

“Delays in processing asylum claims can be unlawful”.

July 2007

SSHD v R(S) Court of Appeal 20th June 2007¹

In 2001 the government set itself administrative targets to process new asylum claims within tighter timescales. In order to achieve this it postponed dealing with cases that it had already received. As a result some of the postponed cases were not considered under existing policies so that where these policies subsequently changed some applicants received less favourable treatment. On 20th June 2007 the Court of Appeal ruled that the delay in one such case was unlawful and recommended that this should be remedied by granting Indefinite Leave to Remain (ILR).

1. Background²

In July 1998, the government issued a White Paper, *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*, setting out its policy for improving the handling of asylum claims. It referred to the inherited backlog of over 50,000 cases awaiting decision and over 20,000 queuing for an appeal hearing. It set out plans for dealing with this backlog by processing most claims within six months. These were however years of high levels of asylum applications and the aim was not met.

In 2001 there was a Public Service Agreement (PSA) between the Treasury and the Home Office which set a target requiring that 60% of new asylum applications should result in a decision being served within 61 days of the application being made. New applications were defined as those lodged on or after 1 January 2001.

The Home Office also struggled to meet this target with the result that it concentrated casework capacity on those cases that could count towards the PSA target, setting aside other cases until resources would allow them to be dealt with. In effect, the old cases were shelved whilst the PSA targets were sought to be achieved.

¹ For the full judgement see <http://www2.bailii.org/ew/cases/EWCA/Civ/2007/546.html>

² All the facts of this case are taken from the judgement above.

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The practical effect of this process was that when eventually cases came to be considered the policy in relation to that particular claim may have changed. This is what happened in the case of Mr. S. The Court had to decide if the Home Office had acted lawfully.

2. The case of Mr. S

Mr S. came from Afghanistan and applied for asylum on 17th September 1999 but was not interviewed until 12th March 2004. On 16th March his claim was refused. A subsequent appeal was rejected by the Immigration Appeal Tribunal in June 2004³. On 11 October 2004 he applied for discretionary leave to remain in the UK. This was refused on 3 November 2005. He subsequently sought judicial review.

Since Mr. S applied for asylum the approach to assessing Afghan asylum-seekers claims had changed to reflect the developing political position in that country following the invasion and the ousting of the Taliban regime in 2001. Under the policies applying until 15th November 2001, a credible claimant from that country could normally be expected to be granted ILR. Furthermore, until April 2002 even an unsuccessful asylum-seeker would normally have been granted Exceptional Leave to Remain (ELR) for 4 years (in recognition of the impossibility of returning anyone safely); and on the expiry of the 4 years, assuming good behaviour (which is not in issue in the case of Mr. S), he would have been granted ILR.

It was accepted that if this claim had been dealt with before 18 April 2002, even if unsuccessful, the claimant would by now have obtained ILR, and would be irremovable. It had been noted that his cousin HM who arrived on the same day received the benefit of that policy. Two friends (NA and AK), who arrived in 2001, and received ELR in the same year, have also obtained ILR.

3. The case of *Rashid*⁴

In considering what had happened in this case the Court compared what had been decided in the case of *Rashid* in 2005. Mr. Rashid was an Iraqi Kurd. His claim for asylum had been refused by the Secretary of State in December 2001 and on appeal in June 2002. The refusal resulted from the Home Office's failure to apply, or draw the adjudicator's attention to, the applicable policy to grant asylum to Iraqi Kurds at the time. Following a request for reconsideration, in March 2003, a new decision was made in January 2004. By that time the situation in Iraq had changed, following the removal of Saddam Hussein's regime, and so had the policy of granting asylum. Hence Mr. Rashid was refused.

The Court of Appeal overturned this decision.

In the case of Mr. S Lord Justice Carnwath said about the *Rashid* case that "it was open to the court to determine that a legally material factor in the exercise of that discretion was the correction of injustice. That proposition did not require express statutory authority. It was implicit in the principles of fairness and consistency which underlay the whole statutory scheme. Further, in an extreme case, the court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion".⁵

However also regarding the case of Mr. S. Lord Justice Carnwath said "the present case differs materially from *Rashid*. There the starting point for the court's intervention was a legally defective decision made when the beneficial policy was still operation. There was no doubt what the correct decision should have been. In this case, administrative delay meant that there was no such decision. Administrative delay in

³ The Immigration Appeal Tribunal (IAT) became Asylum and Immigration Tribunal (AIT) in April 2005.

⁴ See the Refugee Council briefing on *Rashid* http://www.refugeecouncil.org.uk/policy/briefings/2005/iraq_ILR.htm Page 2 of 4

⁵ Quoted in *SSHD v R(S)* Para 46

itself, even if it results in less favourable treatment, does not provide the basis for a remedy.⁶ In short it has to be shown that the Home Office has acted unlawfully for a remedy to be available.

4. What did the court decide?

The court accepted the submission of Mr. S' representative "that this is not a case of mere delay, but of a deliberate and unlawful decision in 2001 to postpone his and other backlog cases, dictated solely by the requirements of the PSA." That constituted 'conspicuous unfairness amounting to abuse of power'.⁷

Lord Justice Carnwath added "This can be seen as a textbook case of another well-established category of public law illegality, in this case the unlawful fettering of a discretion. A public authority may not adopt a policy which precludes it from considering individual cases on their merits, nor may it allow its treatment of applications to be dictated by agreement with another government body".

"It is clear from Dr. McLean's evidence (as it has been from many cases coming before the courts) that the government was faced with a crisis in 2001, and it needed to take drastic measures to deal with it. Had those measures been based on a principled assessment of the issues and implications, no legal complaint could have been made. However, Dr McLean, fairly and frankly, makes no attempt to justify the decision in that way. On his evidence, the postponement of the old applications was an arbitrary decision, dictated only by the perceived need to meet the targets for dealing with new applications laid down by the agreement with the Treasury. In my view, that was unlawful, and (if it is necessary so to hold) an abuse of power".⁸

Lord Justice Carnwath thus ordered "that the case be remitted to the Secretary of State to redetermine in the light of this judgment, with the expected consequence that the claimant will be granted ILR".⁹

5. Who does this affect?

Clearly any case with a similar set of facts should also benefit from this judgement. More generally if it can be shown that the Home Office has acted unlawfully, by similarly postponing consideration of cases where favourable policies have subsequently changed, then similar reasoning may apply.

For example at various times there were ILR/ELR policies with respect to Iraq, Sierra Leone and Angola as well as Afghanistan. All such country wide policies had however ended by April 2003.

Similarly, as in *Rashid*, if the Home Office failed to apply an existing policy then again it may be possible to challenge a refusal.

6. What to do if you think this affects you.

Seek legal advice to see if the judgement does apply to you and what further legal representations could be made regarding your refused asylum claim.

Footnote: There has been a subsequent Court of Appeal decision on 27th June 2007 which also concerned two Afghan cases - ZK & YM [2007] EWCA Civ 615¹⁰. ZK got his decision in April 2001 and

⁶ Ibid Para 48

⁷ Ibid Para 49

⁸ See *ibid* Paras 50-54. Dr. McLean was Assistant Director in the Asylum and Appeals Policy Directorate of the Home Office

⁹ *Ibid* Para 60

¹⁰ <http://www.bailii.org/ew/cases/EWCA/Civ/2007/615.html>

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the judge took the view that there had been inordinate delay in bringing the matter to the Court since the failure of his appeal in February 2002. He had not been affected by an arbitrary policy to delay consideration as he had received a decision.

The judge distinguished ZK from *Rashid* as follows: The delay in making the decision and the failure to grant ELR for four years, are far removed from the cumulative errors which gave rise to a finding in *Rashid* that there had been an abuse of power. In *Rashid*, the policy relied on was a policy under which asylum, as distinct from leave to remain, should have been granted. Serious errors of administration occurred, amounting, in the words of Dyson LJ, to "flagrant and prolonged incompetence".¹¹

YM received a decision in September 2002 and again was distinguished from *Rashid*: "The delay in considering the original claim, (as with the more recent delay in dealing with the letter seeking reconsideration), was unfortunate but it was not challenged at the time and falls very far short of the abuse of power found to have occurred in *Rashid*".

Whether YM may have suffered delay because of the policy of delaying older cases (as in S) was not raised.

¹¹ Ibid Para 26