Neutral Citation Number: [2006] EWHC 526 (Admin)

Case No: CO/6595/2005
CO/6710/2005
CO/8017/2005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2006

Before :

Mr Justice Collins

- -

Between :

R(A): (H) & (AH)	Claimant
- and -	
Secretary of State for the Home Department	Defendant

Mr Raza Husain (instructed by The Refugee Legal Centre) for the Claimants
Mr Robin Tam & Mr S Grodzinski (instructed by Treasury Solicitor) for the Defendant

Hearing dates: 7 – 8 March 2006

- -

Judgment

Mr Justice COLLINS :

1. These three claims have been heard together since each raises the same question, namely what is the effect of the decision of the Court of Appeal in *R(Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744? Each claimant is an Iraqi national of Kurdish ethnicity who lived in the part of Iraq which, following the Gulf war in 1991, remained under the control of Saddam Hussein. The north of Iraq, broadly speaking, an area north of the 36th Parallel, was designated the Kurdish Autonomous Zone (KAZ) following the adoption of UN Security Council Resolution 688. Between 1992 and 1996, there was armed conflict between rival factions for control in the KAZ. By 1999 there was a degree of stability.

2. Saddam Hussein's regime was extremely repressive and there was hostility towards and discrimination against Kurds on the ground of their ethnicity. They were detained and subjected

to torture or other serious ill-treatment, whether or not they were suspected for good reason of anti-government activities or sentiments. So it was that a number came to this country and sought asylum here. The three claimants were among that number. A and AH arrived here in June 2001 and H in August 2002. Each asserted that he had been seriously ill-treated and feared that he would be persecuted on return, not only because of what had happened to him to make him leave but because, if returned having failed to establish an asylum claim, he would be persecuted on that account. Thus, even if not entitled to be regarded as a refugee by virtue of what he said had occurred in Iraq, he would, it was submitted, be a refugee sur place.

3. There were others who came to this country seeking asylum who were living in the KAZ. There were two main factions in power in the KAZ, with a third which had fewer adherents. Each was hostile to the others and that hostility spilled over into ill-treatment to those who were of a different political persuasion. One or other of the two main factions controlled their own halves of the KAZ, with the third faction having its sphere of influence between the two. Many of those coming from the KAZ were regarded as economic migrants and their claims to asylum or, after October 2000, to be allowed to remain because to return them would breach their human rights, were rejected.

4. So long as Saddam Hussein remained in control in what has been called the Government Controlled Area (GCA), it was not possible to return anyone to the KAZ since the only route which could be used was through Baghdad. For obvious reasons, this meant that any Kurdish asylum seeker was not returnable. Those from the KAZ who had their claims rejected were refused leave to enter or to remain here. By October 2000, it was believed that enforced returns to the KAZ of those who had come from the KAZ might become possible (some voluntary returns had been effected through Turkey or Jordan). It was also the view of the Home Office that, if an individual's complaint was of persecution by the main party in charge in the part of the KAZ in which he lived because of his adherence to the other main party, he could relocate in safety to the part controlled by his chosen party.

5. It might have been supposed that those who came from the GCA could relocate in safety to the KAZ so that they did not qualify for asylum. That indeed was the view of many of the case workers who dealt with such cases. However, since 1991 there was a policy not to invoke internal relocation in such claims. There were various reasons for this, not least of which was the refusal by the KAZ authorities to accept any returnees other than those who had lived in the KAZ or had families there. There was also the problem of getting them to the KAZ. That policy remained in being until early 2003 when, because of the invasion of Iraq and the removal of Saddam Hussein, the situation changed radically and most of those who thereafter sought asylum failed to establish that they needed surrogate protection and, it was believed, there would shortly be and has now been a possibility of enforced removal.

6. The problem, which was identified in *Rashid*, was that this policy seems to have been unknown to and so ignored by caseworkers, Home Office Presenting Officers (HOPOs) who represented the defendant before the appellate authority, the Treasury Solicitor and counsel instructed by her. Thus any who would have qualified as refugees but for the possibility of internal relocation should have been recognised to be refugees. Since the practice was to grant Indefinite Leave to Remain (ILR) rather than a leave which was to last only so long as the individual remained a refugee, those who received it are entitled to remain here even though, because of the change of circumstances in Iraq, they are no longer refugees.

7. *Rashid* was heard by the Court of Appeal in June 2005. The policy had existed since 1991 and by February 2003, at the latest, its existence was known, certainly to the Treasury Solicitor. On 12 March 2003, a letter was written by the Refugee Legal centre, who were representing Mr Rashid, to the Treasury Solicitor's representatives dealing with his claim which stated:

> "I enclose a copy of a letter dated 6 March 2003 from your colleague Sarah Townsend to … solicitors concerning the case of A. That case was due to be heard next week by the Court of Appeal together with M and K. Ms Townsend's letter … states:-
>
> 'Although the Secretary of State remains of the view that the Tribunal's determination [in A] is correct as a matter of law, he was not, as a matter of policy at the time of this case, relying on the availability of relocation from southern Iraq to the KAZ. Accordingly the Secretary of State will shortly be

> writing to your client granting him refugee status and would therefore invite you to withdraw your appeal.'
>
> I understand that M, also an Iraqi Kurd from [the GCA], was also recognised as a refugee last week on the same basis as A."

8. Notwithstanding this, when *Rashid* was heard by the Court of Appeal, the defendant was unable to produce any explanation to the court why the policy had not been applied and was apparently unknown to those who dealt with the relevant claims. Not surprisingly, the RLC has been pressing the defendant to produce the necessary explanation since August 2005, when the claims of A and H were lodged. A's claim came before me on 26 August 2005 when Mr Husain attempted to persuade me to make an order that no returns should be made to Iraq at least until the effect of *Rashid* was determined. I was not prepared to do this because I did not think there was jurisdiction to make such an order (although I did not hear full argument – that being unnecessary given the view I expressed). I did say this:

> "… [It] would clearly be wrong to seek to return anyone who falls within this group [i.e. Kurds from the GCA whose claims were dealt with before March 2003] … until that matter [i.e. the effect of *Rashid*] is sorted out and to detain them and put them up for removal in the hope that they might not claim judicial review is frankly improper, is it not? "

To this, Mr Grodzinski said:

> "My Lord, those behind me will have noted your Lordship's comments."

9. In the case of AH, on 15 September 2005 the RLC wrote to the defendant seeking confirmation that he would not be detained with a view to removal until the issue had been sorted out. No such confirmation was forthcoming, despite what I had said on 26 August, and so the claim in his case was lodged on 6 October 2005.

10. No evidence was forthcoming from the defendant despite requests and it being long overdue under the relevant CPR Rules. This led to an application to me and on 18 February 2006 I directed that unless the evidence upon which he sought to rely and detailed grounds were served within 14 days, the defendant would be debarred from relying on any evidence unless the court was persuaded that there were very good reasons to admit it. On 28 February 2006 the evidence was served, consisting of a long statement with exhibits from Mr Andrew Saunders, an assistant director in the Asylum and Appeals Policy Directorate, who has had responsibility for the management of Country policy since June 2000. Part of his responsibility was to oversee the production of policy documents known as Operational Guidance Notes (OGN) which were intended to provide guidance to case workers and others dealing with individual cases. In the process of producing these OGNs, he had to inform himself of the Immigration and Nationality Directorate's (IND) policies in relation to specific countries. I shall have to consider his account of what was produced in relation to Iraq in more detail in the course of this judgment.

11. Apart from the policy that internal relocation to the KAZ should not be relied on to defeat an asylum claim, it was recognised that Kurds fleeing from the GCA would be entitled to refugee status or at least would need subsidiary protection, usually in the form of Exceptional Leave to Remain (ELR). In paragraph 24 of his statement, Mr Saunders says:

> "Following Iraq's defeat during the 1991 Gulf war, serious unrest took place in Iraq. Uprisings in the south of the country were crushed by Saddam Hussein and the human rights situation was such that Iraqi asylum seekers from south and central Iraq [i.e. the GCA] were, as far as I am aware, always able to establish either a valid claim under the Refugee Convention or a need for subsidiary protection (such as ELR) arising from factors such as the severe penalties which Saddam imposed on those who had left Iraq illegally. The position in practice was therefore similar to that which would have prevailed if there had been a formal country-specific ELR policy (namely that, with a few exceptions, all those who did not qualify for refugee status would be granted ELR), although there was never a formal country-specific policy in the case of such Iraqi claims. "

Whether what was there indicated is to be labelled a policy or a practice seems to me to be immaterial. Whatever it is called, it should have been applied to all Kurds who sought asylum and were from the GCA.

12. In the circumstances, Mr Tam conceded that, had the practice or policy been applied as it should have been, A and H should have been accorded refugee status and so granted ILR. AH should (as I assume in the light of Mr Saunders's statement) have been granted ELR (since at the time of the decision he was not regarded as having established an entitlement to refugee status). The practice at the time was to grant ELR for 4 years. It was further (and remains) the practice or policy to grant ILR to an applicant who had, without any contraventions of the law, remained here for 4 years in accordance with his ELR. Thus, it is submitted, each of the claimants should now be granted ILR, A and H because they ought to have been granted it when their applications were considered before March 2003 and AH because he should then have been granted at least 4 years ELR which would, had he been able to apply, have resulted in ILR.

13. Until the defendant's evidence was received, the claimants' advisers were not aware of the policy or practice to grant 4 years ELR. Accordingly, I was asked by Mr Husain to give leave to amend the claim in the case of AH to seek ILR on the basis that he should have been granted ELR. Mr Tam, perhaps somewhat surprisingly, said that he was not able to confirm that the practice had been as Mr Saunders appeared to indicate and asked leave to adduce further evidence if it transpired that the assumption that 4 years ELR should have been granted was wrong. I indicated that I would assume that that was the position if I decided in favour of the claimants in principle but I would in those circumstances give him time to produce evidence to contradict that assumption, in which case further argument would be needed. Since it has been conceded that A and H were entitled to ILR because they should have been regarded as refugees, that amendment was unnecessary in their cases.

14. I should now set out the material facts of the individual claims.

(1) **A**

(a) A was born on 1 January 1973. He lived in Kirkuk in the GCA and in June 1991 was arrested because he had been involved in the uprising following the end of the Gulf war. He was detained for some 6 months during which he suffered torture. In 1999 he opened a printing shop in Kirkuk and to get the necessary licence he had to undertake never to print anything critical of the government. The business was successful. In May 2001 he had been away on a purchasing trip in Baghdad when he was told by his family that his partner and staff had been arrested and his shop closed because it had been discovered that his partner, an opponent of the regime, had printed anti-government material. His father was arrested as a bait to get him to show himself, but he escaped and came to the United Kingdom.

(b) On 27 August 2002 his application was refused. The decision letter was poor and was rightly criticised by the adjudicator who heard his appeal as being largely fallacious and unjustified in its reasoning. The adjudicator allowed the claimant's appeal, albeit the HOPO had argued that he could relocate to the KAZ, on the basis that, following a decision of the I.A.T. in *Maghdeed* [2002] UKIAT 03631, the KAZ was incapable of qualifying as a place of alternative protection. That decision applied observations of Keene LJ in *Gardi v Secretary of State for the Home Department* [2002] 1 W.L.R. 2755. The Court of Appeal had had no jurisdiction to hear that appeal since it should have gone to the Court of Session in Scotland and so those observations are not binding. In any event, I am satisfied they were wrong. They were based on the belief, following arguments raised by Professor Hathaway that:-

> "The very structure of the Convention requires that the protection will be provided not by some legally unaccountable entity with de facto control, but rather by a government capable of assuming and being held responsible under international law for its actions."

(c) This depends on construing the words 'unable … or unwilling to avail himself of the protection of that country' to mean that there must be protection provided by an entity capable of granting nationality to a person in a form recognised internationally – see Paragraph 37 of *Gardi*. The contrary view, which I believe to be correct, is that a person can only qualify for refugee status if he is in need of surrogate protection since he cannot receive that protection within his own country. The only question to be answered is whether such protection exists within that

country, however that protection is provided. If it is provided, it will be protection of that country. Any other construction would grant refugee status to those who do not need it. Since *Maghdeed*, other decisions of the Tribunal have reached a contrary and in my judgment the correct view. I should add that I have not heard argument on the point, in particular on the question of what 'protection' may mean for the purposes of the Refugee Convention.

(d) Notwithstanding the policy not to rely on internal relocation to the KAZ, the defendant sought and obtained leave to appeal to the I.A.T. and, following the grant of leave, for reasons which I confess I fail to understand, the I.A.T. saw fit to remit the case for a fresh hearing. By the time that took place in May 2004, the situation in Iraq had changed and so the adjudicator decided that, whatever had happened in the past when Saddam Hussein had been in power, there was then no risk of persecution. He correctly applied the decision in *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97, which by then had received statutory blessing, that he had to consider the state of affairs at the time of the appeal.

(e) I should add that the claimant has a wife and son, who is now 13. Both have left Iraq and are living unlawfully in Iran. He has been kept from them now for nearly 5 years. Had he been granted ILR as a refugee, as should have happened, he would have been able to apply that they should join him here and there is no apparent reason why that application should not have succeeded. There is in addition medical evidence which confirms physical and psychological disabilities resulting from the ill-treatment he suffered in 1991.

(2) **H**

(a) H was born in January 1982. He was arrested in February 2002 having been seen reading a banned book. He was held until June 2002. Following his release, he was stopped and abused by a security officer. Two days later that officer was killed and the police raided his home because they believed he had been responsible. He had not, but he decided he must flee the country and so came to the United Kingdom and sought asylum.

(b) The refusal letter, which was dated 20 September 2002, asserted that the claim did not engage the Refugee Convention. In the light of the account given, which was not disputed, that assertion was clearly erroneous. He was targeted because it was believed he was an opponent of the regime and so, whether or not he had been involved in the killing of the officer, he would be at real risk of torture and possibly death if he returned.

(c) In Paragraph 7 of the letter, this was said:

> "The Secretary of State considers that you have related your alleged fear of return only to certain areas within Iraq. Irrespective of his other comments regarding the merits of your claim, the Secretary of State considers that you do not qualify for recognition as a refugee. This is because there is a part of Iraq in which you do not have a well-founded fear of persecution and to which the Secretary of State considers it would be reasonable to expect to go."

This was contrary to the policy and should not have been relied on to defeat the asylum claim.

(d) Mr Tam therefore has inevitably and correctly accepted that H ought to have been accorded refugee status and so granted ILR. By the time his appeal was heard by an adjudicator in July 2003, Saddam Hussein had been deposed and so there was no further risk of persecution. His appeal was therefore dismissed.

(3) **AH**

(a) AH was born in August 1983. He claimed to have been arrested together with his family in November 1999 because his brother had been involved in an organisation of which Saddam Hussein's regime disapproved. He was ill-treated but was released after some 10 days. He remained fearful of action against him by Security forces so he fled to this country in June 2001. His claim to asylum was rejected initially largely because it was believed he was only avoiding military service and he had not attended for interview. That was not his fault since he had been dispersed by NASS and IND had not been informed of his new address, a far from uncommon example of one part of the Home Office not being informed of what another was doing. On 6 August 2001 he lodged an appeal, unaware that by virtue of the practice – Mr Tam told me it

was not a policy, a subtle distinction which makes no practical difference – he should have received 4 years ELR if he was not a refugee. It seems the appeal was withdrawn: certainly it did not go ahead. This was because the Home Office, recognising that his failure to attend the interview was not his fault, had agreed to reconsider his claim following an interview.

(b) Despite the announced policy that interviews would be held within 2 months, it was not until 16 December 2002 that he was interviewed. On 22 February 2003, his claim was refused, but he was granted 6 months ELR. This was because on 20 February 2003 the practice had changed so that instead of 4 years only 6 months ELR was to be granted to Iraqi Kurds such as AH.

(c) The refusal of his asylum claim was because his account was disbelieved. The decision letter is one of the poorest I have seen and the reasons given for disbelieving the claimant are insupportable. In due course, a further claim was made when the ELR had expired, but that was refused, reasonably because of the change of circumstances in Iraq. An appeal to an adjudicator was dismissed in February 2005. The claimant's account was accepted, but there was by then no real risk of persecution on return.

15. The Court of Appeal in *Rashid* was singularly unimpressed with the defendant's conduct. No explanation was given to the court why the failure to apply the correct policy to the claimant had been persisted in for so long and why all those in the Home Office who dealt with him were apparently unaware of the policy. At paragraph 31, Pill LJ said this:

> "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."

In the light of the unsatisfactory nature of the explanation which has now been given, those observations apply equally to these claims.

16. In paragraph 36, Pill LJ expressed his conclusions thus:

> "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 (sic) deliberations. I am very far from saying that administrative errors may often lead to a finding of conspicuous unfairness amounting to an abuse."

But, as the court decided, those errors did.

17. May LJ agreed with Pill LJ. Dyson LJ gave a separate judgment in which he rested his decision on the frustration for Mr Rashid of his legitimate expectation that the appropriate policy would be applied to him notwithstanding that he was at the time unaware of its existence. It would be conspicuously unfair to him not to require the Secretary of State to honour that policy in the circumstances. In paragraphs 51, 52 and 53 he said this:

> "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 Q.C. 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 reasonable 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 has been linked procedurally. Had he been so treated, he would have had the benefit of the policy and been accorded full refugee status."

Thus the Secretary of State had acted with conspicuous unfairness amounting to an abuse of power.

18. Mr Tam seeks to distinguish *Rashid* largely on the ground that there has now been an explanation given by Mr Saunders. He further relies on the fact that these claimants had not commenced proceedings and so it was not inconsistent to have allowed the claims of those who at the time had done so.

19. It is therefore necessary to see what the explanation for the failures is and whether it is satisfactory in all the circumstances and so draws the sting of the criticisms levelled by the Court of Appeal in *Rashid*. The crucial period so far as these cases are concerned is that between October 2000, when the Human Rights Act 1998 came into force and so added the possibility of claims under the European Convention on Human Rights to those under the Refugee Convention, and February 2003 when at last the existence of the policy became known to the Treasury Solicitor and presumably more widely within IND.

20. The policy itself probably dated back to 1991. In 1998/1999 there was a general reorganisation in IND to try to deal with the situation which was beginning to get out of control resulting from a continuing increase in asylum applications. By January 2000, the backlog of asylum applications exceeded 120,000. As a result of the reorganisation, it was decided that casework teams, which had dealt with specific countries and so had a common knowledge of the issues which were relevant to those countries, should no longer deal with particular countries. The Senior Caseworker attached to each team (thereafter called Case Management Units (CMU)) was supposed to be the source of knowledge to whom caseworkers could turn. In addition, OGNs were introduced in 2000. Before that the Country and Information Policy Unit (CIPU) had had responsibility for identifying, as Mr Saunders puts it, blanket ELR policies in relation to countries where a general policy was possible. An example was Somalia where the human rights and humanitarian situation was so awful that most who came from that country could not be returned.

21. OGNs were intended to provide caseworkers with the necessary guidance so as to ensure consistency in dealing with claims from particular countries. They would not cover every

possible situation or class of claimant but were intended to deal mainly with common categories of claim that caseworkers were likely to encounter. In November 1998 the UNHCR wrote a letter to IND's Director of Asylum and Policy in which it was indicated that those who had been integrated in the community or had lived in the KAZ might well have an internal flight alternative and that included 'persons originating from the northern part of Iraq under the control of the Government of Iraq who have sought asylum abroad and are found to have a valid fear of persecution vis-à-vis the central Government in Baghdad, but have nothing to fear from the Kurdish authorities in the north'. Some 9 months later, in August 1999 CIPU issued an internal memorandum which repeated what had been said in the UNHCR letter. This was thoroughly misleading since it omitted to mention that the policy was that Iraqi Kurds who came from the GCA would not be refused on the basis of the possibility of internal flight. There is no explanation given of why it took 9 months for CIPU to react to the UNHCR letter or why, when it did react, it disseminated misleading information to the caseworkers who had to deal with the claims.

22. The year 2000 saw a large increase in the number of asylum seekers from Iraq. It was decided that claims by Kurds who had come from the KAZ could be processed through Oakington because they were relatively straightforward and IND was encouraged actively to seek means of returning to the KAZ those who failed to substantiate a claim. In the meantime, they were to receive ELR. Between 2000 and 2002, there were 28,746 asylum seekers from Iraq. Some 85% of those were Kurds from the KAZ. The balance came from the GCA. Mr Saunders says the numbers were thus 'relatively small', but over the period, they would have amounted to about 2000.

23. In October 2000 Mr Saunders produced a draft OGN which failed to mention Kurds from the GCA, although, in dealing with those who might have a claim to ELR, reference was made to Non-Kurds who had attracted the adverse attention of Saddam Hussein, his family or government, Marsh Arabs from Southern Iraq and doctors who had refused to obey orders to punish people by various forms of mutilation. None of those can be regarded as particularly large categories and it is, to say the least, surprising that no mention was made of Kurds who, it should have been appreciated, must be granted at least ELR since internal relocation was not to be relied on. Mr Saunders accepts that 'with the benefit of hindsight the guidance lacked clarity'. As a Senior Caseworker, Mr Saunders should have appreciated the lack of clarity at the time, particularly as he must have realised that internal relocation was erroneously being relied on to refuse claims and ELR or asylum was not being granted.

24. The OGN on Iraq was eventually agreed in April 2001. It was known that, while the policy was not to rely on internal relocation for Kurds from the GCA, since October 2000 ministers had been anxious to explore the possibility of enforced removal to the KAZ but only of those who had come from the KAZ. In March 2001, the then minister, in answer to a Parliamentary Question, stated that there might be some who could be returned to Northern Iraq (the KAZ). She did not say that internal relocation could apply to those from the GCA. However, the OGN stated no more than the draft to which I have already referred and so was equally unhelpful.

25. Following the I.A.T. decision in *Maghdeed* in August 2002, it was thought that it might mean that internal relocation within the KAZ was not possible so that a claimant who feared persecution by one of the factions could not be expected to relocate to the territory of the other. *Maghdeed* should never have reached the I.A.T. since he came from the GCA and internal relocation should not have been relied on. It is extraordinary that this was apparently not appreciated by those, including Mr Saunders, who had to consider the effect of *Maghdeed*, particularly as it led to a revision of the OGN in October 2002. That OGN 'contained specific guidance to caseworkers not to argue the availability of intra-KAZ internal relocation'. The only reference to Kurds from the KAZ comes under the heading dealing with the need to consider ELR for those whose asylum claims are rejected. This is in itself somewhat surprising since such Kurds were being the subject of ethnic cleansing or arabisation in the GCA towards the north bordering the KAZ. However, what was said was:

> "The authorities in the KAZ have however made it clear that they would only readmit to the territory they control those who can show that they were previously resident there. Internal flight for other Iraqis to the KAZ is not therefore a viable option. "

26. A's claim was refused on 27 August 2002 and internal relocation to the KAZ was relied on. H was refused on 20 September 2002 and again internal relocation was relied on. Each appealed, but their claims were never reconsidered, as they should have been, since by the time the appeals were lodged the situation had been made clear, or so it is said, in the October 2002 OGN. Furthermore, at the hearing of A's appeal on 6 March 2003, internal relocation was still relied on and leave to appeal was in due course sought and obtained on the basis of a misunderstanding of the effect of *Maghdeed*. It does not seem that the lack of clarity had been removed, despite Mr Saunders' assertion that it had.

27. In February 2003 a fresh OGN was issued following further I.A.T. decisions which did not follow *Maghdeed*. This removed all reference to non-Arabs or Kurds from the GCA. On 20 February 2003 a letter was sent to ILPA which stated:

> "At the present time, we will not be applying the option of internal relocation to the KAZ for applicants from GCA."

It also notified ILPA of the change from 4 years to 6 months ELR. It is of interest to note that the letter refusing AH's claim is dated 22 February 2003 and that 6 months ELR is accordingly granted instead of 4 years. In March 2003, consideration of all claims from Iraq was suspended pending the outcome of the military action. After June 2003, it was considered that returns could be made and that most applicants would not qualify for asylum.

28. I have gone through the history and the explanations for the failures to apply the policy in some detail. It is a sorry story. I have no doubt that there was a failure to deal properly with these claims because all those concerned with them were not properly instructed. In the context of asylum claims, that is a lamentable state of affairs. Dyson LJ in *Rashid* said that, in the absence of any reasonable explanation, he considered that the court was entitled at the very least to infer that there had been flagrant and prolonged incompetence. The explanation does not remove that inference; indeed, it confirms it. Albeit the numbers of Kurds from the GCA claiming asylum were not, in the context of asylum claims as a whole, very large, they were by no means insignificant. Each was entitled at least to 4 years ELR and many to be regarded as refugees. The failure to apply the policy was not limited to individual caseworkers but extended to all at every level who dealt with the cases. Mr Tam accepted that what had happened was inexcusable but not that it should be regarded as incompetence.

29. In *Rashid,* the Court relied on legitimate expectation and the need to hold the Secretary of State to the policy that was in force during the relevant period. In the circumstances, there had been conspicuous unfairness. Legitimate expectation is grounded on fairness. It was initially regarded as limited to procedure and the processes which would be applied in reaching decisions which affected individuals. It is now clear that it extends to substance: see *R v North and East Devon G.A. ex p Coughlan* [2001] Q.B. 213. The court expects government departments and, indeed, all officials who make decisions which affect members of the public to honour statements of policy. To fail to do so will, if one wants to apply classic *Wednesbury* principles, mean that the decision maker has failed to have regard to a material consideration. Thus irrationality, in the sense in which it was used by Lord Diplock, is linked to reasonableness. That much was recognised as long ago as 1984 in *R v Home Secretary ex p Khan* [1984] 1 W.L.R. 1337 at 1352D, where Dunn LJ said:

> "The categories of reasonableness are not closed, and in my judgment an unfair action can seldom be a reasonable one. The cases cited by Parker LJ show that the Home Secretary is under a duty to act fairly, and I agree that what happened in this case was not only unfair but unreasonable. Although the circular letter did not create an estoppel, the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration and thus reached his decision upon a consideration which on his own showing was irrelevant. In so doing … he misdirected himself according to his own criteria and acted unreasonably."

30. This is not the usual legitimate expectation case. The claimants were unaware of the policy and did not rely upon it. I am not persuaded that it is necessary to rely on the doctrine of legitimate expectation since all that is really being said is that there is a legitimate expectation that the Home Secretary will, in reaching his decisions, apply whatever policy he has adopted consistently. That is really to say no more than that an individual can expect that he will be

fairly treated. Here, the decisions made were clearly unlawful in that the decision makers failed to have regard to the policy of which they should have been but were not aware because of incompetence.

31. However, that does not necessarily bring them success. Here, it is what has been called the *Ravichandran* principle which Mr Tam, submits defeats them. In truth, that is not peculiar to asylum cases since regard will always be had, if a decision is challenged, to the situation as it has developed and exists at the time of any hearing. The court has a discretion whether relief should be granted and its exercise will be affected by the circumstances prevailing at the time of the hearing. It is particularly important in the asylum context since the *Ravichandran* principle has been given statutory support.

32. As Mr Tam submitted, any case in which, for whatever reasons, the decision maker or makers concerned have failed to have regard to a material consideration will mean that the decision is unlawful. It can also be properly labelled unfair. But if that is to result in relief in the grant of whatever should have been granted at the time notwithstanding a change of circumstances the *Ravichandran* principle will be set at nought. That was recognised by the Court in *Rashid* – see per Dyson LJ at paragraph 48. The court will only intervene if persuaded that, using the legitimate expectation approach, 'to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power'. That has resulted in the use of the adjective conspicuous in defining the unfairness. In paragraph 50, Dyson LJ helpfully identified relevant matters in these words:

> "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 p 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."

33. A poor decision by individual caseworkers will not normally qualify. That can be cured by an appeal and if circumstances have changed (which may in some cases be to the claimant's advantage where developments in the country of his nationality have worsened), his claim will be affected accordingly. But here there was systemic failure which not only affected the decision but also led to the appellate authority being misled. Thus the claimant was deprived of the chance of having a fair decision not only from the administrators but also from the independent appellate body. It is this coupled with the lack of any satisfactory explanation – satisfactory, that is, in the sense that it excuses the conduct – which leads me to reject Mr Tam's argument. In effect, I am doing no more than following the guidance given by the Court of Appeal in *Rashid.*

34. I recognise that cases such as this which justify relief such as is claimed here will be rare. The court has to decide whether the unfairness is such that it goes beyond that which should attract no relief other than that afforded by a right of appeal. I recognise that it is not possible to define where the line should be drawn with any precision. Inevitably, the circumstances of an individual case will be the deciding factor. It is only if the court is persuaded that the unfairness is so bad that abuse of power is an appropriate label that it will find in a claimant's favour. That is the position here.

35. In the result, A and H must be granted ILR. They are not now entitled to refugee status, but, since the policy was to grant ILR, all those such as the claimants who were but are not now refugees will still retain ILR. The claimants should not be in a different position. In A's case, he should also be permitted to apply to have his family join him here and that application should be considered applying the same criteria as would have been applied if he had been recognised as a refugee. AH should have been granted 4 years ELR in July 2001 when his claim was refused. That would by now have expired. He should be permitted to apply for ILR as if he had been granted the necessary 4 years ELR and was applying in time provided that he makes his application within a reasonable time. What that should be and the precise nature of any relief

for all the claimants I will hear argument about if agreement cannot be reached. In AH's case, there is the possibility of further consideration by the defendant of the precise nature of any policy in relation to ELR.