is granted.

40. The important relevant relief in this case, as I see it, is a declaration the effect of which would be expected to be a grant by the Secretary of State of permission to remain indefinitely in the United Kingdom, and that should be made. I would not take further action to improve the claimant's financial position. Thus while I would quash the declaration that the claimant is entitled to refugee status, I would dismiss

the appeal against the rest of the judge's order. I see no need for further declarations but will hear submissions from counsel as to the form of the Order, if necessary, when judgment is handed down.

Lord Justice May:

41. I agree that, subject to the modification of the relief which Pill LJ proposes, this appeal should be dismissed for the reasons which he gives.

Lord Justice Dyson:

42. Under the Secretary of State's policy that was in force during the period between 4 December 2001 (the date of the claimant's application for asylum) and 21 March 2003 (when decision-making in relation to Iraqi nationals was suspended), the claimant was entitled to asylum. Nevertheless, his claim was rejected by the Secretary of State on 11 December 2001, and subsequently his appeal was dismissed by the adjudicator and his application for permission to appeal refused by the IAT. It was only on 6 March 2003 that the existence of the policy was revealed to those representing the claimant. The Secretary of State agreed to reconsider the claimant's case in the light of the policy. But following the cessation of hostilities in Iraq in June 2003, the policy was withdrawn. On 16 January 2004, the Secretary of State once again refused the claim for asylum.

43. It is common ground that the claimant was not entitled to asylum pursuant to the Secretary of State's post-war policy. Mr Tam submits that the decision of this court in *Ravichandran* [1996] Imm AR 97 is fatal to the claimant's case, since asylum claims are determined in the light of the circumstances prevailing at the latest stage of the decision-making process. The Refugee Convention provides asylum protection from persecution on the grounds specified in Article 1A(2). Once the risk of such persecution disappears, the need for protection ceases together with the justification for asylum. As against that, it seems unfair and unjust that the claimant should be returned to Iraq in circumstances where, if the Secretary of State had followed his own policy and/or revealed its existence to the claimant, the adjudicator or the IAT during the period December 2001-March 2003, the claimant would have been accorded full refugee status.

44. The stark question that arises on this appeal is which of the two considerations should prevail: justice and fairness which suggest the conclusion that, even if he is not now accorded full refugee status, the claimant should at least not be returned to Iraq, or the *Ravichandran* principle which suggests that he should be returned to Iraq.

45. In his valuable discussion at p 641 of the 5th edition of *Administrative Law*, Professor Craig has identified four circumstances in which problems of legitimate expectation can arise: (i) where a general policy choice which an individual has relied on has been replaced by a different policy choice; (ii) where a general policy choice has been departed from in the circumstances of a particular case; (iii) where an individual representation has been relied on by a person, which the administration seeks to resile from in the light of a shift in general policy; and (iv) where an individualised representation has been relied on, and the administration then changes its mind and makes a decision that is inconsistent with the original representation. The present case seems to me to fall into the second of these categories.

46. A useful starting point for the discussion is the statement by the Court of Appeal in *R(on the application of Bibi) v Newham LBC* [2001] EWCA Civ 607, [2002] 1 WLR 237 at [24]:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

47. The answer to the first of these questions is plainly that the Secretary of State committed himself to applying his policy during the period December 2001-March 2003. That must follow from the existence of the policy itself. For the purposes of the first question, it is immaterial that the claimant was unaware of the existence of the policy: see, for example, per Hobhouse LJ in *R v Secretary of State for the Home Department ex parte Ahmed and Patel* [1998] INLR 570, 591H.

48. It is in the second question where the real difficulty lies. As was made clear in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57], where the court considers that a lawful promise or practice has given rise to a substantive legitimate expectation, the court will in a proper case decide whether "to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power". It is for the court to decide whether the frustration of an individual's expectation is so unfair as to be a misuse of the authority's power. In performing this exercise, the court is not confined to a consideration of the rationality of the decision which is under challenge: see *Coughlan* at [74].

49. As Laws LJ said in *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115, 1130, the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases, a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large: in such cases the judges may not be in a position to adjudicate save at most on a bare *Wednesbury* basis "without themselves donning the garb of policy-maker, which they cannot wear." In other cases, where, for example, there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found.

50. The nature of the decision will, therefore, always be relevant to the question whether the frustration of an expectation is an abuse of power. The court will not only have regard to whether wide-ranging issues of policy are involved, but also whether holding the public body to its promise or policy has only limited temporal effect and whether the decision has implications for a large class of persons. The degree of unfairness is also material. That is why in *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681, Simon Brown LJ referred to "conspicuous unfairness" amounting to an abuse of power. The more extreme the unfairness, the more likely it is to be characterised as an abuse of power. If the frustration of a

legitimate expectation is made in bad faith, then it is very likely to be regarded as an abuse of power and, therefore, unlawful.

51. In the present case, to hold the Secretary of State to the policy that was in force between December 2001 and March 2003 *in relation to cases that he considered during that period* does not of itself raise any wide-ranging issues of policy. I do accept, however, that to hold him to that policy in circumstances where, at the latest stage of the decision-making process, the policy had been withdrawn would infringe the important principle established by *Ravichandran.*

52. But as against that, in my judgment it is clear that there has been conspicuous unfairness in this case. It is true that Mr Rabinder Singh QC disavowed any allegation of bad faith. He was right to do so, because there is no evidence that the failure to apply or even reveal the existence of the policy between December 2001 and March 2003 was deliberate and the result of bad faith. But it is a remarkable feature of this case that, despite repeated requests for clarification and direct instructions from the interviewing officer, the caseworker and the presenting officer who were party to the original and appellate consideration of the claimant's case as to their state of knowledge of the policy, no response has ever been provided; not even after the grant of permission to apply for judicial review, when the Secretary of State had a duty of full and frank disclosure. As Lord Walker said in *Belize Alliance of Conservation NGOs v Department of the Environment* (29 January 2004) (PC), a respondent authority owes a duty to the court to cooperate and make candid disclosure of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. This the Secretary of State has signally failed to do.

53. In the absence of any explanation, I consider that the court is entitled at the very least to infer that there has been flagrant and prolonged incompetence in this case. This is a far cry from the case of a mistake which is short-lived and the reasons for which are fully explained. The unfairness in this case has been aggravated by the fact that, as explained by Pill LJ, the claimant was not treated in the same way as M and A, with whose cases his case had been linked procedurally. Had he been so treated, he would have had the benefit of the policy and been accorded full refugee status.

54. Accordingly, the answer to the second of the three questions identified in *Bibi* is that the Secretary of State acted unlawfully in choosing to ignore his policy. In so doing, he acted with conspicuous unfairness amounting to an abuse of power.

55. As for what the court should do about it (the third question), I agree with what Pill LJ says at paras 37-40 of his judgment and having nothing to add.

56. For these reasons, which I believe are substantially the same as those of Pill LJ, I too would dismiss this appeal.