Case No: C5/2006/0624

Neutral Citation Number: [2006] EWCA Civ 1619
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
(Mr Justice Hodge OBE, President and Mr A McGeachy, Senior Immigration Judge)
HX/21466/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 28th November 2006

Before :

LORD JUSTICE WARD
LORD JUSTICE NEUBERGER
and
LORD JUSTICE GAGE

– –

Between :

A L (Serbia)	**Appellant**
− and −	
Secretary of State for the Home Department	**Respondent**

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

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Ms Nicola Rogers and Ms Joanna Stevens (instructed by **Brighton Housing Trust**) for the appellant
Ms Lisa Giovannetti (instructed by **the Treasury Solicitor**) for the respondents

– –

Judgment
As Approved by the Court

Lord Justice Neuberger:

Introduction

1. This is an appeal brought by Mr A L against the decision of the Asylum and Immigration Tribunal ("the AIT"), who rejected his contention that his removal from the United Kingdom would be in breach of Article 14 of the European Convention on Human Rights and Freedoms ("ECHR").

The facts relating to the appellant

2. The relevant facts relating to the appellant may be shortly stated. He was born on 28 April 1984 in Kosovo, where he lived with his parents until March 1999, when the family left, after they had been threatened by the authorities. Shortly thereafter, the appellant was separated from his parents, with whom he has had no subsequent contact, despite periodic attempts to locate them. He arrived in the United Kingdom (via Macedonia and Albania in each of which he spent a few months) in January 2000.

3. Almost immediately on arriving in this country, the appellant claimed asylum. A year later, the Secretary of State refused his claim, but granted him exceptional leave to remain until 28 April 2002, his eighteenth birthday. Since then, he has been resident in this country. On 4 April 2002, he applied for an extension of his leave to remain, but this was refused by the Secretary of State on the ground that the appellant had no reason to fear persecution if he was returned to Kosovo.

4. The appellant's appeal was rejected by an Adjudicator on 31 March 2005, but, on 27 June 2005, Henriques J, sitting in the Administrative Court, ordered that his appeal should be reconsidered in relation to one issue. That issue was "whether the removal of the [appellant] would be contrary to Article 8 taken together with Article 14 [of the ECHR] having regard to the fact that the [appellant] was at the time of entering the UK an unaccompanied minor and would thus be treated differently from a person in identical circumstances with one or more natural parents in this country".

5. The appellant's remitted appeal was then heard by the AIT (Mr Justice Hodge and Mr A McGeachy), who dismissed it in a determination promulgated on 6 January 2006. He now appeals against that determination.

The appellant's case on Article 14: the family amnesty policy

6. The appellant's Article 14 claim arises out of a concession announced by the Secretary of State on 24 October 2003. This concession is contained in "APU Notice 4/2003", and is sometimes referred to as the "family amnesty policy". In that Notice, the Secretary of State announced the policy as a "One off exercise to allow families who have been in the UK for three or more years to stay".

7. The policy involved the grant, for those who qualified, of indefinite leave to remain in the United Kingdom. In order to qualify, a person had to be an adult who satisfied three conditions, namely that he or she (a) had made an asylum claim before 2 October 2000, (b) had been in the United Kingdom for at least three years on 24 October 2003, and (c) had at least one dependant (other than a spouse) aged under 18 in the United Kingdom on 2 October 2000 or 24 October 2003. The concession extended to the spouse of any qualifying adult. So far as other dependants of such an adult were concerned, they also benefitted from the concession provided that they "formed part of the family unit on 24 October 2003". (The explanation of the choice of dates is that 2 October 2000 is when the Human Rights Act 1998 came into force, and 24 October 2003 is when the policy was announced.)

8. Excluded from the concession were persons who had a criminal conviction, those who were the subject of an Anti−Social Behaviour, or Sex Offender, Order, those who had made an asylum application "in more than one identity", those who should have their asylum claim considered in another country, those who presented a risk to security, or those whose presence in the UK was otherwise not conducive to the public good.

9. The appellant's case is based upon Article 14 of the ECHR ("Article14") which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

10. In *Thlimmenos -v− Greece* (2001) 31 EHRR 15, the Strasbourg Court said that:

> "The application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols"

11. In this case, the appellant contends that his non−eligibility for indefinite leave to remain in this country is within the ambit of his private and/or family life under Article 8 of the ECHR, and that, consequently, his reliance on Article 14 is, at least in principle, justified. While Ms Giovannetti made it clear that the concession was not intended to be of general application, the Secretary of State accepts that, at least in this case, there is no reason in principle why the appellant should not be entitled to rely upon Article 14. In other words, it is conceded that there is a sufficient nexus between the appellant's case and Article 8 of the ECHR to enable him to invoke, at least in principle, a claim under Article 14.

12. In paragraph 21 of its clear and carefully reasoned decision, the AIT explained the appellant's case that the policy is unjustifiably discriminatory insofar as it does not apply to him in the following terms:

> "He was a child who had himself claimed asylum prior to 2 October 2000. He had been in the United Kingdom for over 3 years on 24 October 2003. The dependant child of an asylum seeker who had claimed asylum as the appellant had in January 2000 and was still living, as the appellant was, in the UK in October 2003, some three years later, would have qualified for indefinite leave to remain as a dependant of that asylum seeker. The appellant was at 2 October 2000 an asylum claiming unaccompanied minor. He claimed his position is the same as a child under eighteen in October 2000 who is the child of an adult asylum applicant. It is discriminatory to treat him differently. The concession should apply to him as a matter of law."

The law relating to Article 14

13. The appellant contends that he has been unjustifiably discriminated against, contrary to Article 14, under the family amnesty policy, because, as someone who arrived in this country as an unaccompanied minor, he is less favourably treated under the policy than people who shared all his characteristics (minors seeking asylum before October 2000 who are still here in October 2003), save that they arrived here with a parent (and I shall refer to this group as "accompanied minors"). As Ms Giovannetti said when opening her submissions on behalf of the Secretary of State, this case raises a point in a "difficult and complicated area of the law".

14. In *Wandsworth London Borough Council -v− Michalak* [2003] 1 WLR 617, Brooke LJ said at paragraph 20 that, in considering the question of whether or not there had been a breach of Article 14, the court should adopt a structured approach, which involved answering the following questions:

a) "Do the facts fall within the ambit of one or more of the substantive Convention provisions ×?

b) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other?

c) Were the chosen comparators in an analogous situation to the complainant's situation?

d) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

15. As subsequent consideration of those questions has shown, it is by no means clear that this structured approach, attractive though it seems on the face of it, is appropriate, at least in many cases: see for instance the observations of Lord Hoffmann and Lord Walker of Gestingthorpe in *R(Carson) -v− Secretary of State for the Home Department* [2006] 1 AC 173 at paragraphs 30 to 33 and 63 and 64 respectively. At paragraph 63, Lord Walker approved the suggested approach, in relation to sex discrimination claims, of Lord Nicholls of Birkenhead in *Shamoon -v− Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paragraph 11, to the effect that tribunals might be well advised to:

> "concentrate[e] primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter the application fails."

16. Accordingly, a "simple and non−technical approach" is often, indeed normally, appropriate - see per Carnwath LJ in *Esfandiari -v− Secretary of State* [2006] HRLR 26, paragraph 8. As to comparators, the position was pithily put by Lord Hoffmann in the *Carson* case at paragraph 14: "discrimination means a failure to treat like cases alike. × The Strasbourg court sometimes expresses this by saying that the two cases must be in an ‘analogous situation'".

17. The simpler approach and the inter−relationship between Brooke LJ's four questions can also be discerned in what was said by Lord Steyn about Article 14 claims in *R(S) -v− Chief Constable of Yorkshire Police* [2004] 1 WLR 2196, at paragraph 46:

> "[I]f the different treatment is not on a relevant ground for the purposes of Article 14, then this article is not applicable. In any event, identification of the ground for different treatment is material to the question of justification".

18. As the argument in this case has demonstrated, the issues of whether the applicant's choice of comparators is appropriate, whether the comparators were in an analogous situation, and whether any difference in treatment had an objective and reasonable justification, raise questions which cannot fairly or sensibly be considered entirely independently from each other. They interrelate.

19. There is further valuable relevant guidance in the speeches in the *Carson* case as to the proper approach to be adopted in Article 14 cases. Thus, in paragraph 65, Lord Walker quoted with approval from a passage on page 144 of Feldman on *Civil Liberties and Human Rights in England and Wales* (2nd edition 2002), which included

this: "[I]n most instances of the Strasbourg case law×the comparability test is glossed over and the emphasis is (almost) completely on the justification test" (itself a quote from another source).

20. Also in the *Carson* case, Lord Hoffmann said this:

> "15. × Characteristics such as race, caste, noble birth, membership of a political party and × gender, are seldom, if ever, acceptable grounds for differences in treatment. ×[I]t is therefore necessary × to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification× .
>
> 16. There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds × On the other hand, differences in treatment in the second category (eg on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.
>
> 17. There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other. × But there is usually no difficulty about deciding whether one is dealing with a case where the right to respect for the individuality of a human being is at stake or merely a question of general social policy."

21. To much the same effect, Lord Walker said:

> "55. The proposition that not all possible grounds of discrimination are equally potent is not very clearly spelled out in the jurisprudence of the Strasbourg Court. It appears much more clearly in the jurisprudence of the United States Supreme Court, which in applying the equal protection clause of the 14th Amendment has developed a doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. They are personal characteristics (including sex, race and sexual orientation) which an individual cannot change × and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim."

The Secretary of State's justification of the family amnesty policy

22. The Secretary of State's contemporaneous explanation for the policy was contained in a Home Office press release dated 24 October 2003. The policy was there described as a preliminary "to the introduction of tough new rules to build on the tremendous progress already made in halving the number of asylum seekers entering Britain this year. The press release then said (in a slightly garbled phrase) that "long standing and highly expensive family asylum claims will be eligible for leave to remain". Reference was made to the benefit of improving "the lives of real families in our communities". It was pointed out that children from asylum seeking families were "especially motivated and doing well at school".

23. The Secretary of State was quoted in the press release as saying that "MP's from all sides appealed to me for such families to be allowed to stay in the UK every week." His statement went on to point out that the Home Office was:

> "currently supporting 12,000 families who applied for asylum before October 2000. It is believed that the vast majority will qualify for leave to remain in the UK under the terms of the policy. × Up to 3,000 who are self supporting may also qualify, the families will be given the immigration status of ‘indefinite leave to remain' in the UK which means they are able to live and work here without restrictions."

The press release ended by saying that the policy was "designed to remove the current incentive to families to delay removal as long as possible and so save money in support and legal costs". The cost of support was said to arise partly, indeed probably largely, from the fact that many asylum−seekers could not work unless their claims had been accepted, and therefore they (and their families) had to be supported at the expense of the taxpayer, unless and until they had been granted asylum or permission to remain.

24. A letter sent a few weeks later to all Members of Parliament by a Junior Home Office Minister stated that:

> "The aim of the exercise is to help eligible families to become integrated into the communities where they have settled by enabling them to sustain themselves through permanent paid employment."

25. We have had the benefit of a more detailed explanation of the factors which drove this policy. (It is right to record that this more detailed explanation was not before the AIT, but, realistically in my view, no objection was taken on behalf of the appellant to our looking at it, because it only gave more details of the points already available to the AIT). By mid−1998 there was a backlog of over 50,000 asylum applications, and the annual cost of supporting asylum seekers was around £400m. The family amnesty policy was part of a drive to cut down the cost, to reduce the administrative

burden, and generally to increase the efficiency of the system. The cost of support was one significant factor, but there were others.

26. First, although it is only necessary for the parent or parents in an asylum seeking family to be granted asylum to enable the whole family to remain, it is quite possible for each child of the family to make a separate asylum application. If a parent was refused asylum, then it was not uncommon for a child to make an application, and, in that event, no member of the family would be removed until the child's application was finally disposed of. The consequences in terms of time and expense are self−evident, particularly as such applications were apparently often made "on the brink of removal". (This problem has now been addressed by so−called "one−stop approach to appeals", but that could not have been safely applied to families already in this country).

27. Secondly, the practice is and has been (quite understandably) to remove all the members of the family unit at the same time, but there are, for a number of fairly obvious reasons, often difficulties in getting all members of a family together, especially if they know that it is for the purpose of removing them.

28. Thirdly, the view was taken by the Home Office that families who had been settled in this country for some years "would have started to develop ties with the community, and the children were likely to have made friends and to be settled in schools".

29. We were also told that the Home Office had estimated that about 15,000 families would qualify under the policy, and that "the savings could amount to £15,000,000 for every 1,000 families". The evidence also indicated that it was not intended that the policy would "identify all those in the backlog who had a compassionate case for leave to remain in the United Kingdom" and that it therefore did not "preclude the exercise of discretion, on the merits, in any other case with compassionate factors." The evidence also showed that there had been a significant number of asylum claims from unaccompanied minors. For instance, in 2004, there were just under 3,000 such claims, representing about 9% of the total asylum claims.

Discussion

30. The AIT held that the appellant's Article 14 case failed on the grounds that (a) the appellant's choice of comparators, namely persons in an identical position to him, save that they came to this country seeking asylum with one or both of their natural parents, was flawed, and that (b) even if Article 14 was engaged, the difference in treatment under the policy was justified. Having considered the clear and well−maintained arguments advanced by Ms Rogers and Ms Stevens for the appellant, and by Ms Giovannetti for the Secretary of State, I have come to the conclusion that the AIT was right and that, although the conclusion on ground (a) is not, in my view, fatal to the appellant's appeal, his failure on ground (b) is.

31. The arguments have thrown up a number of factors, or strands, which in my opinion merit consideration. I shall begin by identifying what seem to me to be the essential issues from the perspective of the Secretary of State, and then turn to the essential issues from the viewpoint of the appellant.

32. First, as was made clear at the time it was announced (see paragraphs 22 to 24 above), the reasons for the family amnesty policy were primarily practical and economic (see paragraphs 25, 26, 27 and 29), but social considerations also played a part (see paragraph 28). None of those reasons appear to me to be objectionable, and it was not suggested otherwise. They appear to me to be perfectly proper reasons.

33. Secondly, the practical and economic reasons for the policy did not apply to asylum−seeking individuals who were on their own to the same extent as they applied to members of asylum−seeking families. Unaccompanied minors, like other individuals, could not have made sequential asylum applications (resulting in extra costs and administrative problems) in the same way as members of an asylum−seeking family. For similar reasons, the removal of an unaccompanied minor once he or she is 18, like any other individual, self−evidently does not engage many of the practical and procedural difficulties (with the consequential cost implications) which could arise in relation to family units.

34. As for the social reasons, the policy was intended to benefit families; that is illustrated by the fact that it could have been relied on by the appellant if, by 24 October 2003, he had had a dependant (other than a wife) in his family unit (eg if he had fathered a child who was living with him). However, I accept Ms Rogers's point that much of the social reasoning applies equally to persons such as the appellant: he will have attended school, and have formed attachments, in this country in the same way as someone who came here with, or who is living with, a parent, but is otherwise in his position.

35. Thirdly, while the policy can undoubtedly operate as something of a blunt instrument, it appears to me inevitable that any policy of this type will produce anomalies. Unless the policy had given every asylum−seeker in this country in October 2000 the right to remain, it was necessary to limit its scope. Limiting its scope to families is, at least on the face of it, understandable for the reasons already discussed. Decisions, in such a context, as to cut−off dates, what precisely constitutes a family unit, and as at what date someone has to show he is a member of the unit, are not, of course, wholly immune from judicial scrutiny. However, because personal circumstances are almost infinitely various, it would have been impossible to identify qualifications which produced no perceived anomalies. Particularly if the qualifications were to be (as they are) few and simple, which is plainly a desirable feature.

36. As was accepted on behalf of the Secretary of State, the policy "was not predicated on the view that, by definition, each individual falling within [its] terms would have a stronger × case for the grant of leave to remain than any individual falling outside [its] terms". I should add that it cannot be seriously (and has not been) suggested that

it was inappropriate for the Executive to introduce a policy of this type, particularly in the circumstances described in the evidence.

37. Fourthly, it seems to me that this is an area where the Executive (and, indeed, the Legislature) should be accorded a relatively wide margin of discretion (or appreciation). At first sight, this might seem surprising, as asylum is an area of law where, for obvious reasons, the courts have had to become relatively closely involved following the introduction of the Human Rights Act 1998. However, the policy with which this case is concerned gives a concession of a right to remain to those who, at least probably, would have no ECHR (or other) basis for resisting removal from this country. Further, the policy was introduced, as explained above, for good and understandable administrative and economic reasons, and its effect appears to comply with its aim as encapsulated in those reasons.

38. Fifthly, and turning to look at matters more from the perspective of the appellant, there is no question of the policy having been directed against people such as him. The policy was not fashioned so as to exclude persons who came to this country as unaccompanied minors, had (unsuccessfully) applied for asylum before October 2000 but were granted leave to remain until 18, and who, on reaching 18 had no dependants. I accept that the effect of the policy is not to benefit them, while it does benefit those who came as children of a person who had (unsuccessfully) applied for asylum before October 2000, provided that they were still members of that person's family unit in October 2003. However, the policy was, as I have explained, something of a blunt instrument - and inevitably so. Other groups were not included in the concession. For instance, any adults on their own who applied for asylum before October 2000 and had no dependants in a family unit in October 2000 or October 2003; any families who did not apply for asylum until after 2 October 2000; any dependants of someone who had the benefit of the policy who were not part of his family unit in October 2003.

39. Sixthly, there is the question of the appellant's chosen comparators. There is obvious force in the contention that those who share all the attributes of the appellant, save that they arrived here as accompanied minors, represent an appropriate comparator group. However, it seems to me that there are problems with this contention. First, unaccompanied minors have been, and are, treated differently from accompanied minors from the moment they arrive in this country. Unaccompanied minors were rarely formally interviewed, were normally the subject of care arrangements effected with local authorities, and were almost routinely given exceptional leave to remain until 18. As the AIT (who rejected the appropriateness of the appellant's choice of comparator group on this ground) put it, "their position here in the UK was therefore clear and established until they reached the age of 18". Accompanied minors will, at least normally, have no such position; if a parent's asylum application is rejected (and, if made, the child's application is similarly rejected), the family (including the minor concerned) is liable to be removed.

40. The second problem with the comparator group selected by the appellant is that, on closer examination, it is over−simple and does not really reflect the effect or purpose

of the policy. It does not exclude all those who arrived here as unaccompanied minors and sought asylum before October 2000. A person who arrived here as an unaccompanied minor could obtain the benefit of the policy if (a) he joined a parent who had applied for asylum and was already here, or (b) he was joined here by a parent who sought asylum before October 2000, provided in each case he was part of that parent's family unit in October 2003, or, perhaps most significantly, (c) he himself had a dependant (eg he had a child) living in his family unit in October 2000 or October 2003. Further, an accompanied minor whose parent benefits from the policy can only do so for himself as a dependant if he was part of the parent's family unit in October 2003 (or if he himself had dependants living with him at that date).

41. This closer analysis does not automatically mean that one must reject the appellant's choice of comparators: it may simply serve to show that people in his category have significantly more restricted rights, rather than no rights, under the policy when compared with his chosen comparator group, whose rights are somewhat more restricted than might at first appear. However, the effect of this closer analysis does take matters somewhat further, in that it shows that the essence of the policy is, as its name and much of the evidence as to its purpose indicates, to benefit members of family units. It seems to me that the fundamental feature of the appellant which disentitles him from benefiting from the policy is, in brief, that he was not a member of a family in October 2000 or October 2003.

42. Bearing in mind these two points, the more appropriate comparator group, in my judgment, is, as Ms Giovannetti argues, that of people who arrived here as unaccompanied minors and sought asylum before October 2000, and who had their family unit with their own dependants in October 2000 or October 2003 (or who were, by October 2003, members of the family unit of their parents, who themselves satisfied the requirements of the policy).

43. Seventhly, there is the question of whether the difference in treatment is on the ground of a "status" within Article 14 at all. On the appellant's case as to the appropriate comparator group, I consider that he would be right to contend that the discrimination is on the ground of "other status" within Article 14. Indeed, I did not understand Ms Giovannetti to argue otherwise. A person such as the appellant will (one hopes) frequently not have been an orphan, but his position will, I would have thought normally, be pretty similar to that of an orphan because he has lost contact with his parents- as in this case. It is worth mentioning that Article 2 of the UN Convention on the Rights of the Child, which requires rights to be accorded to children "irrespective of × race, colour, sex, language, religion, × disability, birth or *other status* " (emphasis added), is treated as prohibiting "discrimination on the basis of the status of a child being unaccompanied or separated" in the 2005 report "Treatment of Unaccompanied and Separated Children outside their Country of Origin" prepared by the UN Committee on the Rights of the Child.

44. Even on the Secretary of State's comparator group, it is my view that the appellant's claim would fall within the "other status" requirement of Article 14. To accord benefits to a person because he is or was a member of a family, and to refuse similar

benefits to someone who is not, appears to me to fall within the ambit of an Article which prohibits unjustifiable discrimination on the grounds, inter alia, of "birth... origin×or other status". In the *Yorkshire Police* case, Lord Steyn said in paragraph 48 that the Strasbourg court "has interpreted ‘other status' as meaning a personal characteristic", which seems to be satisfied here, even on the Secretary of State's approach. I do not consider that that view is weakened by Carnwath LJ's attractive suggestion in paragraph 10 of the *Esfandiari* case that one should exclude "groups which have no special significance in the scheme of the Convention". If anything, especially in the light of the terms of Article 8, the converse of that suggestion would suggest that discrimination on the ground of whether or not one is a member of a family or whether one has dependants is within the ambit of "other status" in Article 14.

45. Eighthly, I turn to consider which of the two categories identified by Lord Hoffmann in paragraphs 15 and 16 of the *Carson* case the present case falls. If the appellant's chosen comparator group is the correct one, I accept that it can be said that to treat an 18−year old who arrived in this country as an unaccompanied minor differently from one who arrived as a minor with a parent is at least getting close to what Lord Walker, in paragraph 55 of the same case, characterised as "‘suspect' grounds of discrimination". Applying his tests (which were, I think, intended to be a useful guide rather than firm rules), the status of having been an unaccompanied minor is involuntary, and I suppose that it might be seen by some as a demeaning ground for discrimination. I have already described the position of the appellant as close to that of an orphan. On the other hand, the discrimination is not particularly or obviously demeaning when one bears in mind (a) the specific categories of "suspect" grounds identified by Lords Hoffmann and Walker, together with (b) the purpose and reasons for the discrimination.

46. To my mind, if the appellant is right on the identification of the comparator group, this would be one of those relatively rare "borderline" cases identified by Lord Hoffmann in paragraph 17 of the *Carson* case. If one is to opt for one category or the other, I would conclude that the present case would not involve discrimination on a "suspect" ground even on the appellant's comparator group. First, the discrimination on his case is not based on a distinction identified in paragraph 15 or 55 in the *Carson* case, and I consider that the "suspect" category should not be too easy to extend. To extend it results in fettering the discretion or margin of appreciation afforded to the Legislature and Executive (and indeed the Judiciary), and it is not as if discrimination in the other category does not have to be justified. Secondly, the circumstances in which a minor seeking asylum will be unaccompanied by a parent will be multifarious in origin in a way different to the way in which the circumstances giving rise to the "suspect" ground could arise. Thirdly, there is the purpose and effect of the policy as already discussed.

47. If the Secretary of State's comparator group is to be preferred, then I would reach the same conclusion with more confidence. Two final more general points on this aspect. First, as already implied, it seems to me, especially in "borderline" cases, that the resolution of the issue of categorisation may be assisted by reference to the purpose of, and reasons for, the policy in question - another example of the inter−relationship

of issues in this difficult field. Secondly, as is in a way foreshadowed by paragraph 17 in the *Carson* case, it may be that there is not an entirely clear demarcation between two categories: there may be more of a spectrum, albeit that the preponderance of cases will be at one or other end of that spectrum.

48. Finally, there are the consequences for the appellant of the difference in treatment of which he complains. The effect of the policy not applying to him is that he will have to leave this country, where he has lived since January 2000, and go back to Kosovo, which he does not want to do. That is a significant interference with his freedom. However, as the facts of this case show, he was not precluded by the policy from re−applying for asylum when he reached 18. His application for an extension of his leave to remain was considered both on the humanitarian grounds and on discretionary grounds. The risk of persecution, and the interference with his private and family life if he were to return to Kosovo, were both carefully considered by the Adjudicator and by the AIT. Further, he was still entitled to (and he did, albeit unsuccessfully) apply for discretionary leave to remain. In that connection, we were told on behalf of the Secretary of State that he "accepts that those who arrived in the United Kingdom as unaccompanied minors "may have strong compassionate grounds for seeking leave to remain".

Conclusions

49. In summary, then, my conclusions are as follows. The appellant has succeeded in establishing (by concession) that his claim may in principle fall within Article 14 − see paragraph 11 above. For the reasons given in paragraphs 39 to 42 above, I am not persuaded that the group he has identified is the correct comparator. However, whether that group or the group identified by the Secretary of State is the correct comparator, I consider, as explained in paragraphs 43 and 44 above, that he has brought himself within the "other status" group in Article 14. Nonetheless, in my judgment, the discrimination was not unlawful, or, to put it in another way, the discrimination has been justified, for the reasons set out in paragraphs 32 to 38 and 45 to 48 above.

50. In these circumstances, I would dismiss the appeal.

Lord Justice Gage:

51. I agree with both judgments.

Lord Justice Ward:

52. I confess to having some sympathy for the appellant. But for an accident of history and his misfortune to become separated from his family as they fled from Kosovo, he can justifiably say that he would have arrived here as a member of a family, may well have at that time be able to claim asylum as part of the family and so would have fallen within the concession. As it is he, like those fortunate enough to arrive with their parents, has attended school here, made his attachments here and lived a good industrious life here. To send him back to Kosovo is tough. That, however, is a social judgment, not a legal one. I agree with Neuberger L.J.'s legal analysis. To compare an unaccompanied minor with a family is not, I fear, to compare like with like. Even if it is, the difference in treatment can be objectively justified by the Secretary of State. I agree with my Lord's careful analysis. Consequently I regret that I too must dismiss this appeal.