Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Samir Boukhatem) v Secretary of State for the Home Department FCJR [2013] UKUT 00464 (IAC)

Heard at Field House **Judgment sent**

On 27 June 2013

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE LATTER

UPPER TRIBUNAL JUDGE JORDAN

THE QUEEN (ON THE APPLICATION OF

SAMIR BOUKHATEM)

Applicant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the applicant: Ms G. Ward, instructed by Duncan Lewis & Co., solicitors

For the respondent: Mr R. Harland, instructed by Treasury Solicitor

JUDGMENT

Introduction

1.
The applicant challenges as Wednesbury unreasonable the decisions made by the respondent on 17 July and 25 August 2012 and 21 June 2013 refusing to treat the applicant's submissions as a fresh claim within the meaning of paragraph 353 of the Immigration Rules.

2.
The applicant is a citizen of Algeria who was born on 22 April 1984. He arrived in the United Kingdom on 8 September 2001 and applied for asylum about ten days later. His asylum application was refused and his appeal before Immigration Judge M.A. Khan was dismissed in 19 September 2002. An application was made for permission to apply to the Upper Tribunal for reconsideration to the Tribunal. That was refused on 4 November 2002.

3.
On 25 November 2002 a letter was sent to the applicant notifying him that his asylum claim had been finally determined and that he no longer qualified for financial support under s. 95 of the Immigration and Asylum Act 1999. Temporary support was to be provided until 30 November 2002 and he would be permitted to remain in his accommodation until 5 December 2002. The letter continued :

“You must now leave the United Kingdom. Help and advice on returning home can be obtained from the Immigration Office dealing with this case, or the immigration service… alternatively help and advice for asylum seekers and those whose asylum claim has been refused who wish to return home voluntarily can be obtained from the International Organisation for Migration.”

The letter of 27 November 2002

4.
It is not clear whether receipt of this letter prompted the applicant's representative to write a letter dated 27 November 2002 which said:

“We wish to make a fresh application on behalf of our client and hereby apply on his behalf to be granted leave to remain on an asylum basis. The appellant has a well-founded fear of persecution in Algeria and suffered a great deal of persecution in Algeria before fleeing the country for the safety of his life.”

5.
Given that the fact that the applicant's asylum claim had been finally determined a few days before when his application to appeal against the determination of Judge Khan had been refused and his appeal rights exhausted, there could be nothing within this letter that amounted to a fresh claim. No suggestion was made that there was to be a further human rights claim but, insofar as it dealt with circumstances that post-dated a decision made a few days before, there could not be the remotest prospect of a fresh claim succeeding. It is, therefore, difficult to understand how in these proceedings so much attention has been paid to a letter which carries so little weight and has so little significance. It was not a fresh claim. However, on that scant foundation, it was said that the decision made on 17 July 2012 was a response to it following some 9 ½ years later. By this device it was sought to argue that there had been a delay of such scandalous proportion that the applicant should benefit from the weight of judicial authority directed against the Secretary of State when an appellant or applicant has been the victim of inexcusable delay. However, as Judge Jordan said when he granted an adjournment to pursue the application for judicial review, the letter of 27 November 2002 (“the 2002 letter”) was in reality a ‘ non-letter ’ and provided no basis for enhancing the applicant's claim under Article 8.

6.
That does not, of course, mean that the passage of time which has occurred since November 2002 and the relevant decisions should not be examined. The fact that over 10 years has elapsed since the applicant’s rights under the Refugee Convention were determined (at which point the applicant could have been removed) inevitably required an examination as to whether removal would violate the applicant's human rights. However, the delay is not properly categorised as arising from a failure on the part of the respondent over a period of more than 9 years to make a decision upon an asylum claim or upon further submissions sufficient to amount to a fresh claim under paragraph 353 based upon the 2002 letter.

7.

Since the matter was last before the Upper Tribunal, the disclosure of documents has revealed that the applicant's solicitors wrote a further letter on 6 January 2003 to follow-up the 2002 letter. In it, City Law Practice sought a Self-Completion Questionnaire at a time when this form was used to initiate an original claim for asylum. No details of any asylum claim are mentioned even in summary form and no human rights claim is mentioned. This letter does not, therefore, provide any basis for asserting years later that the respondent was under an obligation to reach a decision upon it.

8.
Pausing there, the applicant knew that his asylum claim had failed and that he was required to leave. The 2002 letter could provide him with no basis for believing that he had a further right to remain or that the letter of 25 November 2002 which had told him that he should make arrangements to leave had been annulled or cancelled. Had the respondent in 2002, made a decision on the 'claim' in the 2002 letter for further leave to remain that application would have been doomed to fail; it contained no basis for further leave.

9.
Much energy has been expended upon seeking to analyse the actions of the applicant and the respondent in the years that followed. It may therefore be helpful to provide a summary of events:

CHRONOLOGY

2003 onwards The respondent maintains that the applicant failed to maintain contact with respondent.

24 June 2004 The applicant is arrested when seeking to open a bank account with a document to which he was not entitled. On admitting responsibility, he received a police caution. There is then an issue as to whether the applicant was served with an IS96 requiring him to report on 28 June 2004.

28 June 2004 onwards

There is no doubt that the applicant thereafter failed to report but, if he knew nothing of the requirement to do so, his failure cannot be held against him.

29 April 2010 The respondent sent a letter to the applicant's last known address. The letter was returned on 13 May 2010 as the applicant had moved. The applicant relies upon this as an acknowledgment that his case was in a backlog of old asylum cases and the case would be considered by the CRD. The letter seeks further documentation.

25 October 2010 The applicant's representatives write to the respondent, containing a letter from the Applicant's friend. (1)

25 January 2011 The applicant's representatives write to the respondent. (2)

28 April 2011 The applicant's representatives write to the respondent. (3)

19 May 2011 The applicant's representatives write to the respondent. (4)

15 August 2011 The applicant's representatives write to the respondent. (5)

22 September 2011 The applicant's representatives seek judicial review requiring the respondent to reach a decision in the legacy programme raised in the 29 April 2010 letter.

16 March 2012 First application for judicial review requiring the respondent to make a decision. No mention is made of the 2002 letter.

17 July 2012 A decision is made. The representations are refused, thereby rendering judicial review no longer necessary.

10. This chronology raises a series of issues concerning the responsibility for the delays that arose in handling the case but two things are certain. The applicant remained notwithstanding the fact that he knew he had no substantive right to remain as a failed asylum-seeker. The respondent took no action to remove the applicant.

The treatment of delay at law – the legacy cases and paragraph 395C

11. This issue of delay arises in two distinct ways within the compass of the applicant's Article 8 case. First, the applicant raises the specific delay-related point identified in Hakemi & Ors v SSHD [2012] EWHC 1967. Second, there is the more general delay issue referred to in EB (Kosovo) v SSHD [2008] UKHL 41.

12. In Hakemi & Ors v SSHD , Burton J was considering the fact that by the end of 2006, there was a massive and unmanageable backlog of asylum/human rights applications, by which the Home Office was overwhelmed. 500,000 outstanding applications received prior to 5 March 2007 were transferred to the Casework Resolution Directorate ("CRD") which endeavoured to grant or refuse leave to remain by July 2011. By July 2011 there was a rump of some 116,000 cases, consisting in part of 18,000 still active cases and in a "controlled archive" of some 98,500 cases. The active cases and the controlled archive were transferred, in July 2011, to a new body, who were to resolve them. The legacy process, over its five years of operation, resulted in considerably more grants than refusals but there was no amnesty.

13. The CRD was to consider the grant of leave outside the Immigration Rules but by reference to paragraph 395C, which states:

"Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State, including:

(i) age;

(ii) length of residence in the United Kingdom;

(iii) strength of connections with the United Kingdom;

(iv) personal history, including character, conduct and employment record;

(v) domestic circumstances;

(vi) previous criminal record and the nature of any offence of which the person has been convicted;

(vii) compassionate circumstances;

(viii) any representations received on the person's behalf."

14. Chapter 53 of the Enforcement Instructions and Guidance ("EIG") was at all material times the published guidance as to 'relevant factors' in paragraph 395C of the Immigration Rules:

"53. Extenuating Circumstances

It is the policy of the Agency to remove those persons found to have entered the United Kingdom unlawfully unless it would be a breach of the Refugee Convention or ECHR or there are compelling reasons, usually of a compassionate nature, for not doing so in an individual case.

53.1.1 Instructions on applying paragraphs 364 to 368 and 395C of the Immigration rules

Before a decision to remove is taken on a case, the case-owner/operational staff must consider all known relevant factors (both positive and negative). It is important to cover the compassionate factors in the transcription of the interview…

53.1.2 Relevant Factors in paragraph 395C.

(i) The consideration of relevant factors needs to be taken as a whole rather than individually, for example, the length of residence may not of itself be a factor, but it might when combined with age and strength of connections with the UK.

For those not meeting the long residence requirements elsewhere in the immigration rules, the length of residence is a factor to be considered. In general, the longer a person has lived in the UK, the stronger their ties will be with the UK. However, more weight should be attached to the length of time a child has spent in the UK compared to an adult."

15. Prompted no doubt by the emerging case law, the EIG drew a clear distinction between the accrual of time in the United Kingdom which was attributable to the applicant and those periods which were caused by the Secretary of State.

" (ii) Residence accrued as a result of non-compliance by the individual

Where there is evidence of an attempt by the individual to delay the decision making process, frustrate removal or otherwise not comply with any requirements imposed upon them, then this will weigh against the individual.

(iii) Residence accrued as a result of delay by UKBA

Case law has established that there are particular contributory factors involving delay that need to be present before it is considered significant enough to grant leave. These include cases where:

- an application has been outstanding for over 2 years; and
- no decision has been received from the UK Border Agency during that time; and
- the individual has been making progress enquiries during that time;
- in the meantime the delay has meant that they have built up significant private or family life or the delay has resulted in considerable hardship.

(iv) In addition to the foregoing, provided that none of the factors outlined in 'Personal History' weigh against the individual, then caseowners should also place weight on significant delay in cases where, for example:

[Non-family cases] where delay by UKBA has contributed to a significant period of residence. Following an individual assessment of the prospect of enforcing removal, and where other relevant factors apply, 4-6 years may be considered significant, but a more usual example would be a period of residence of 6-8 years". (The "delay" here is not delay for which the defendant is responsible, e.g. by

way of delaying in dealing with the initial consideration, refusal (if such it be) and appeal, but 'delay' by virtue of passage of time.)”

16. Mr Forshaw, Assistant Director of UKBA, in an email of 29 October 2010 wrote that:

"... as the 395C exercise requires a holistic evaluation of cases based on a range of factors – both positive and negative - ”

When the active cases were transferred from CRD some required an urgent decision. An email from Mr Forshaw, dated 31 st August 2011, stated with regard to them,

" the most appropriate way to deal with these cases is to apply the following criteria under paragraph 395C ... use the lowest limit of 4 years' residency for single applicants ... use the lower limit of 3 years' residency for families".

17. Rule 395C simply sets out factors which must be considered. Chapter 53 did not affect or fetter such considerations, or change them. It gave guidance by way of a very broad spectrum for residence (in the case of a single applicant, such as the claimants in Hakemi) of 4 to 8 years. Six years was a half-way point between 4 years and 8 years. It was submitted this developed into practice or policy, " a ll things being equal " (words drawn from a statement of Mr Forshaw) that six years' residence would result in a grant of leave, and this practice or policy was said to amount to a change or an alteration of a substantive criterion for leave to remain .

18. Burton J found that there was no change in Rule 395C, but simply discussion and guidance in relation to the factors to be taken into account, always subject to what Mr Forshaw called the holistic approach.

19. The training slides prepared by the defendant for the training of the Caseworkers involved with the CRD contained the following passage:

" The individual's personal history will be particularly relevant where residency has been built up as a result of the person evading enforcement action, as it would not be appropriate for a person to benefit from refusing to co-operate with the Home Office. However the strength of the connections that the person has established and any compassionate circumstances should still be carefully considered ... An individual's lawful employment history and how they have supported themselves and/or their family during their stay in the UK may also be relevant to consideration of their personal history. Similarly the individual's effort to actively press for resolution of their immigration status will add weight to any delays suffered. A person who has actively attempted to resolve their status through requesting progress reports, for example, will have a stronger case than someone who has simply taken advantage of the delay and not made any contact or attempt to regularise their position. "

20. In Chapter 53 there was express reference to " Residence accrued as a result of delay by UKBA " with reference to HB (Ethiopia) v SSHD [2006] EWCA Civ 1713. There was no room for a claim that the defendant should be regarded as culpable in respect of " failing to enforce removal ". Burton J continued:

“If there had been culpable delay by the defendant in dealing with the initial asylum or human rights application, then that would be taken into account, as [counsel] accepts. But once the application has been dealt with and all rights of appeal extinguished, then what has occurred is that the failed asylum seeker has not left the jurisdiction, as he plainly ought to have done, not having any leave to remain, while the defendant has not taken any steps, or been so overwhelmed with the backlog that it has

been unable to take steps, to enforce that obligation of the failed applicant. The 'delay' is simply the same as the passage of time, which, of course, was inevitably being considered in the Legacy Cases. If anything, such passage of time would be held against the failed applicant, if he or she has, for example, failed to comply with reporting requirements, or acted with deception: see the passage in Chapter 53, part of which has already been recited in paragraph 29 above:

" Caseowners must also take account of any evidence of deception practised at any stage in the process, attempts to frustrate the process (for example, failure to attend interviews, supply required documentation), whether the individual has maintained contact with the UK Border Agency, as required, and whether they have been actively pressing for resolution of their immigration status. The caseowner must assess all evidence of compliance and non-compliance in the round. The weight placed on periods of absconsion should be proportionate to the length of compliant residence in the UK. For example, additional weight should be placed on lengthy periods of absconsion which form a significant proportion of the individual's residence in the UK. "

21. Three of the claimants in Hakemi were close to the 6-year period when Mr Forshaw accepted that " all things being equal " they would be likely to have been granted leave, but in each case the Secretary of State concluded that all things were not equal. For example, one of the claimants never had an arguable asylum claim at all. (He had lied about the country he came from and the ill-treatment he had alleged he had suffered there.)

R (on the application of Fatima Mohammed) v SSHD

22. In R (on the application of Fatima Mohammed) v SSHD [2012] EWHC 3091 (Admin) Mr Stephen Morris QC sitting as a Deputy High Court Judge considered three principal grounds for judicial review: (i) the claimant was still awaiting a decision on consideration of her case under the legacy programme; (ii) (which was in reality the same point as that in (i)) the case should be stayed pending further consideration of the claimant's case as the Secretary of State had as yet considered the claimant's case and (iii) in any event, the defendant's decision, in so far as discretionary leave to remain under paragraph 395C was refused, should be quashed as being Wednesbury unreasonable or in some other way unfair or unlawful because the defendant had failed to consider or apply the policy or practice applicable to those who have been resident for a long time and in particular for more than 6 years. Related to this, it was said that there has been inconsistency in decision-making.

23. The Deputy Judge found that the claimant could not have understood, and did not understand, it to mean that her application remained outstanding. The Secretary of State’s correspondence did not give rise to any legitimate expectation of a further decision. However, the main thrust of the challenge was that the decision letter was Wednesbury unreasonable on the basis that the defendant failed, or failed adequately, to take account of the fact that, at the time, the claimant had been resident in the United Kingdom for 10 years and 1 month and thereby the defendant failed properly to apply paragraph 395C as expanded upon in Chapter 53 of the EIG. In particular, she failed to give sufficient weight to the length of the claimant's residence and in particular failed to apply her own guidance applicable in a case where residence exceeded 6 years: (a) there was an internal "6 year" benchmark or practice which the defendant failed to apply; (b) the defendant failed to apply the policy on length of residence in Chapter 53 and (iii) there had been inconsistency of treatment of length of residence in different cases. The Deputy Judge continued:

“Whilst not entirely clearly drafted, in my judgment, the effect of paragraph 53.1.2 EIG is that weight is to be placed on significant periods of residence and that guidance is then given as to what periods of residence are to (or may) be considered to be significant; and in a case such as the claimant's a

period of 6 to 8 years is or may be considered to be significant. Plainly such a significant period of residence is to weigh as a factor operating against removal. These are the instructions given to the caseworkers and which in my judgment the caseworker in the CRD in the present case should have consciously taken into account…There is no evidence that the claimant's residence of more than 10 years was weighed in the balance as being a significant factor. There is nothing in the decision letter itself to suggest to the contrary, and the external material referred to above does not establish that it was considered…It is important in a legacy case such as this where a long period of residence is plainly liable to be a factor of weight, and where the defendant's own guidance indicates that it is, that it is considered by the decision maker."

Recent decisions upon the Hakemi jurisdiction - DM, Re Judicial Review [2013] ScotCS CSOH 114

24. Since we heard the appeal, further decisions have been made shedding light on Hakemi principles in the context of a claim for judicial review. In DM, Re Judicial Review [2013] ScotCS CSOH 114 (9 July 2013) Lord Doherty considered the case of a petitioner who had come to the United Kingdom in 1998 and claimed asylum. His asylum claim was refused; on 15 December 2000 he became appeal rights exhausted. In the meantime he had married a British citizen in August 1998 and on 12 December 2001 was granted leave to remain for one year on account of his marriage. The marriage collapsed. The petitioner made no further application for leave to remain when his leave expired on 12 December 2002. He became an overstayer. He did not contact the authorities until 29 May 2009 when solicitors wrote applying for discretionary leave on the basis that removing him would breach his Article 8 ECHR right to private life and that he had a right " to have his case considered/ reconsidered in light of the policy as announced by the Secretary of State in July 2006 in respect of case resolution ".

25. The Secretary of State did not reach a decision on the petitioner's representations of 29 May 2009 until 14 November 2011. Having made a decision in accordance with the factors contained in paragraph 395C, the Secretary of State rejected the petitioner's claim for leave to remain and concluded removal was proportionate. On appeal, the First-tier Tribunal allowed his appeal, resulting in the grant on 31 August 2012 of discretionary (not indefinite) leave to remain in the United Kingdom until 30 August 2015.

26. It was said that the 29 May 2009 representations should have been answered by 19 July 2011, but were not responded to until 14 November 2011 and the decision to refuse to grant the petitioner Indefinite Leave to Remain was unlawful. It was submitted on the petitioner's behalf that the various statements amounted to a promise that legacy cases such as the petitioner's would be decided within five years of 25 July 2006; that there had been a practice that persons granted leave to remain on paragraph 395C considerations were granted Indefinite Leave to Remain; that the promise had given rise to a legitimate expectation that the petitioner's case would be decided within that period which, had it been, would have resulted in the grant of Indefinite Leave to Remain.

27. Lord Doherty was not persuaded that any of the statements relied upon by the petitioner constituted a promise that all legacy cases would be dealt with within five years of 25 July 2006. The statements were aspirational only: a clear declaration of an objective, and the expression of determination to achieve it. However, it was not, and was not intended to be, a binding undertaking to those with legacy claims.

28. The petitioner therefore failed to establish that prior to July 2011 there was a practice of granting Indefinite Leave to Remain in rule 395C cases which was so unambiguous, so widespread, so

well-established and so well-recognised as to carry a commitment to legacy claimants that its continuance was assured and that their cases would be determined in accordance with it. From 20 July 2011 the clear policy in rule 395C non-removal cases was to grant discretionary leave to remain for up to three years. But, even if on 24 July 2011 the respondent had decided on rule 395C grounds not to remove the petitioner, he would not have been granted Indefinite Leave to Remain. Further, there was no obligation to decide legacy cases in accordance with the law, policy and practice applied by the CRD when it was operational nor was there a commitment that its continuance was assured and cases would be determined by CRD or the respondent in accordance with it.

29. There is nothing within the decision in DM that provides the applicant with any purchase in his claim for judicial review. Rather the reverse in that it demonstrates the limitations that exist upon applications for judicial review advanced on the basis that the Secretary of State was required to make a decision and (a) was required to make a decision at a particular time and/or (b) in a manner that was consistent with historic policies that were no longer applicable.

Okonkwo (legacy/Hakemi; health claim) [2013] UKUT 00401 (IAC)

30. In Okonkwo (legacy/Hakemi; health claim) [2013] UKUT 00401 heard on 23 July 2013, the President and Upper Tribunal Judge Hanson decided that

“i) It may be unfair for the Secretary of State to fail to apply the terms of a policy to a case that fell within the terms of the policy when it was in existence: Hakemi and others [2012] EWHC 1967 (Admin), and Mohammed [2012] EWHC 3091 Admin considered.

ii) Chapter 53 of the EIG Instructions as in force December 2011 did not mean that any adult who had lawfully resided in the UK for six years had an expectation of discretionary leave to remain applying former rule 395 C together with the policy then in force.”

31. In August 2011 the appellant and her husband applied for discretionary leave to remain outside the Rules. They relied on the length of lawful residence of Mrs Okonkwo (over 5 years) and the fact that she had received a kidney transplant in the United Kingdom and the consequences that removal would have upon her health. There was a prompt reply to the application made on 29 September 2011 in which the Secretary of State refused the application for an extension of stay. Her counsel, Mr Medhurst, argued that a consideration of rule 395C would have had to take into account EIG Chapter 53 as in force on 8 December 2011. The decision of the Administrative Court in Mohammed [2012] EWHC 3091 Admin made plain that a failure to apply those instructions to a decision where they should previously have been applied could make a subsequent decision conspicuously unfair, and those instructions required in the normal case that a person who had been resident for six years to be given discretionary leave to remain.

32. The proper meaning of the instructions in EIG Chapter 53 was central to this submission but the panel concluded Mr Medhurst had misunderstood them. By the time the case came before the Judge, it was clear that that no lawful removal decision had yet been made and despite previous regrettable uncertainty in the law, there was no obligation in law for the Secretary of State to make decisions to remove at the same time as a decision to refuse leave to remain.

33. Further 53.1.2 of the EIG referred to ‘ Residence accrued as a result of delay by UKBA ’ and that they were created partly in response to the decisions of the higher courts that delay by the Home Office can be a significant factor in the assessment of whether removal is a proportionate interference with human rights. Reliance was placed upon the words, ‘Any other case where delay by UKBA has

contributed to a significant period of residence…4-6 years may be significant, but a more usual example would be a period of 6-8 years'. It was argued that the appellant has been here for six years and there had been delay in making a decision on her case between August 2011 and October 2012 thereby entitling her to qualify for exceptional leave on length of residence alone.

34. The panel disagreed. Mrs Okonkwo's residence until August 2011 was not because of any delay by the Home Office, but was a consequence of the progress of her studies and the post-study work experience rule. There was no delay by the Home Office in any decision-making following the August 2011 application. There was a prompt refusal in September 2011 and following appeal further decisions in March 2012 and October 2012 based on assertions of contentious issues of law. The factual predicate for the operation of the policy did not exist.

35. The proper meaning of the EIG was that, in the case of adults with no children, residence of between four to eight years may be considered significant but that was residence following an initial assessment of the prospect of removal. Removal was only considered in September 2011 and decisions to remove were made in March 2012 and October 2012 against a background of appeals and the clarification of a complex area of law. Thus, there was no delay of two, three or four years, that were the relevant periods needed under the instructions.

36. Although it is always a relevant factor, pure length of residence alone has never been a decisive consideration in immigration decision-making. Accordingly, the centre piece of the applicant's claim to unfairness fell away.

R (ex p. Julius Labinda Che) [2013] EWHC 2220

37. In R (on the application of Julius Labinda Che) v SSHD [2013] EWHC 2220 (Admin) (26 July 2013) Mr C M G Ockelton, Vice President of the Upper Tribunal (sitting as a Deputy High Court Judge) considered the application for judicial review of a person whose asylum claim had been refused in a letter dated 17 October 2006. On 30 March 2007 the Secretary of State made a decision to give directions for his removal as an illegal entrant. On 12 June 2007 his appeal against that decision was heard and dismissed principally because the claimant's claim was disbelieved. His appeal rights were exhausted on 23 November 2007. He had never had any leave to be in this country, and did not depart after the dismissal of his asylum claim. In 2009 his representative made further submissions enlarged on 19 March 2010 which the defendant answered by a decision of 19 April 2011. The Secretary of State concluded that the further submissions were not significantly different from the material which has previously been considered and did not amount to a fresh claim. The claimant was told he had no basis of stay in the United Kingdom and should make arrangements to leave the United Kingdom without delay.

38. A letter dated 31 July 2011 was crucial to the claimant's case. In it the Secretary of State told the claimant's representative that, in March 2011, the UK Border Agency had completed its internal review of all outstanding legacy cases and that the claimant's case had been reviewed but no final decision had yet been made.

39. The claim for judicial review alleged a failure both to consider the claimant's case under the legacy policy and a failure to grant the claimant leave to remain. It was said that the defendant unlawfully delayed in making a decision: the letter of 31 July 2011 created a legitimate expectation that a decision would be made shortly and it was unreasonable for the defendant to delay making the decision. Secondly, the delay had a substantial adverse effect. The evidence of the policies and practices of those making legacy decisions in the period soon after 31 July 2011 suggested that if a

decision had been made at that time it would have been a grant of leave. (The argument that the decision made on 30 May 2012 was inadequately reasoned and failed to take into account the submissions that have been made about the claimant's situation was roundly rejected.)

40. Mr Ockelton said the creation of the CRD was for the purposes of review, and in order to divide those who were entitled to remain from those who ought to be removed. Further, the policies and practices applied to the decision of individual cases were no different from those which would be applied to any other cases that shared the same facts. In the group of those who waited for a long time for a decision following a claim for asylum, it could properly be said that it was the Secretary of State's own inactivity that had enabled them to develop a personal life in the United Kingdom and to build up relationships here. Even in the case of those whose appeal rights were exhausted, the general lack of enforcement enabled such situations to develop, even if they should not have been allowed to do so. The inclusion of a case within the 'legacy' gave no additional expectation of a grant of leave.

41. In those cases in which the claimant complained that he had not received a 'legacy decision' granting him leave to remain, it was conventionally argued, amongst other things, that the claimant had not had a 'legacy decision' and was therefore still awaiting one which, with luck, would be a decision granting leave.

42. Mr Ockelton decided that it was ‘ wholly unarguable ’ in cases in which the claimant has had a notification that he was not to be granted leave but was to be removed, that he had not had a decision in this case. Although he was not a person who has yet actually been removed, his case has been reviewed, he had had his legacy decision, and the removal process, which had to start with such a notification, had begun. Such a person was not therefore awaiting a decision which the judicial review proceedings were said to be seeking: decision-makers had completed their task and only those charged with arranging the mechanics of removal had any further work to do on his case. The claimant had no perceptible entitlement to another decision. He had made no further valid submissions and none was outstanding.

43. Nor did he have a legitimate expectation derived from the letter of 31 July 2011 since such an expectation arose from a promise which was ‘ clear, unambiguous, and devoid of relevant qualification ’. In order to assess this, it was necessary to look to see what, on a fair reading of what was said, was reasonably to be understood by the person to whom the words were expressed. Reliance on any promise was not essential, but if there has been reliance, that would be relevant in deciding whether it was open to the authority to go back on the promise which would be one of the factors to bear in mind when deciding whether a change of policy or a revocation or abandonment of the promise could be justified in the public interest.

44. Whist the 31 July 2011 letter on its face did amount to a clear and unequivocal representation that the claim was outstanding, the assessment of any expectation legitimately arising from the letter had to be made in the context of the recipient's knowledge. The claimant and his solicitors knew perfectly well that all the outstanding submissions that had been validly made had been dealt with in the decision of 19 April 2011. They knew that, contrary to what had been said in the letter, the claimant's case was not one in which the Secretary of State had not been able to come to a final decision. The decision had been reached, and communicated; all that was awaited was removal. Mr Ockelton continued:

“40. Nothing to which the claimant has pointed indicates that the legacy programme involved any system of repeated review of cases in which no further (valid) submissions had been made. It is thus

somewhat difficult to understand what it is said that the claimant's expectation was. It cannot have been that there would be a new decision based on submissions made after 19 April 2011, because no submissions had been validly made after that date."

45. His claim for judicial review fell to be dismissed.

The Hakemi point and the changes in the Immigration Rules

46. There was no such thing as a legacy policy. Rather, the legacy cases were a process by which guidance was offered to caseowners as to the implementation of the Immigration Rules and, in particular, paragraph 395C. Paragraph 395C, however, was deleted from the respondent's policy by a change in the Immigration Rules introduced on 13 February 2012 by HC 1733. The decisions challenged in the proceedings for judicial review are decisions made on 17 July and 25 August 2012 and 21 June 2013. It is clear that the Secretary of State is entitled to change her policies and apply those changed policies to decisions made after the changes were introduced, notwithstanding the fact that, at the date of application, the applicant met the requirements of the Immigration Rules then in force, Odelola v SSHD [2008] EWCA Civ 308. Further, the Court of Appeal roundly rejected the contention that, in such circumstances, the Secretary of State had a duty to consult with applicants prejudiced by the changes, R (on the application of Rahman, Abbassi and Munir) v SSHD [2011] EWCA Civ 814, a decision which was found to be ' plainly correct ' in the words of Lord Dyson in the Supreme Court, (with whom the other Judges of the Supreme Court agreed): Munir & Anor, R (on the application of) v SSHD [2012] UKSC 32).

47. Nevertheless, if during a period when the former policy existed, a claimant was able to establish that he was entitled to a decision and the delay was occasioned by the respondent with the result that the decision post-dated the 13 February 2012 change in the Rules, it may be open to the claimant to establish the delay has prejudiced him such as to render the respondent's actions unlawful. Here, however, the applicant made no application that required the respondent to reach a decision upon it. There was, therefore, no relevant delay. The passage of time relied upon by the applicant did not, therefore, cause him to be prejudiced because he never stood to benefit from a decision made in more favourable circumstances.

48. Further, the applicant cannot rely upon any inconsistency in the respondent's decision-making by identifying that some in the applicant's position were granted leave whilst, in similar circumstances, the applicant was not. As the applicant was not entitled to a decision, the treatment of those that were so entitled is irrelevant. Even if the applicant were able to establish (which has not been shown) that other applicants were granted leave whilst others were not, such an inconsistency in the decision-making cannot benefit the applicant who had no right to a decision.

49. It is the inevitable consequence of these decisions that the applicant has no claim to be entitled to the benefit of the legacy cases. There can, therefore, be no viable claim that the applicant is permitted to advance before the First-tier Tribunal that this right should be the foundation of a fresh claim that removal would violate his human rights. The respondent was not required to consider the fresh claim as one to which the Hakemi legacy programme applied. Nor was she therefore required to consider what a First-tier Tribunal Judge would make of such a claim in the context of an Article 8 claim because no such consideration could arise.

50. It follows from this that the time and energy expended on the attribution of blame for the delay may appear irrelevant. However, whilst the principles in Hakemi may no longer apply, the attribution of fault (or, perhaps, more accurately, an assessment of the impact that the applicant's continued

presence in the United Kingdom has on his Article 8 claim) is necessary in reaching a conclusion as to whether, applying anxious scrutiny, the applicant establishes he has a fresh claim with a realistic prospect of success before the First-tier Tribunal.

The treatment of delay at law - EB (Kosovo)

51. There is a second way in which delay is material. In EB (Kosovo) v SSHD [2008] UKHL 41 Lord Bingham of Cornhill when dealing with delay, identified its significance in Article 8 claims:

“13. In Strbac v Secretary of State for the Home Department [2005] EWCA Civ 848 , [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held Shala v SSHD [2003] EWCA Civ 233 , [2003] INLR 349 to be no authority. While I consider that Shala was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission.

1. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

2. Delay may be relevant in a second, less obvious, way…

3. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone) , heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947 , [2005] INLR 575, para 25:

"Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal".”

52. In the context of this appeal, the effect of delay has not resulted in an unlawful inconsistency as between those whose claims had been treated at an earlier stage and those dealt with later. This is not, therefore, a case of a dysfunctional system yielding unpredictable, inconsistent or unfair outcomes as between various individuals or classes of them. Rather, the delay can only be seen in the context of the first type and the effect it has had, if any, on the development of closer personal and social ties and the establishment of deeper roots in the community than were there earlier.

Paragraph 353B

53. Although paragraph 395C has been removed from the Immigration Rules, a different formulation of principle or policy is now to be found in paragraph 353B of the Immigration Rules:

“Exceptional Circumstances

353B. Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:

(i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;

(ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;

(iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused; in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate.”

54. The combination of factors identified here (the applicant’s appeal rights had been exhausted; he had no outstanding further submissions; the absence of a grant of leave to remain; compliance with any conditions attached to a previous grant of leave or temporary admission; time spent in the United Kingdom for reasons beyond the migrant's control) gravitate against the applicant, rather than in support of him.

55. Paragraph 353B, therefore, offers little to the applicant as a spring-board from which to advance a fresh claim before a Judge.

The broader principle

56. Overlaying these cases is the general principle adumbrated in R (on the application of FH & Others) v SSHD [2007] EWHC 1571 (Admin), Collins J in the case of a claimant whose human rights claim has not been determined and has been outstanding for some 5 years. In such circumstances, he treated the claim as more akin to an initial claim and thus fell into what had properly to be regarded as an exceptional case:

“It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court.”

The responsibility for the delay

57. The applicant's presence in the United Kingdom from the date of his arrival on 8 September 2001 until 25 November 2002 was spent by the applicant pursuing an unmeritorious claim on the basis of which the applicant failed to establish he had any substantive right to remain. On 25 November 2002, he was (reasonably) told to leave and he did not do so. Thereafter, he remained without leave and in the sure knowledge that he should not be here. For the reasons we have given, the 'non-letter' of 27 November 2002 and the follow-up letter of 6 January 2003 does nothing to strengthen the applicant's position vis-à-vis the Secretary of State or the strength of public interest in favour of removal.

58. The respondent maintains that the period from January 2003 until 24 June 2004, the date on which he was arrested when attempting to open a bank account which he was not entitled to do, was time during which the applicant failed to maintain contact with the respondent. Whether he was maintaining contact with the respondent or not is largely immaterial, the applicant knew he should leave whilst he was seeking to secure his continued (unlawful) presence in the United Kingdom by creating as normal a life as possible by using the banking system. Nothing in the applicant's conduct operates to minimise or marginalise the public interest in removal.

59. At the time of his arrest, the respondent maintains that the applicant was served with the IS96 notifying him that he was liable to immigration detention and requiring him to report. The applicant says not. What, however, cannot be in doubt is that the applicant's arrest and caution provided him with no basis for asserting a substantive right to remain. Nothing was done which the applicant could construe as strengthening his status as one who was liable to be removed because his asylum claim had been refused and who had been told to leave and who had no substantive right to remain under the Immigration Rules.

60. The IS96 at [C318] was addressed to the applicant at Consert Road. However, it is also known that the applicant was personally encountered by immigration officials. There is evidence of a second IS96 and this may account for the generation within the Home Office files of an address in Northumberland Avenue Reading on 25 June 2004, [C178]. The information can only have come from the applicant. This suggests that the applicant received the IS96 or was informed of its contents but it is largely immaterial since he could have no basis for thinking he had any right to remain.

61. The respondent categorises the applicant as an absconder because he failed to report when he was required to do. The record at [C170] clearly demonstrates he did not report, indeed, the applicant accepts it. However, the material is equivocal and not easy to understand. Print-outs from the Home Office computer records show a series of addresses in Peterborough, Reading and Peckham. The information upon them is difficult to explain without a narrative. Suffice it to say that the evidence of what the Home Office knew of the applicant's whereabouts and what the respondent was told by the applicant is equivocal. We do not consider it necessary to categorise the applicant as an absconder or that such a classification assists in assessing the fresh claim.

62. Ms Ward submitted that where there are issues of fact to be resolved in a fresh claim, it is impossible for the Secretary of State to second-guess what a First-tier Tribunal Judge may find as a fact and, therefore, the applicant is entitled to have his fresh claim determined by a Judge. We reject that submission. It would have the effect of requiring the Secretary of State to treat any fresh material or submissions as true for the purposes of paragraph 353. She is not required to do so. It was open to the Secretary of State to reach the conclusion that the applicant had absconded but to be alive to the possibility that a Judge may take a different view in the assessment of the facts. In the context of this

claim we are satisfied that these relatively minor issues on the facts do not preclude the Secretary of State from reaching a sustainable conclusion that the claim would fail before a Judge applying anxious scrutiny. Our reasons for so doing lie in the factors over which there can be no, or little, dispute.

63. It is accepted that there was no contact after 25 June 2004 until communication was resumed in 2010, a period of 6 years. That is sufficient for our purposes to classify the applicant as a person who was content to let sleeping dogs lie without taking active steps to conceal his presence.

64. The communication revived following the letter of 29 April 2010 (see below) in which the respondent acknowledged the applicant was in a backlog. For the reasons we have stated, there was no outstanding decision to be made. The letter was sent to the applicant's last known address. He was not apparently living there.

65. In October 2010, the application's representatives took up cudgels. The submissions are supported by a letter from the applicant and a friend. The applicant's letter [C13] speaks of the applicant learning a lot about life and culture in England and speaking fluent English. He referred to good friends who had assisted him financially and to adapt to the community and of his doing good things within the community. The friend's letter is a character reference on behalf of the applicant: a good and helpful man whom everybody likes. As Mr Harland pointed out, these are a long way away from a viable Article 8 claim.

66. In the period October 2010 to August 2011, a period just short of a year there is sustained and active pressure by the applicant's representatives to seek a response. This is not provided until 17 July 2012 when the submissions are refused.

67. It is thus possible to discern periods in the latter part of the chronology when the applicant's representative was pursuing the matter with some vigour but the underlying claim that was being pursued was one without substance, relying in large part on the respondent's own view, found in the letter of 29 April 2010, that this was a legacy case.

68. It is not permissible, as a matter of law, for the applicant to rely upon the respondent's failure to remove him, even if the respondent knew of the applicant's whereabouts. It was open to the Secretary of State to treat the period between 2002 and 2010 as a period during which the delay was not attributable to failure on her part such as to reduce the effect of the public interest in removal. The respondent was not, therefore, required to consider the fresh claim on the basis that the weight to be attached to the public interest in maintaining immigration control should be significantly discounted by her own actions or failings in the course of events since 2002.

69. It was open to the respondent to treat the applicant as one who had failed to leave at the conclusion of his asylum appeal and had then disappeared. However, if the applicant had not avoided making contact with the immigration authorities (we would not necessarily regard maintaining contact with NASS as the same since NASS and the Border Agency were two distinct organisations), it was open to the respondent to treat the applicant as one who had not actively pursued a substantive right to remain.

The respondent's letter of 29 April 2010

70. On 29 April 2010, the respondent wrote to the applicant [B68-70] at an address in Northumberland Avenue, Reading informing him that the CRD was responsible for the applicant's case. There was, of course, no such case since the 2002 letter was neither a claim for asylum nor a fresh claim. It could not become one because the respondent, through inadvertence or error, saw fit to

call it one. The applicant and his representative could have been in no doubt that there was no claim since nothing had been asserted as the basis for one. In the letter, the respondent sought information about the applicant's case.

71. It is also accepted that the applicant was not living at that address when the letter was sent out. At C202 there is an extract from the Home Office files that on 29 April 2010 a letter was returned undelivered because the applicant was not living at that address. At [C206] there is a letter from Alan Sweetzer who was visiting the address in Northumberland Avenue Reading which belonged to his deceased cousin and came across the letter of 29 April 2010 addressed to the applicant. It categorically confirmed the applicant had never lived at that address. The writer does not say how he was able to say this ‘ categorically ’ since he neither owned nor, apparently, lived at the address. He might have been able to do so if he had visited his cousin regularly and knew the house intimately but we just do not know.

72. Nevertheless, there came a time when the applicant’s representatives became aware of the April 2010 letter and the fact that the Secretary of State was treating the applicant’s case as falling within the legacy programme.

The proceedings for judicial review

73. As we have pointed out, the initial claim for judicial review was to compel the Secretary of State to reach a decision under the legacy programme. Initially, no mention was made of the November 2002 letter.

74. Since the applicant became aware of the November 2002 letter, the applicant has consistently sought to advance the application for judicial review on the basis of the respondent's failure to reach a decision for 9 ½ years amounts to a violation of his human rights:

(i) Grounds, 2 March 2012 [B.42]

(ii) Letter before action [B20, paragraph 2, unnumbered]

(iii) Grounds, 28 September 2012, paragraph 19

(iv) Renewal of the application for permission, 16 January 2013, paragraph 9

(v) Amended grounds 12 April 2013, paragraph 19

75. For the reasons we have given, reliance on the letter of November 2002 does not give rise to a viable claim that there has been delay on the part of the respondent such as to enhance the applicant’s prospects of success. If there has been delay, it is of the type identified in EB (Kosovo) as associated with the passage of time and the inevitable strengthening of the Article 8 claim: ‘ the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier…the longer the period of the delay, the likelier this is to be true. ’ This is the simple operation of a developing private life by reason of the passage of time. The fresh claim, as now advanced, only has traction as an Article 8 claim.

The Vine report

76. When Upper Tribunal Judge Jordan granted an adjournment, he did so in part because counsel then instructed by the appellant wished to rely upon a report provided by the Chief Inspector, Mr John Vine, in 2012. In the event, this was not made the subject of further submissions before us. The substance of the Chief Inspector's report was that, in his opinion, claimants had a reasonable

expectation that their cases would be decided by July 2011. His inspection of the UK Border Agency's handling of legacy asylum and migration cases which took place between March and July 2012 found that the issue of delay was treated differently by case owners and that,

"Staff told [the inspectors] that significant levels of non-compliance were not taken into account when deciding to grant leave if the applicants could demonstrate some form of compliance within the last twelve months. This view was supported by our file sampling."

77. Whatever this might mean in the context of other applications for judicial review, it can have no relevance to the applicant's position or upon any claimants who did not have an outstanding application either under the legacy programme or at all. In any event, the Chief Inspector's opinion cannot amount to a legitimate expectation in public law terms.

The evidence of private life

78. Ms Ward submits that the applicant had entered the United Kingdom as a minor and has spent his entire adult life here. He is now aged 29. Whilst this is true, it remains the fact that he spent the first 17 years in Algeria and his presence in the United Kingdom does not entitle him to remain under the Immigration Rules by reference to the length of his stay, nor has there been a time when it has done so.

79. The quality of the private life that the applicant has developed has, however, not been stated in any great detail. It was said on his behalf in relation to family and private life in the grounds that were submitted on 25 October 2010

"…our client does not have a family life in the UK but he has developed a strong network of close friends with whom he has a strong relationship."

80. The October 2010 submissions were supported by a letter from the applicant and a friend. The applicant spoke of learning a lot about life and culture in England and speaking fluent English and having good and supportive friends. The friend's letter spoke of the applicant as a good and helpful man whom everybody likes.

81. At D12 in his statement of evidence form in support of his original asylum claim, when asked for any other reasons why it he wished to remain in the United Kingdom, the applicant stated that he was then in Peterborough and attending college. He said that he was very happy and that, from time to time, he went to Social Services where he sometimes helped them in interpreting either Arabic or French.

82. These are the glimpses provided by the applicant of the nature, scope and extent of his private life in the United Kingdom. They are the normal examples of an individual living in a community. There is nothing to say that they cannot be replicated in another community.

The failure to meet the requirements of the conditions for Article 8 in the Immigration Rules.

83. Originally, the respondent discounted the applicant's Article 8 claim because it did not meet the requirements of the new Rules which required the applicant to establish a presence in the United Kingdom of 20 years which he could not, of course, do. In MF (Article 8 - new rules) [2012] UKUT 393 (IAC) the Tribunal identified the need to apply a pure Article 8 consideration where an applicant has failed under the new Rules, albeit the new Rules provided a useful insight into the respondent's view of the proportionality of removal.

84. As a result, the respondent produced a supplementary letter dated 21 June 2013 which fully responds to the applicant's Article 8 claim in its widest sense. However, such an approach may not have been necessary.

85. In Nagre v SSHD [2013] EWHC 720 (Admin), Sales J said:

"It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave.

The only slight modification I would make… is to say that if after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

86. This point became academic with the service of the letter of 21 June 2013.

87. The fresh claim that the Secretary of State was required to consider was a claim based on simple presence since 2001. It was open to the Secretary of State to treat the applicant's presence in the United Kingdom as without lawful justification. Neither the November 2002 letter nor the follow-up letter of January 2013 altered the quality of the applicant's presence in the United Kingdom. There was nothing in the contact that the respondent had with the applicant in 2004 that altered the nature of the applicant's presence. The recognition that the applicant was part of a legacy programme in the respondent's letter of 29 April 2010 gave rise to no additional substantive rights. The applicant was not entitled to a decision under paragraph 395 by the time it was deleted. There was no Hakemi claim that the applicant could advance. In these circumstances the Secretary of State was entitled to treat the applicant as one whose mere presence in the United Kingdom since 2001 did not confer on him a right to claim that removal would be unlawful pursuant to the terms of Article 8. The quality of the private life of the applicant as disclosed in the material before the respondent shows little that demands protection from removal. The applicant has not formed relationships or had children or created a business that would be jeopardised by removal. The public interest in the applicant's removal has not been significantly weakened by failures on the part of the respondent. There was no unconscionable delay on the part of the Secretary of State. There were no factors which should be treated as undermining the weight to be attached to immigration control. There was scant evidence of a developed private life.

88. This was the claim that the Secretary of State was required to consider when applying paragraph 353. Whilst his claim had arisen since the asylum claim was dismissed in 2002, the Secretary of State had to consider whether a First-tier Tribunal Judge applying anxious scrutiny would conclude that the time spent in the United Kingdom was sufficient to render removal proportionate under Article 8 given there was no substantive right to remain under the Immigration Rules (past or present).

89. The Secretary of State was entitled to reach the conclusion that the passage of time in the United Kingdom was not sufficient to establish a right to remain and, accordingly, that removal was

disproportionate. It was open to her to conclude that a First-tier Tribunal Judge would take a similar view.

Conclusions

90. The Secretary of State adopted a correct approach to Article 8 and paragraph 353 in the combined decisions of 17 July and 25 August 2012 and 21 June 2013 and reached a decision that cannot be classified as perverse or irrational or Wednesbury unreasonable.

DECISION

The application for judicial review is dismissed.

The applicant has 7 days from service of the judgment upon him to file and serve reasons why he should not pay the respondent's costs and the respondent is, within 7 days thereafter, to file and serve her response. Costs will then be determined on the papers not earlier than 7 days thereafter.

ANDREW JORDAN

UPPER TRIBUNAL JUDGE

Appendix 1

REASONS FOR ADJOURNMENT

1. The applicant is a citizen of Algeria who was born on 22 April 1984. He arrived in the United Kingdom on 8 September 2001 and applied for asylum about ten days later. His asylum application was refused and in due course the application was made the subject of an appeal which came before Immigration Judge M A Khan. The decision that he reached was on the basis of a claim that had been put forward by the applicant that his family had been subjected to incessant raids over a substantial period of time, that those raids occurred as often as two or three times a week and that on an occasion in July 2001, when his brother returned from military service, the terrorists attacked and murdered him. The Immigration Judge rejected those matters. He did not accept that there had been any such terrorist attacks upon the applicant's premises and he did not accept that the applicant left Algeria with a well-founded fear of persecution.

2. I recite those facts because of what then happened in 2002. The decision of the judge was promulgated and an application was made for permission to apply to the Upper Tribunal for reconsideration to the Tribunal. That was refused on 4 November 2002. There then followed, after less than a fortnight, a letter dated 27 November 2002 which said:

"We wish to make a fresh application on behalf of our client and hereby apply on his behalf to be granted leave to remain on an asylum basis. The appellant has a well-founded fear of persecution in Algeria and suffered a great deal of persecution in Algeria before fleeing the country for the safety of his life."

3. There is simply nothing in the application that was made for asylum which was not comprehensively covered by the Immigration Judge's determination which had been made a couple of weeks before. It does not amount in any way to even foreshadowing a fresh claim. I described it in the course of argument as a 'non-letter' and in particular it does not give any basis for the subsequent argument that was advanced in the grounds of challenge that there was therefore a nine and a half

year delay until the decision was made which is the subject of these judicial review proceedings, a decision made on 17 July 2012.

4. What then happened was that nothing happened. The applicant did not leave the United Kingdom but nor was it said that he failed to comply with any restrictions on his ability to remain in the United Kingdom. It is not said for example that he absconded or that he failed to report. However, on 24 June 2004, he was subsequently arrested and received a police caution for attempting to open a bank account using a forged French passport. That was determined by way of caution only but it prompted the service of a notice upon him requiring him to report. Within a matter of three days, he failed to report as required and absconded. He did not then present himself. He did not come to the attention of the authorities until about October 2010 and that was curiously enough as a result of being prompted to respond to a letter that was sent to his solicitors by the Border Agency. Thereafter the applicant's representatives took up cudgels in a meaningful way and, from 29 October 2010 until 5 October 2011, they wrote at regular intervals requiring a response. In the course of the correspondence that ensued the Secretary of State appears to have acknowledged that the letter that was provided on 27 November 2002 was a fresh claim although how that could have been done is difficult to see.

5. The grounds insofar as they are material before me press on with a claim that there was a significant delay on the part of the respondent and that the delay covered a period of nine and a half years. For the reasons that I have given I do not accept that this was even an arguable point to adopt as far as a fresh claim was concerned. The argument put forward in the grounds, based on EB (Kosovo) [2008] UKHL 41 is not remotely arguable within the confines of paragraph 353 and the decision in WM (DRC) [2006] EWCA Civ 1495. The delay arises only between 29 October 2010 and 5 October 2011, when the applicant's representatives wrote at regular intervals requiring a response and did not receive one. I will say no more at this stage about this because it can properly be put over to the adjourned hearing.

6. The issue however that requires more detailed argument arises from the case of Hakemi v SSHD [2012] EWHC 1967 in the Administrative Court. It is perhaps surprising that I was not provided with a copy of that decision but it is mentioned in paragraphs 26 and 27 of the grounds and it is those paragraphs which are the subject of the grant of permission to amend the grounds of application. In particular reference is also made in paragraph 27 to a policy guidance which states that Ministers approved a revised guidance allowing case workers to consider granting permission to stay to applicants who had been in the United Kingdom for six to eight years rather than the ten to twelve years that applied at the start of the backlog clearing process.

7. Mr Williams, on behalf of the Secretary of State, relies upon the decision of Mr Steven Morris QC sitting as a Deputy High Court Judge in the case of Mohammad v SSHD [2012] EWHC 3091. He relies in particular on the passage at paragraph 71 that it was ' not arguable ' that there was a policy that leave would be granted on the basis of a sufficiently long period of residence alone. However, in the paragraphs that follow he refers to chapter 53 of the guidance and the setting out of various policy considerations.

8. In addition, Mr Nathan on behalf of the applicant refers to a document that the Secretary of State has not so far considered being an inspection of the UK Border Agency's handling of legacy asylum and migration cases which took place between March and July 2012 in which it was found that the issue of delay was treated differently by case owners and that,

“Staff told [the inspectors] that significant levels of non-compliance were not taken into account when deciding to grant leave if the applicants could demonstrate some form of compliance within the last twelve months. This view was supported by our file sampling.”

9. Quite what that means in the context of an application of this nature or what its effect might be, is yet to be determined. However it does appear that there is an arguable issue as to whether these are policies as such and what the ‘legacy policy’ in particular meant for a case like the applicant’s. It is for that reason that I have permitted the adjournment.

10. I am bound to say that the quality of the private life that the applicant has alleged he enjoys has not been stated in any great detail. It was said on his behalf in relation to family and private life in the grounds that were submitted on 25 October 2010

“…our client does not have a family life in the UK but he has developed a strong network of close friends with whom he has a strong relationship.”

The difficulty with that submission is that whilst it is almost totally devoid of any meaning in the context of an Article 8 claim, reference is made on page 1 of the letter to enclosing a short statement from the applicant and a friend dated 7 October 2010, which I have not seen and which has not been produced. These documents may develop the private life claim somewhat more but the claim does not commence from a particularly promising start. Nevertheless there remains the need to give fuller consideration to the point that is referred to under the general guise of Hakemi and this will be developed in due course by the directions that I have given.