Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

R (on the application of MS) v Secretary of State for the Home Department (excluded persons: Restrictive Leave policy) IJR [2015] UKUT 00539 (IAC)

The Queen on the application of MS (Anonymity order made)

applicant

versus

The Secretary of State for the Home Department

respondent

AND

The Queen on the application of MBT (Anonymity order made)

applicant

versus

The Secretary of State for the Home Department

respondent

Before: The Honourable Mr Justice Dove
Upper Tribunal Judge Gill

<u>Application for judicial review: substantive decision</u>

Having considered all documents lodged and having heard the parties' respective representatives, Ms S Harrison QC of Counsel, Ms C Kilroy of Counsel for MS, Ms A Weston of Counsel for MBT and Ms J Anderson of Counsel for the respondent at a hearing at Field House on 6, 7 and 10 July 2015

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The Restrictive Leave to Remain ("RLR") policy

(i) *With effect from 2 September 2011, the respondent introduced a policy pursuant to which she granted RLR to persons who were excluded from the Refugee Convention but whose removal would be in breach of Article 3 of the ECHR. The policy is stated to have three purposes, namely the public interest in maintaining the integrity of immigration control; public protection to ensure monitoring of where an individual lives and works and prevent their access to positions of trust, and upholding the international rule of law by supporting broader international obligations to remove individuals excluded from the Convention as soon as possible.*

(ii) *Under the RLR policy, the duration for which leave is granted is usually a maximum of six months at a time, with an active review prior to the expiry of the leave when consideration is given to whether the individual can be removed, the intention being to effect removal at the earliest opportunity. The RLR policy also provides for conditions to be imposed, usually as follows: (i) a condition as to the place of residence, specifying the frequency with which the individual is permitted to live away from the designated place of residence; (ii) a condition restricting the individual's employment or occupation; (iii) a condition requiring the individual to report to an Immigration Officer or the Secretary of State at regular intervals; and (iv) a condition prohibiting the individual from studying at an educational institution without the prior consent of the Secretary of State. The RLR policy of 2 September 2011 is a lawful policy. The same applies to the subsequent RLR polices dated 28 May 2012 and 23 January 2015.*

(iii) *There is sufficient flexibility within the RLR policy for decision makers to depart from the usual rule of only granting RLR for a maximum of six months at a time and of imposing the conditions described. The flexibility is comprised, inter alia, in the need to consider which of the types of condition are appropriate, the particular terms of the condition imposed and whether or not the point has been reached in the particular case where the only reasonable course available to the Secretary of State is to grant indefinite leave to remain ("ILR").*

(iv) *In considering the duration of the grant of leave and the type and detail of the conditions to be imposed, it will be necessary for decision makers to consider the impact on the best interests of any children as a primary consideration.*

(v) *Whilst the imposition of time limited leave may have an impact on the quality of family life, in that, it may be stressful for all members of the individual's family to live under the continual "threat" every six months of the individual concerned being removed, it does not interfere with the continuance of family life.*

(vi) *Very strong evidence would be needed to prevail over the public interest and public protection considerations which are given effect in the three purposes of the RLR policy so as to make it unreasonable for the respondent not to grant RLR for more than six months or not to impose the usual conditions.*

ILR: Consideration of whether the end point has been reached:

(i) *The consideration of whether or not the point has been reached where the only reasonable course is to grant ILR will depend upon a variety of factors, including: (a) the reasons*

why the individual was excluded from the Refugee Convention; (b) whether the applicant has remained blamelessly in the United Kingdom for a lengthy period of time; (c) the prospect of removal of the applicant to his or her home country, involving an appraisal of the political circumstances of the home country bearing in mind that the international reputation of the United Kingdom which can be in point in these cases and (d) the particular circumstances of the applicant and his life in the United Kingdom.

(ii) This is not an exhaustive list. Failure to consider this aspect of the policy and provide reasons may amount to an error of law. However, there will be cases when the suggestion that the end point has been reached is so hopeless that reasons are not required in relation to this aspect of the policy

The Discretionary Leave to Remain ("DLR") policy

(i) The current Discretionary Leave policy (applicable since 24 June 2014) as well as its predecessor (the policy in place from at least November 2012) states that the RLR policy will apply unless exceptional circumstances justify divergence from the policy. This overarching policy, of not diverting individuals from the RLR policy unless there were exceptional circumstances, is also a lawful and rational policy.

(ii) The respondent is entitled to apply her overarching policy. She is therefore not obliged to give reasons for applying the RLR policy to an individual and not diverting him or her to the DLR policy, unless there are plainly exceptional circumstances which she may have overlooked capable of outweighing the public interest in the three purposes of the RLR policy. If an individual is not diverted to the DLR policy, the transitional provisions in the DLR policy will not be applicable to him or her.

Delay

In cases where there has been a delay in making a decision on an in-time application for extension of leave and where, during the period of the delay, the applicable policy for excluded persons who cannot be removed has changed from the DLR policy that was applicable to such persons prior to 2 September 2011 to the RLR policy applicable since 2 September 2011, an argument based upon "historic injustice" is not available, applying by analogy the judgment of the Supreme Court in TN and MA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40.

Judgment
(Handed down on 4 September 2015)

Introduction

2. Both members of the panel have contributed to this judgment.

3. Both of these cases raise the question of the legality of the adoption by the respondent of a policy known as the "Restrictive Leave to Remain" ("RLR") policy, first introduced on 2nd September 2011, which made provision for the duration for which leave is granted to persons who are excluded from protection under the Refugee Convention but who cannot be removed due to Article 3 of the ECHR. The RLR policy provided (in brief) that such persons will usually only be granted RLR for a maximum of six months at a time, with some or all of four types of conditions, namely, a condition as to place of residence and the number of nights that the excluded person can be absent from the place of residence; a condition restricting employment or occupation; a condition prohibiting studies; and a condition requiring the individual to report to an immigration officer or the Secretary of State at regular intervals. The RLR policy has been updated twice since, i.e. with effect from 28th May 2012 and 23rd January 2015. Within the RLR policy, it was stated in terms that active reviews would be undertaken when consideration is given to an application for extension of leave to ascertain whether the individual can be removed, and if not, conditions normally imposed were to maintain contact in order to facilitate removal when removal is possible, ensure that the individual does not gain access to positions of influence or trust and signal that the person should not become established in the United Kingdom.

4. Prior to the introduction of the RLR policy on 2nd September 2011, persons who were excluded from protection under the Refugee Convention but who could not be removed due to Article 3 of the ECHR were granted leave as follows:

    (i) until 31 March 2003, exceptional leave to remain ("ELR"); and
    (ii) from 1 April 2003, discretionary leave to remain ("DLR").

5. Conditions were not imposed when ELR was granted to excluded persons who could not be removed.

6. The DLR policy has evolved over time. The current version came into force on 24th June 2014. The version that applied before the current version was in place at least from November 2012. This is the version that was in place when the decisions that are the subject of these claims were made (2nd May 2014 in the case of MS and 21st August 2013 in the case of MBT). None of the versions of the DLR policy provided for conditions to be imposed on the leave granted to excluded persons who cannot be removed.

7. Having set out this brief overview of the RLR policy and the DLR policy (dealt with in greater detail below), we return to the questions that are raised in these claims. Besides the legality of the RLR policy, the claims also raise the question, assuming that the RLR policy is lawful, as to whether or not in their individual cases the policy has been

lawfully applied to them. The structure of this determination is firstly that we shall set out the facts in each of the individual cases, secondly, the respondent's evidence and the policy material is set out, thirdly, we shall identify the issues which are raised in each case, fourthly, we shall deal with the lawfulness of the RLR policy and finally we turn to the lawfulness of the application of the RLR policy in each of the individual cases.

8. Because of the short-lived nature of decisions made under the RLR policy and the length of time taken in the litigation, there have been multiple decisions in respect of each applicant. Although the challenge in each case relates to an earlier decision, we have taken into account the reasoning in the most recent decision in assessing the lawfulness of the application of the RLR policy, given the iterative nature of the successive decisions and the fact that the thrust of the litigation was directed at the lawfulness of the RLR policy.

9. We are indebted to counsel on all sides of the case for the conspicuous hard work and intellectual rigour that they have applied to their written and oral submissions in this case, without which our task would have been infinitely more difficult.

I. The Facts: MS

10. MS is a national of India who was born on 15th October 1972. He arrived in the United Kingdom in April 1995 and claimed asylum. That application was refused on 11th August 1999 and his appeal was certified on national security grounds. MS appealed to the Special Immigration Appeals Commission ('SIAC') and his appeal was allowed on Human Rights grounds on 31st July 2000. SIAC determined that his removal to India would involve a breach of Article 3 of the ECHR as a result of his likely persecution by the authorities in India. It was also determined that he was excluded under Article 1F of the Refugee Convention for his involvement in terrorist activity in support of Sikh separatism.

11. In the proceedings before SIAC MS was identified as being associated with the Dam Dami Taksal faction of the International Sikh Youth Federation which was a violent Sikh extremist organisation in the United Kingdom supporting the activities of the Khalistan Commando Force who were a paramilitary group operating out of Pakistan. The Khalistan Commando Force was an extremist group committed to the establishment of an independent Sikh state in Khalistan in India by violent means. MS was in particular accused of being engaged in a conspiracy with Sikh extremists to arrange delivery of shipments of terrorist equipment from Pakistan to India. The Punjab police arrested individuals involved in this terrorist activity and it was contended that the arrest of MS in November 1998 and his detention had averted arrangements for the terrorist attacks to be completed. At paragraph 24 of the determination from SIAC it was accepted that these contentions of the Secretary of State had been 'proved to a high degree of probability' and that MS had endangered national security and was a continuing danger to national security. Furthermore, it was concluded that the Secretary of State had shown it would be conducive to the public good in the interests of national security for him to be deported. SIAC went on to find that MS had been tortured and mistreated whilst in custody in India. SIAC concluded

that there was a real risk that if returned to India MS would be subjected to torture and furthermore than the general assurances of the Indian government that MS would enjoy the same legal protection and be subjected to the same due process of law as any Indian citizen were not sufficient to ensure that the risk of torture was reduced below the threshold at which there would be a breach by the United Kingdom of Article 3 if MS were to be returned. SIAC went on to conclude that MS was excluded, as a result of the terrorist acts which they had found, from the Refugee Convention by Article 1F(c).

12. Following his appeal being allowed, he was granted ELR on 30th November 2000 pursuant to the policy then applicable. Following the introduction of the DLR policy on 1st April 2003, MS was granted DLR on a rolling six month basis most recently on 9th December 2004 for a period of six months until 8th June 2005. MS applied in time for the renewal of that leave on each occasion it expired and the most recent grant was no exception. He applied for further leave to remain on 7th June 2005 requesting that he be granted indefinite leave to remain ("ILR"), requests that were repeated by letters or applications dated 3rd November 2010 and 28th April 2011, on the basis of the respondent's policy on DLR which was operational at that time.

13. Correspondence was sent regularly by MS's solicitors chasing the respondent for a decision in his case. Holding letters were sent by the respondent in reply to this correspondence. In short, reliance was placed upon the fact that MS had been in the United Kingdom for 10 years and was entitled therefore to ILR under the terms of the DLR policy. Neither of these applications was determined by the respondent and on 31st March 2014 these proceedings were commenced based initially on the failure of the respondent to take any decision on MS's application of 7th June 2005.

14. In response to these proceedings the respondent's acknowledgement of service indicated an agreement to take a decision by 2nd May 2014. By a letter dated 2nd May 2014 with an accompanying notice under the Immigration Act 1971 (the "1971 Act") Ms was granted RLR pursuant to the RLR policy which had been introduced on 2nd September 2011. The pertinent parts of the decision letter provided as follows:

> Restricted Leave
>
> 6. On 31st July 2000 the Specialist Immigration Appeals Commission (SIAC) upheld the Home Office's decision that you should be refused asylum on grounds of exclusion under Article 1F of the Refugee Convention. However, SIAC also found you to be at risk of a breach of Article 3 of the European Convention of Human Rights (ECHR) if you were to be returned to your country of origin. The circumstances of your case are not considered to have changed…
>
> 8. In accordance with the published policy, you are being granted six months Restricted Leave to Remain. This leave is subject to conditions as provided under s.3(1)(c) of the 1971 Immigration Act. These are detailed in the accompanying Notice. A person who knowingly fails to observe a condition of their leave commits an offence by virtue of s.24(1)(b)(i) Immigration Act 1971. Where appropriate, this policy will be enforced by the prosecution of individuals who do not comply with the conditions of their leave…
>
> 12. Notwithstanding the above, consideration has been given to your claim that you should be granted Indefinite Leave to Remain on the basis of your submissions regarding Article 8 of the ECHR

Refusal of application to vary leave to remain to indefinite leave to remain

13. Paragraph 322(2) and 322(12) of Immigration Rules set out "grounds on which leave to remain and variation of leave to remain enter or remain in the United Kingdom should normally be refused."

14. Your application has been considered under paragraph 322(5) of the Immigration Rules which states:

    (v) the undesirability of permitting the person concerned to remain in the Untied Kingdom in light of his character, conduct or associations or the fact that he represents a threat to national security

15. The Secretary of State considers it undesirable to vary your leave to grant you indefinite leave to remain in the United Kingdom in light of your character, conduct and association for the reasons below.

16. It is noted that you have claimed asylum in April 1995. Your claim was refused as you were excluded from the Refugee Convention under Article 1F(c) in August 1999 as there were serious reasons for considering that you were guilty of acts contrary to the purposes and principle of the United Nations. In the determination of the Special Immigration Appeals Commission (SIAC) dated 31st July 2000 agreed with the Secretary of State and upheld this decision:

    "We accept the Secretary of State's submission that this declaration and the materials supplied to us showed beyond doubt that terrorism is contrary to the purposes and principles of the United Nations. It followed that the appellant's 'terrorist acts' exclude them from the Refugee Convention, by virtue of Article 1F(c) and we so find" (Paragraph 68).

17. It further states: "As to the second main issue raised under the Refugee Convention, namely, whether the Appellants are excluded by Article 33(2) from the non – refoulement provisions of Article 33(1), we are satisfied for the reasons already given that each of these Appellants is a danger to the security of the United Kingdom and cannot claim the benefit of the provision of Article 33(1)." (Paragraph 69).

18. It also states that: "That the Secretary of State has demonstrated that each Appellant is a danger to the national security and that it is conducive to the public good to deport him' (paragraph 70).

19. The findings of SIAC have been considered with regard to paragraph 322(5) of the Immigration Rules. It is concluded that it is undesirable for you to remain in the UK and your application for ILR is refused.

Article 8 consideration under Appendix FM of the Immigration Rules…

23. It is noted that you have a wife who is a British citizen and three British children aged 11, 6 and 3 and that you live together as a family unit. Your parents also live with you. It is noted that you have lived in the UK for 18 years and 11 months and that you have siblings who live in the UK.

24. Your suitability to be granted Indefinite Leave to Remain on the basis of Article 8 under the Immigration Rules has been considered with reference to the following rules: S-ILR1.1 the application will be refused limited leave to remain on grounds of suitability if any of paragraphs S-ILR1.2-1.9 apply…

S-ILR1.8 The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-ILR1.3-1.6), character, associations, or other reasons make it undesirable to allow them to remain in the UK.

25. You are excluded from the Refugee Convention due to your previous acts of terrorism, a decision upheld by SIAC. It is noted that it was found that you were a danger to national security and that it was conducive to the public good to deport you. It is noted that you have not acknowledged this fact in any of your representations since 2005.

26. Based on this evidence you fail to fulfil S-ILR1.8 of Appendix FM of the Immigration Rules and it is considered that your character, associations and other reasons, namely your involvement in terrorism, mean that it is undesirable for you to remain in the UK.

27. Therefore you cannot meet the requirements for Indefinite Leave to Remain as the partner of a British citizen. In addition your failure to satisfy the requirements of S-ILR also means that you cannot meet the requirements for leave to remain as the parent of children who are British citizens.

Consideration of exceptional circumstances

…

29. It is noted that you have been in the United Kingdom for 18 years and 11 months and that you have a British wife and three British children under the age of 12. It is noted that as of 2011 your parents live with you and you have other relatives in the United Kingdom. You also claim that you have a lot of friends in the Sikh and local school community and that you undertake voluntary work at your local temple. It is further noted that you are to be granted Restricted Leave, which means that you will be able to continue living with your family in your present circumstances.

30. The Secretary of State has considered interests of your children in light of the above case law and note that they are aged 11, 6 and 4 and that you live together. It is noted that they are British Citizens and that this carries great weight in an Article 8 assessment. Your children are dependent on you as a parent. However, it is noted that you are to be granted Restricted Leave, which means that you will be able to continue living with your children and your wife as a family unit. Your children's family life will therefore continue and their routine will not be disrupted as a result of the Restricted Leave decision.

31. It is noted that a longer period of limited leave or indefinite leave to remain might arguably be in your children's best interests because it would reduce the level of uncertainty regarding your status in the UK. However it is considered that your children's best interests in this regard are outweighed by the public interest reasons for removing you from the UK to maintain an effective immigration control, prevent crime and disorder and protect the rights and freedoms of others, specifically due to the acts of terrorism you previously committed and the need for the UK not to act as refuge for those who have committed acts of terrorism. You are being granted leave to remain in the UK solely as it is considered that your removal at this time would breach the UK's obligations under Article 3 of the ECHR and given your character, conduct and associations it is considered appropriate to grant you leave for a short period in order to review your circumstances in six months' time.

32. Therefore, it is considered that there are no exceptional circumstances in your case because the decision to grant you six months' Restricted Leave will not result in a breach of the UK's obligations under Article 8 of the ECHR, and having considered all the available evidence, it is considered that you do not qualify for leave to remain outside of the Immigration Rules on the basis of Article 8.

15. The attached notice contained the record that the grant of RLR was subject to conditions as follows:

> B. YOU MUST RESIDE AT THE ADDRESS SHOWN ABOVE AND YOU MUST NOTIFY THE SECRETARY OF STATE OF ANY CHANGES OF ADDRESS
>
> C. YOU MUST NOT ENTER OR CHANGE EMPLOYMENT, PAID OR UNPAID, OR ENGAGE IN ANY BUSINESS OR PROFESSION WITHOUT THE PRIOR WRITTEN CONSENT OF THE SECRETARY OF STATE
>
> D. YOU MUST REPORT TO THE SECRETARY OF STATE AT (ADDRESS PROVIDED) on 2nd June 2014 and every six months thereafter…
>
> E. YOU MUST NOT ENROL IN ANY COURSE OF STUDY WITHOUT THE PRIOR CONSENT OF THE SECRETARY OF STATE.

16. The issuing of this decision led to an amendment of the proceedings so as to challenge the respondent's decision of the 2nd May 2014.

17. On 16th January 2015 (responding to an application on 30th October 2014 from MS for further leave to remain) a further period of six months RLR was granted. The same conditions were imposed, incorporating reasons for them as follows:

> 8. The conditions to your leave are on the ASL.4526 Notice of Restricted Leave Subject to Conditions letter. They are summarised as follows:
>
> - Residence restriction – in line with the Restricted Leave policy, your case is a priority for removal. It is therefore necessary for the Home Office to maintain contact with you and be aware of your whereabouts so that your removal can be effected when possible.
>
> - Employment restrictions – in line with the Restricted Leave policy and in view of the reasons for your exclusion from the Refugee Convention, that there were serious reasons for considering that you were guilty of acts contrary to the purposes and principle of the Untied Nations, it is considered appropriate that you seek permission prior to taking up employment. Therefore presumption that your employment should be restricted has been applied in your case.
>
> - Reporting restrictions – although it is concluded that your immediate removal from the UK is not possible at the present time, it is necessary to maintain contact with the Home Office for the duration of your leave. In line with the presumption to impose the reporting condition and the circumstances in your particular case, it is considered that reporting condition of once every six months is appropriate.
>
> - Restriction on studies – in line with the Restricted Leave policy, your case is a priority for removal. You are in the UK temporarily and the restriction placed on studies reflects the temporary nature of your leave and, in the event that the course was publicly funded, the need to reduce pressure on public finances and ensure that the course spaces were available for British Citizens and lawful migrants.
>
> 9. You may apply for these conditions to be varied, where necessary, at any time during the validity of your leave.

18. Similar reasons as had been previously provided were reiterated in relation to the consideration of MS's case under Article 8 both within and outwith the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "Immigration Rules").

19. In witness statements dated 9th March 2015, MS and his wife explain the difficulties associated with the conditions imposed upon MS's leave. The round trip from MS's home to the reporting centre is 28 miles and the process of reporting was lengthy as the staff at the reporting centre when he attended on 2nd June 2014 did not initially know why he was there. At the time of the original grant of RLR, MS was a self employed mini cab driver. Shortly after the receipt of the decision on 8th May 2014, MS's solicitor contacted the Home Office to request permission for his self employment to continue and consent was granted three weeks later on 29th May 2014, causing anxiety during the hiatus between the application and the decision. In relation to studying, on 29th October 2014 MS's solicitor wrote to the Home Office seeking consent for him to take up a course of study as a domestic gas engineer. No response was received to that application and MS's solicitor chased the matter on 21st November 2014. A letter from the respondent was received on 26th November 2014 from the respondent asking for confirmation that MS had been accepted onto the course of study and on 12th December 2014 MS's solicitor wrote again clarifying the course provider and querying why such information was necessary. At the time of MS's witness statement, no substantive response had been received to that correspondence and he had been unable to start the course. He had borrowed money to pay for the course and was worried about losing his place and therefore that money.

20. In the witness statement, he expresses his anxiety about the possibility of prosecution for breach of any of the conditions. He also expresses his concern about the impact of the insecurity of his status upon his wife and children (who it will be noted are British Citizens) and the constraint placed upon his ability to travel abroad in the light of his limited leave. These concerns are reinforced in a statement from MS's wife. In statements from his siblings, concern is expressed about the imposition of conditions and the limited nature of MS's leave to remain in the United Kingdom, bearing in mind his strong family and social ties to this country. The evidence is supported by correspondence from the Gurdwara in which MS takes an active part.

21. The evidence in the case of MS also includes material in respect of others who are subject to RLR. In particular, in a statement from Mr Daniel Furner, evidence is provided in relation to a person who has been anonymised in his own litigation as 'J1'. In J1's case, the respondent has applied the RLR policy and granted RLR with conditions as being 'necessary in the interests of national security'. J1 is in a similar category of person to MS in that he is excluded from the Refugee Convention but cannot be returned as to do so would give rise to a breach of Article 3 of the ECHR. In response to a Freedom of Information ("FOI") request of 28th November 2014, the Office for Security and Counter-Terrorism confirmed on 11th March 2015 that there were at that time 56 people on RLR. All of those people had reporting, prohibition of study without written consent and residence conditions imposed upon them and all bar two had employment conditions imposed. All 56 had been granted RLR for a duration of six months at a time and none had been granted RLR for a period more or less than six months.

22. There is in addition in MS's case a witness statement from Ms Sonia Routledge, his solicitor, who indicates that prior to the introduction of the RLR policy where persons were granted time limited right to remain on Human Rights grounds, their leave would not have been subject to any conditions. She also sets out matters in relation to the submissions made on behalf of MS to which we shall turn in due course in relation to both the purpose of the imposition of the conditions and the availability of measures under the Terrorism Prevention and Investigation Measures Act 2011 ("TPIMA 2011") in respect of individuals suspected of involvement with terrorism.

I. The Facts: MBT

23. MBT is a national of Tunisia who was born on 20th December 1966. On 19th January 1998, he was convicted along with a number of other Tunisian nationals of terrorism related offences in France. These offences included possession and transportation of unauthorised weapons along with unlawful entry to France, forgery of an official document and association with other malefactors. He was sentenced in August 1998 to five years' imprisonment but on the basis that he had already served a substantial period of time on remand he was released in August 1998. On 13th May 1999 he arrived in the United Kingdom and claimed asylum straight away. On 22nd July 2004 the respondent refused his application for asylum on the grounds of his exclusion from the Refugee Convention under Articles 1F(b) and (c) but granted MBT six months DLR. Further DLR was granted to MBT on 4th March 2005 and 17th February 2009.

24. On 30th July 2009, MBT applied for further leave but the respondent lost his application. After a number of letters from MBT's solicitor chasing an outcome to this application which were unanswered, the respondent requested on 25th March 2011 a further copy of the 30th July 2009 application which was duly provided. No decision was reached on this application by the time that MBT's solicitors wrote on 6th November 2012 applying on his behalf for the grant of ILR. That application was supported by information demonstrating that, since MBT had arrived in the United Kingdom, he had married and had four children. His wife and three sons had been granted ILR by the respondent and his daughter and eldest son were registered as British Citizens. He had met and married his wife in the United Kingdom and all of the children had been born and educated in the United Kingdom. The application was supported by an expert's report from Mrs Renee Cohen, a Psychotherapist, who concluded that MBT had symptoms which '*strongly suggest that he is suffering from Post Traumatic Stress Disorder*'. Mrs Cohen noted that he was depressed and had difficulty in sleeping and was easily angered.

25. No response was received to this application and on the 14th January 2013 MBT's solicitor sent a letter before claim challenging the delays which had occurred in assessing his applications. The judicial review proceedings which were issued following that letter were compromised by a consent order of 10th July 2013 within which the respondent agreed to provide a decision within six weeks on MBT's pending application. On 21st August 2013 the respondent gave a decision on the application granting MBT six months RLR subject to conditions. The letter accompanying the Notice of 21st August 2013 issued under the 1971 Act noted the RLR policy which had

come into effect on 2nd September 2011 and observed that conditions were being imposed under s.3(1)(c) of the 1971 Act. The conditions noted on the Immigration Act Notice provided as follows:

> B. YOU MUST RESIDE AT THE ADDRESS SHOWN ABOVE AND YOU MUST NOTIFY THE SECRETARY OF STATE OF ANY CHANGE OF ADDRESS.
>
> C. YOU MUST NOT ENTER OR CHANGE EMPLOYMENT, PAID OR UNPAID, OR ENGAGE IN ANY BUSINESS OR PROFESSION WITHOUT THE PRIOR WRITTEN CONSENT OF THE SECRETARY OF STATE.
>
> D. YOU MUST REPORT TO AN IMMIGRATION OFFICER AT [ADDRESS PROVIDED] on 21st September 2013 at 12pm and monthly thereafter.
>
> E. YOU MUST NOT ENROL ON ANY COURSE OF STUDY WITHOUT THE PRIOR CONSENT OF THE SECRETARY OF STATE.

26. Following a request on 2nd September 2013 from MBT's solicitors that the conditions should be relaxed, on 1st October 2013 the respondent confirmed that there would be no relaxation of the restrictions which had been imposed. On 10th October 2013, MBT's solicitors sent a pre-action protocol letter and on 25th October 2013 the respondent refuted the claim. In particular, it was contended that MBT could not have had any expectations of being granted ILR and the letter observed as follows:

> The Home Office policy on discretionary leave states as follows:
>
> > where a person is covered by one of the exclusion categories, they will not become eligible for consideration for settlement until they have completed ten years of discretionary leave.
>
> By your own admission, your client was first granted a period of limited leave to remain in 2004. It should therefore be self evident that your client cannot hope to have completed ten years of limited leave (including continuing leave) until next July at the earliest. I can confirm that no such consideration will be made until that time…
>
> As you are well aware your client was excluded from the 1951 Refugee Convention under Article 1F(b) and (c) in 2004 because there were serious reasons for considering that he had committed acts contrary to the purpose and principles of the UN, and was convicted of serious crime before arriving in the UK. You have stated that your client has not committed any criminal offences since arriving in the United Kingdom; respectfully, this is not relevant.

27. Judicial review proceedings were commenced on 20th November 2013. On 19th February 2014, MBT applied for further leave to remain and in response to that application he was granted RLR on 20th March 2015. Having noted his exclusion from the Refugee Convention and the existence of the RLR policy the respondent's letter confirmed he was being granted six months RLR subject to conditions. Further reasoning was provided in relation to the conditions as follows:

> 10. The conditions attached to your leave are on the ASL.4526 Notice of the Restricted Leave Subject to Conditions letter. These are summarised as follows:
>
> - Residence Restriction – in line with Restricted Leave police (sic), your case is a priority for removal. It is therefore necessary for the Home Office to maintain contact with you and be aware of your whereabouts so that your removal can be effected when possible, and the conditions imposed on you satisfy the need for

the UK to maintain effective immigration control and not give sanctuary to convicted terrorists.

- Employment Restriction – in line with Restricted Leave policy and in view of the reasons for your exclusion from the Refugee Convention, that you committed acts contrary to the principles and purposes of the United Nations, it is considered appropriate that you seek permission prior to taking up employment. Therefore, the presumption that your employment should be restricted has been applied.

- Reporting Restrictions – although it is concluded that your immediate removal from the UK was not possible, it is necessary for you to maintain contact with the Home Office for the duration of your leave. In line with the presumption to impose the reporting condition and the circumstances in your particular case it is considered that a reporting condition of once every month is appropriate. This is because it is consider (sic) necessary for you to maintain regular contact with the Home Office, and the conditions imposed on you satisfies (sic) the need for the UK to maintain effective immigration control and not give sanctuary to convicted terrorists, who have been excluded from the Refugee Convention.

- Restriction on Studies – in line with the Restricted Leave policy, your case is a priority for removal. You are in the UK temporarily and the restriction placed on studies reflects the temporary nature of your leave and, in the event that the course was publicly funded, the need to reduce pressure on public finances and ensure that the course spaces are available for British citizens and lawful migrants.

28. This decision in relation to MBT went on to consider other aspects of his case. Firstly, the decision appraised MBT's claim to ILR on the basis of his submissions under Article 3. The decision provided as follows:

> 13. Your application has been considered under paragraph 322(1C)(i) which lists one of the grounds as: they have been convicted of an offence for which they have been sentenced to imprisonment for at least four years. This is a mandatory refusal and the Secretary of State has no discretion to grant indefinite leave to remain to an individual who falls within this provision.
>
> 14. Therefore you do not qualify for indefinite leave to remain due to your convictions and five year sentence in France.
>
> 15. Further, it is noted that you were refused asylum in 2004 on the basis that you were excluded from the Refugee Convention under Article 1F(b) and (c) as there was (sic) reasons for considering that you had committed acts contrary to the purposes and principles of the United Nations. Your exclusion is a strong adverse indication of your character, conduct and associations and therefore your application would also fall for refusal under paragraph 322(5) of the Immigration Rules.
>
> 16. In light of the above factors your presence in the UK is considered undesirable. Your application to vary your leave and for ILR is therefore refused.

29. The letter went on to note that the transitional arrangements in the DLR policy excluded those who were the subject of the RLR policy operational from 2nd September 2011. The respondent therefore concluded that MBT did not qualify for ILR in accordance with the DLR transitional arrangements. The letter went on to assess the question of Article 8 under Appendix FM of the Immigration Rules. The decision noted as follows:

20. It is noted that your wife has been granted Indefinite Leave to Remain and that all four of your children who are aged 13, 8, 12 and 10 are now British Citizens. It is noted that you have lived in the UK for 16 years.

21. Your suitability to be granted Indefinite Leave to Remain on the basis of Article 8 under the Immigration Rules has been considered with reference to the following rules:

22. S-ILR 1.1 the applicant will be refused limited leave to remain on grounds of suitability if any of paragraph S-ILR 1.2-1.9 apply…

23. S-ILR 1.8 the presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within the paragraphs S-ILR 1.3-1.6), character, associations or other reasons, make it undesirable to allow them to remain in the UK.

24. You are excluded from the Refugee Convention due to your previous convictions and the nature of your crime. It is noted that you were found to be party to acts, methods and practices of terrorism, which were contrary to the purposes and principles of the United Nations.

25. Based on this evidence you fail to fulfil S-ILR 1.8 of Appendix FM of the Immigration Rules as it is considered that your character, associations and other reasons, namely your involvement in terrorism, which means that it is undesirable for you to remain in the UK.

26. Therefore you cannot meet the requirements for Indefinite Leave to Remain as the parent of children who has (sic) been registered as British Citizens.

30. Having excluded any claim by MBT on the basis of his private life as assessed under Rule 276ADE, the decision went on to consider exceptional circumstances outside the Immigration Rules and s.55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act"). The decision records as follows:

33. It is noted that you have been in the UK for 16 years and that you have four children, all of whom who have been granted British Citizenship. It is therefore considered that you have established family life here in the UK.

34. It is noted you live with your wife and children. It is therefore considered that your grant of restricted leave will not have an adverse effect on your children's wellbeing, as you will continue to live with them and your wife as a family unit, and therefore their routine will not be disrupted as a result of the Restricted Leave decision. Moreover your children have been granted British Citizenship in line with the current Immigration Rules.

35. It is noted that a longer period of limited leave or indefinite leave to remain may arguably be in your children's best interests because it would reduce the level of uncertainty regarding your status in the UK. However, it is considered that your children's best interests in this regard are outweighed by the public interest reasons for removing you from the UK.

36. In light of this, it is considered that a grant of Restricted Leave is consistent with obligations under s.55 of the Borders, Citizenship and Immigration Act 2009 consideration.

37. Therefore, it is considered that there are no exceptional circumstances in your case because the decision to grant you six months Restricted Leave will not result in a breach of the UK's obligations under Article 8 of the ECHR, and having considered all the

available evidence, it is considered that you do not qualify for leave to remain outside the Immigration Rules on the basis of Article 8.

38. The Secretary of State has an obligation to maintain effective immigration control, prevent crime and disorder and protect the rights and freedoms of others, specifically due to the acts of terrorism you previously committed and the need for the UK not to act as a refuge for those who are excluded from the Refugee Convention due to their criminality due to committing acts of terrorism.

39. You are therefore being granted leave to remain in the UK solely because it is considered that your removal at this time would breach the UK's obligations under Article 3 of the ECHR and given your character, conduct and associations it is considered appropriate to grant you leave for a short period in order to review your circumstances in six months time.

31. The notice under the 1971 Act which accompanied this decision re-imposed the same conditions subject to which MBT had been previously granted RLR.

32. In a statement dated 22nd December 2014, which was considered as part of the respondent's decision of 20th March 2015, MBT expresses his concern about the impact upon him both of the temporary nature of the six months RLR which he has been granted and also the condition in relation to the prospects of him obtaining employment which in turn caused anxiety and insecurity to him and his family as a result of the financial pressure which it places them under. He states that in effect it has made it impossible for him to find work. He also expresses his concern about the reporting condition and provides evidence about an incident when as a result of stress caused by his being unsure as to when he should have reported, he suffered an episode of ill health and a subsequent period of anxiety and distress. He also explains that the limited periods of the earlier DLR and current RLR preclude him from pursuing courses in higher education which he would have wished to follow.

II. The respondent's evidence and policies

(a) The respondent's DLR policy

33. We have evidence as to the evolution of the respondent's policy in relation to persons in the category of MS and MBT, namely people who are excluded from the Refugee Convention but who it is not possible to return as a result of the protection afforded by Article 3. This is as follows.

34. In Asylum Directorate Instructions dated July 1998, criteria were established for the granting of exceptional leave to remain. Under the "eligibility criteria" exceptional leave to remain was mandatory for persons excluded from the Refugee Convention but who cannot be removed due to Article 3 of the ECHR. The document describes that prior to 27th July 1998 people granted exceptional leave to enter or remain were normally given 12 months leave followed by two periods of three years but that after 27th July 1998 they would normally be granted four years leave.

35. On 1st April 2003, exceptional leave was replaced with DLR including for persons who were excluded from the Refugee Convention but who could not be removed due to

Article 3 of the ECHR. The document named: "API March 2003 Discretionary Leave" had indicated that, in the case of persons whose removal would be in breach of Article 3 of the ECHR, DLR would be granted for a variable period dependent upon the basis upon which it was being granted but initially for no longer than three years but if they are excluded from the Refugee Convention, the initial period for which DLR is granted "should" be six months. The document went on to observe that, where an extension of leave was sought after a period of DLR, the request would be subject of an active review.

36. In relation to applications for settlement, the March 2003 API provided that a person who is not excluded would not become eligible for settlement until they had completed six years of DLR. That period would be longer, at least 10 years, for those in the excluded category. The excluded category was dealt with in relation to applications for settlement within section 8 of the document as follows:

> 8. Applications for settlement
> A person will normally become eligible for consideration for settlement after completing six continuous years of Discretionary Leave. However, where a person is covered by one of the exclusion categories they will not become eligible for consideration for settlement until they have completed 10 continuous years of Discretionary Leave. Any time spent in prison would not count towards the six or 10 years. An individual may apply for ILR/settlement at the six or 10 year stay shortly before Discretionary Leave expires. The application will be considered in the light of circumstances prevailing at that time.

37. In the period prior to the introduction of the RLR policy on 2nd September 2011, the March 2003 API was replaced by (it would seem) at least two versions of the DLR policy (in force, it would seem, from 27th February 2007 and 18th December 2008 respectively), both of which provided that excluded persons who cannot be removed due to Article 3 of the ECHR should normally be granted DLR for six months and that such persons were not eligible for consideration for settlement until they had completed at least 10 years' DLR.

38. In R (on the application of Mayaya and others) v Secretary of State for the Home Department [2011] EWHC 3088 (Admin) (25th November 2011), Cranston J held that the March 2003 API breached the no-fettering principle by suggesting that a person must always have at least ten years' DLR to be granted ILR. By an Order of the Court of Appeal in the same case, sealed on 19 March 2013, parts of the DLR policy that was in force before 9th July 2012 were struck down by consent as being unlawful, including the provision that excluded persons were not eligible for consideration for settlement until they had completed ten years of DLR.

39. The next DLR policy that came into force was the version that was in force at least from November 2012. It specifically refers to the RLR policy, from which it follows that it came into force either simultaneously with the RLR policy or subsequent to the RLR policy introduced on 2nd September 2011. We shall refer to this policy hereafter as the "November 2012 DLR policy". Unfortunately, the precise date on which the November 2012 DLR policy came into force is not clear from the papers before us.

40. The November 2012 DLR policy provides, inter alia, as follows:

1. Introduction

Humanitarian Protection (HP) and Discretionary leave (DL) were introduced on 1 April 2003 to replace Exceptional Leave to Remain (ELR).

This instruction explains the limited circumstances in which it may be appropriate to grant Discretionary Leave…

With effect from 2 September 2011, a new policy of Restricted Leave replaced the grant of Discretionary Leave for individuals refused asylum and Humanitarian Protection on Article 1F-related exclusion grounds but whose removal would be contrary to the UK's ECHR obligations.

Article 1F-related cases which were granted Discretionary Leave before 2 September 2011 should remain on their existing leave until it falls for renewal. When the renewal application is received, the application must be considered in line with the Asylum Instruction on Restricted Leave and granted Restricted Leave unless exceptional circumstances justify divergence from the published policy.

3.3 Criminality and exclusion

In all cases where leave is being considered decision makers must have regard to the criminality thresholds. This applies to consideration of initial grants of Discretionary Leave, further applications for Discretionary Leave and cases being handled under the Transitional Arrangements.

Persons subject to any of the grounds of exclusion set out in the AI on Exclusion under 1F of the Refugee Convention and thereby also excluded from a grant of Humanitarian Protection must be considered under the policy of Restricted Leave and not granted Discretionary Leave.

5. Duration of grants of Discretionary Leave

…

From 9 July 2012 an applicant needs to complete at least 120 months, (i.e. a total of 10 years normally consisting of four 2.5 years periods of leave), before being eligible to apply for settlement. Separate arrangements exist for cases granted 3 years Discretionary Leave prior to 9 July 2012. see Transitional Arrangements below.

7. Applications for further leave

This section applies to applications made on or after 9 July 2012.

…

Anyone granted Discretionary Leave prior to 2nd September 2011 to whom the policy on Restricted Leave applies and who continues to be excluded from Asylum, Humanitarian Protection and Discretionary Leave should be considered under the policy guidance on Restricted Leave and must not be granted further Discretionary Leave.

8. Applications for settlement

This section applies to applications made on or after 9 July 2012. See Transitional Arrangements for cases where Discretionary leave was granted before 9 July 2012.

A person will normally become eligible for consideration for settlement after completing 120 continuous months (10 years) of Discretionary Leave The application will be considered in the light of the circumstances prevailing at that time.

8.1 Consideration of application

As with an extension request, the application should be subject to an active review to consider whether or not they still qualify for Discretionary Leave (or some other form of leave).

8.2 Granting settlement

Where a person has held Discretionary Leave for an appropriate period and continues to qualify for Discretionary Leave, they should be granted settlement unless there are any criminality or exclusion issues. See Criminality and/or Exclusion section above.

11. Transitional Arrangements

All decisions made on Discretionary Leave on or after 9 July 2012 will be subject to the criteria set out in this guidance.

Individuals granted Discretionary Leave on a date prior to and including 8 July 2012 may apply to extend that leave when their period of Discretionary leave expires. Decision makers must apply the following guidance:

Applicants granted Discretionary leave before 9 July 2012

Those who, before 9 July 2012, have been granted leave under the Discretionary Leave policy in force at the time will continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing 6 years Discretionary Leave).

…

Those granted Discretionary Leave for six month periods because of the refusal or withdrawal of asylum or Humanitarian Protection on grounds of criminality must normally wait 10 years before being considered for settlement. However, a failure to accrue 10 years' leave cannot be the sole basis for refusal. The decision maker must consider whether there are exceptional circumstances that merit a departure from this position.

41. With effect from 24 June 2014, the November 2012 DLR policy was replaced by the policy which continues to apply currently and which we will refer to as the "June 2014 DLR policy". The June 2014 DLR policy provides, inter alia, as follows:

1. Introduction

Humanitarian Protection (HP) and Discretionary leave (DL) were introduced on 1 April 2003 to replace Exceptional Leave to Remain (ELR).

This instruction explains the limited circumstances in which it may be appropriate to grant DL….

With effect from 2 September 2011, a new policy of Restricted Leave replaced the grant of DL for individuals refused asylum and Humanitarian Protection on Article 1F-related exclusion grounds but whose removal would be contrary to the UK's ECHR obligations.

Article 1F-related cases granted DL before 2 September 2011 should remain on their existing leave until it falls for renewal. When the renewal application is received, it must be considered in line with the Asylum Instruction on Restricted Leave and granted Restricted Leave unless exceptional circumstances justify divergence from the published policy….

2.5 Criminality and exclusion

In all cases being considered for a grant of leave under this policy decision makers must consider the impact of an individual's criminal history before granting any leave. A person will normally be granted six months' DL where they:

1. Would have established that they were a refugee but are not eligible for a grant of asylum either because:

    a. they fall to be excluded under Article 1F of the Refugee Convention; and/or

    b. there are reasonable grounds for regarding them as a danger to the security of the United Kingdom within the terms of paragraph 334(iii) of the Rules; and/or

    c. they have been convicted of a particularly serious within the terms of paragraph 334(iv) of the Rules; and/or

2. Are excluded from Humanitarian Protection (HP) under paragraph 339D(iii) of the Rules or would be excluded from HP if they were eligible; and/or

3. Cannot be removed because of the UK's obligations under the European Convention on Human Rights (ECHR); and

4. Do not fall within the Restricted Leave Policy.

6. Applications for further leave

This section applies to applications made on or after 9 July 2012.

…

Anyone granted DL Leave prior to 2nd September 2011 to whom the policy on Restricted Leave applies and who continues to be excluded from Asylum, Humanitarian Protection and DL should be considered under the policy guidance on Restricted Leave and must not be granted further DL.

7. Applications for settlement

This section applies to applications made on or after 9 July 2012. see Transitional Arrangements for cases where Discretionary leave was granted before 9 July 2012.

A person will normally become eligible for consideration for settlement after completing 120 continuous months (10 years) of DL providing any application for further leave has been made in accordance with section 3C of the Immigration Act 1971 (as amended). See IDI Chapter 1 section 5.0 for guidance. The application will be considered in the light of circumstances prevailing at that time.

7.1 Consideration of application

As with an extension request, the application should be subject to an active review to consider whether or not they still qualify for DL (or some other form of leave).

7.2 Granting settlement

Where a person has held DL for an appropriate period and continues to qualify for DL, they should be granted settlement unless there are any criminality or exclusion issues. See Criminality and/or Exclusion section above.

10 Transitional Arrangements

All decisions made on Discretionary Leave on or after 9 July 2012 will be subject to the criteria set out in this guidance….

Individuals granted DL on a date prior to 8 July 2012 may apply to extend that leave when their period of DL expires. Decision makers must apply the following guidance:

Applicants granted Discretionary leave before 9 July 2012
Those who, before 9 July 2012, have been granted leave under the DL policy in force at the time will normally continue to be dealt with under that policy through to settlement if they qualify for it (normally after accruing 6 years continuous DL). Further leave applications for those granted up to 3 years DL before 9 July 2012 are subject to an active review.

Consideration of all further leave applications will be subject to a criminality check and the application of the criminality thresholds, including in respect of cases awaiting a decision on a further period of DL on that date. See Criminality and Exclusion section above.

Decision makers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same and the criminality thresholds do not apply, a further period of 3 years DL should normally be granted….

If there have been significant changes or the applicant fails to meet the criminality thresholds (see criminality and exclusion section above), the application for further leave should normally be refused.

Those granted DL for six month periods because of the refusal or withdrawal of asylum or Humanitarian Protection on grounds of criminality must normally wait 10 years before being considered for settlement. However, a failure to accrue 10 years' leave cannot be the sole basis for refusal. The decision maker must consider whether there are any exceptional circumstances that merit a departure from this position.

42. Accordingly, it will be seen that the current DLR policy provides that the normal period for which DLR is granted under the DLR policy is six months where the person is excluded from the Refugee Convention, cannot be removed due to the ECHR and does not fall within the RLR policy. Under the DLR policy, a person will normally become eligible for consideration for settlement after completing 10 years continuous DLR unless there are any criminality or exclusion issues and provided an application for further leave has been made in accordance with s.3C of the 1971 Act.

43. It is to be noted that there was nothing in any version of the DLR policy that provided for the imposition of conditions upon the grant of DLR.

(b) The RLR policy and guidance

44. On 2nd September 2011, there was a change in policy, as will be evident from what we have set out above. It is important to understand the taxonomy of the documents to which we were referred during the course of argument and which forms the structure of the decision making process which we are considering. After the hearing, we received, in accordance with a direction given at the hearing, further evidence from Ms Cole in relation to the status of the documents which we received in the evidence and which we set out below bearing on the question of RLR. That witness evidence is not entirely clear but appears to support the descriptions of the status of the documents which we were given at the hearing and which are reflected in what follows.

45. Firstly, on 2nd September 2011 the UKBA issued a policy statement entitled "Policy Statement on Article 1F of the Refugee Convention: restricted discretionary leave". The policy statement provided as follows:

> With effect from 2nd September 2011 all cases excluded form the protection of the Refugee Convention by virtue of Article 1F but who cannot be immediately removed from the UK due to Article 3 of the European Convention of Human Rights will be subject to a new, tighter, restricted leave policy.
>
> Such cases should usually only be granted restricted discretionary leave to remain for a maximum of six months at a time, with some or all of the following restrictions:
>
> > A condition restricting the person's employment or occupation in the UK
> >
> > A condition restricting where the person can reside
> >
> > A condition requiring the person to report to an immigration officer or the Secretary of State at regular intervals;
> >
> > A condition prohibiting the person studying at an education institution
>
> In addition, relevant information on all Article 1F cases will be referred by the UK Border Agency to the Independent Safeguarding Authority (ISA) to consider whether the individuals concerned should be barred from working/volunteering in ISA-regulated fields.
>
> This policy applies to all relevant individuals, whether they are seeking leave or renewal of leave to remain, including cases in which a previous grant of leave to remain was for a period longer than six months.
>
> The power to attach conditions to leave is provided by s.3(1)(c) of the Immigration Act 1971. A person who knowingly fails to observe a condition of their leave commits an offence by virtue of s.24(1)(b)(ii) of the Immigration Act 1971. Where appropriate, this policy will be enforced by the prosecution of individuals who do not comply with the conditions of their leave.

46. Pursuant to this policy, on 28th May 2012 an Asylum Casework Instruction was published. The respondent's position in submissions made to us was that was not policy but was guidance in order to assist in the implementation of the RLR policy and decision making. This is supported by the subsequent evidence in the main. The summary of the policy was set out as follows:

1.5 With effect from 2nd September 2011, all individuals excluded from the protection of the Refugee Convention by virtue of Article 1F but who cannot be immediately removed from the UK due to Article 3 of the European Convention of Human Rights (ECHR) are subject to a new, tighter, Restricted Leave policy (formally known as Restricted Discretionary Leave). Such individuals should usually only be granted Restricted Leave to remain for a maximum of six months at a time, with some or all of the following restrictions:

- on the person's employment or occupation in the UK;
- on where the person can reside;
- a requirement to report to an immigration officer or the Secretary of State at regular intervals;
- a prohibition on the person studying at an educational institution…

1.8 The power to attach conditions to leave is provided by s.3(1)(c) of the Immigration Act 1971. A person who knowingly fails to observe a condition of their leave commits an offence by virtue of s.24(1)(b)(ii) of the 1971 Act. Where appropriate, this policy will be enforced by the prosecution of individuals who do not comply with the conditions of their leave.

1.9 The policy imposes a short period of leave and appropriate conditions while removal options continue to be pursued. Persons excluded from Refugee Convention (and from Humanitarian Protection) continue to be a priority for removal even where removal cannot currently be enforced. Such cases will remain under close review by UK Border Agency and will be removed at the earliest opportunity. These reviews will be conducted at six monthly intervals as a minimum, prior to the expiry of the Restricted Leave.

1.10 The rationale for the imposition of these conditions is:

- Public interest: The public interest in maintaining the integrity of immigration control justifies frequent review of these cases with the intention of removing at the earliest opportunity. Therefore we want to ensure close contact and give a clear signal that the person should not become established in the UK.
- Public protection: It is legitimate to impose conditions designed to ensure that the UK Border Agency is able to monitor where an individual lives and works and/or prevent access to positions of influence or trust
- Upholding the rule of law internationally. The policy supports the principle that those excluded from refugee status, including war criminals, cannot establish a new life in the UK and supports our broader international obligations. It reinforces the message that our intention is to remove the individual from the UK as soon as is possible.

It is for these reasons that only Article 3 considerations will normally outweigh the public interest in securing removal. Where qualified rights are engaged, such as Article 8, only the strongest factors would prevail over the public interest in removal.

47. In respect of children, the Asylum Casework Instruction provided as follows:

1.11 Some individuals excluded by virtue of Article 1F and granted Restricted Leave will have dependent children. In applying the policy the caseworker must have regard to the need to safeguard and promote the welfare of children in the UK, as provided by s.55 Borders

Citizenship and Immigration Act 2009. In such cases, the decision maker must have regard to the likely impact the imposition of any conditions may have on dependent children and consider what is appropriate in that particular case. Conditions should be set having regard to the published guidance on the s.55 duty.

48. Turning to the issue of the duration of leave, the Asylum Casework Instruction provided as follows:

2.1 Restricted Leave should be limited to a maximum of six months at a time, so as to emphasise its short-term nature and because it would be at odds with the aim of this policy to permit such a person to re-enter the UK. A grant of leave for longer than six months permits a person to leave the UK and to be readmitted during the validity of their grant of leave (Article 13(2)(b) Leave to Enter and Leave to Remain Order 2000).

2.2 A shorter period than six months should be granted where removal appears to the decision maker to be reasonably likely within six months or where, in exceptional cases, the risk posed by the individual warrants the case being kept under review more frequently than six monthly.

49. The Asylum Casework Instruction then proceeds to address the various categories of conditions. In relation to employment it provides as follows:

3.1 The presumption is that permission to work will normally be restricted rather than denied outright where any condition is imposed.

3.2 Any employment restriction should also apply to voluntary work, self employment or engagement in any kind of business, paid or unpaid. The type of restriction imposed should be in proportion to the public protection risk posed by the individual. The options for restricting employment are:

(i) To notify the Secretary of State of all employment and volunteering roles. This should be used for the lowest-risk cases in order that UK Border Agency can notify corporate partners, where appropriate, about the person's employment

(ii) To apply restrictions on working or in particular occupations/professions. Generally, this condition will be expressed as a condition not to take any employment or engage in any business unless the Secretary of State has given prior consent in writing. When consent is sought for a particular job, the precise type of work to be restricted will depend entirely on the risk factors posed in individual cases. The condition should generally be used to prevent the person from working in roles with unsupervised contact with vulnerable people, or in roles which could be inappropriate according to the alleged crimes or acts for which the individual is being excluded, e.g. working with migrant communities from the country of origin where war crimes were allegedly committed. If an individual is already in employment (…) then details of that employment must be obtained and an assessment undertaken as to its continuing suitability prior to a grant of Restricted Leave.

(iii) A total ban on employment in any capacity whether as paid or volunteer – this should be used exceptionally in cases posing a particularly high public protection risk. Such cases should also be referred to the local police force for handling under the Potentially Dangerous Person (PDP) regime.

50. In respect of the residence condition, the Asylum Casework Instructions provided as follows:

4.1 These cases remain a priority for removal and it is consistent with the policy objectives to ensure the UK Border Agency maintains contact with individuals. A requirement to notify the Agency of a change of address is to ensure that the individual can be located when removal is possible. Requiring the person to live in a specific area where the accommodation is publicly provided or funded may also be legitimate in order to reduce the cost of providing housing.

4.2 One or both of the following residence conditions should usually be imposed:

(i) to notify the Secretary of State of the home address and any change of address, and or

(ii) to seek the prior consent of the Secretary of State to any change of address.

4.3 Option (i), to notify the Secretary of State of changes of address, should normally be imposed in all cases. In cases requiring the additional condition in option (ii), the individual will be subject to a requirement to seek the consent of the Secretary of State before changing address…

4.4 In deciding whether to give consent, decision makers must have regard to known risk factors and consult the advice of partners (e.g. police, local authorities) where appropriate. If specific risk factors are known, it may be appropriate to advise the individual that he will not be given permission to live within a certain area.

4.5 In this section, "residence" should be given the meaning on habitual residence. A person subject to a residence condition should also be subject to a condition to not spend more than three consecutive nights away from that address without the prior written consent of the Secretary of State. In addition, the person must not spend more than 10 nights away from that address in any rolling six month period…

4.6 Each case should be considered on the individual facts and risks. Particular risks may arise where:

- the individual concerned may pose particular risks to individuals in the community on the basis of past behaviour – for example, the UK Border Agency may wish to prohibit residence close to a school or other facilities;

- there is a significant community from the applicant's country of origin in that locality. The risk may be to the individual (e.g. from members of the community seeking retribution), or there may be a general public order risk if it becomes known that the person is living in the community. It may also be suspected that an excluded individual will seek to use his influence within the community to intimidate others or to exert undue influence. Where that is a real concern, the individual should be informed that permission will not be granted to live at an address within a specified area.

51. Turning to reporting restrictions, the Asylum Casework Instruction provided as follows:

5.1 The presumption is that all cases subject to this policy will be made subject to a condition to report regularly to the Secretary of State. This condition is designed to maintain contact with the individual and monitor compliance with the other conditions. Contact management is a priority because these cases remain under review for removal at the earliest possible stage.

5.2 The precise frequency and location of the reporting event will depend upon the following factors:

- the imminence of removal;
- the perceived risk of absconding;
- the need to maintain contact with the individual to monitor compliance with conditions,
- the impact of the reporting requirement on the individual taking into account
  - o the location of the reporting centre;
  - o health and ability;
  - o domestic responsibility;
  - o employment

5.3 As a guide monthly reporting should be considered the normal standard for Restricted Leave cases. This frequency can be modified up or down, taking into account the factors specified above. Where, in <u>exceptional</u> circumstances, it would be unreasonable to expect the individual to report each time in person, other options should be considered such as home visits.

52. In terms of the restriction on studies, the Asylum Casework Instruction stated as follows:

6.1 Grants of Restricted Leave in Article 1F exclusion cases should generally be subject to a condition which prevents them from undertaking a course of study, whether by attending in person or remote learning.

6.2 These individuals are in the UK on a temporary form of leave, pending their removal from the UK when circumstances permit. The rationale for restricting study is that it underlines the temporary nature of the leave. It also reduces pressure on public finances and, for privately funded courses, ensures that the person does not occupy course spaces that would otherwise be taken up by British Citizens or lawful migrants. It is also in the wider public interest to ensure that migrants who are welcome in the UK are afforded the opportunities that come from education, ahead of those on Restricted Leave.

53. Finally, so far as is relevant to the arguments presented in the case, the Asylum Casework Instruction provided at section 9 for "active reviews". The content of the document in this respect is as follows:

9.1 Grants of Restricted Leave will normally fall for renewal every six months. It remains the responsibility of the individual to apply for further leave to remain, but case owners should review the case in good time <u>before</u> the expiry of the leave to re-assess any protection needs and the prospects of removal. In many cases, the country situation will not have changed sufficiently to make removal possible within the next review period, but this must always be checked against COI at the time. In this scenario, case owners should seek information either in writing or via a reporting event about the person's work and future intentions and, on application consider a further grant of Restricted Leave in line with this policy. At the active review stage case owners should also review whether the conditions attached to the leave remain appropriate.

9.2 Where the circumstances have changed to the extent that the individual's removal would not be in breach of our ECHR obligations, the individual should be refused further leave and appeal rights notified in the usual way and, subject to those appeal rights, progressed to removal.

9.3 Article 1F cases which were granted Discretionary Leave before 2nd September 2011 should remain on their existing leave until it falls for renewal. When the renewal application is received, the application should be considered in line with the policy on Restricted Leave and be granted Restricted Leave unless exceptional circumstances justify a deviation from the published policy.

54. The Asylum Casework Instruction dated 28th May 2012 was updated and replaced on 23rd January 2015 by a document entitled "Asylum Policy Instruction: Restricted Leave". Again, this document enjoyed the same status as the Asylum Casework Instruction, namely, that it was guidance rather than policy and provided for the purpose of assisting the application of the RLR policy. Much of the document dated 23rd January 2015 simply reiterated what was in the document from 28th May 2012. By way of background the document observes as follows:

1.1. Purpose of

1.1 Purpose of instruction

1.1.1 This guidance explains the circumstances in which the Home Office will consider granting restricted leave to individuals who cannot be removed because this would breach their rights under the European Convention for the Protection of Human Rights (ECHR) and:

- are excluded from the Refugee Convention for Article 1F reasons, or who would be excluded were a Convention reason to apply (i.e. those excluded from a grant of Humanitarian Protection), or

- have been refused asylum under Article 33(2) of the Refugee Convention

1.1.2 The instruction provides specific guidance on:

- the categories of persons who may be granted restricted leave under the policy;

- the duration of leave and conditions that may be attached to any grant of restricted leave;

- conducting an active review in cases granted restricted leave.

1.2.4 As those who fall within the scope of this policy have committed serious international crimes and/or represent a danger to the security of the UK, only Article 3 considerations will normally outweigh the public interest in removing them because it is an absolute right and the extent of the public interest cannot be taken into account. Where qualified rights are engaged, such as Article 8 ECHR, only in the most compelling and compassionate circumstances could their family or private life, or medical considerations, outweigh the public interest in removal in these cases. It is expected there will be very few such cases but where there are such cases this policy applies.

1.2.5 Such cases will be reviewed regularly with a view to removal as soon as possible and only in exceptional circumstances will individuals on Restricted Leave ever become eligible for settlement or citizenship. Such exceptional circumstances are likely to be very rare.

55. A new feature of the "Asylum Policy Instruction: Restricted Leave" dated 23rd January 2015 was that it provided that individuals on RLR would not be able to have recourse to public funds unless they were destitute. A further new addition was that the RLR

policy now included a section dealing with "applications for indefinite leave to remain". In respect of such applications the document provided as follows:

> 4.12.1 Those excluded from the Refugee Convention and/or Humanitarian Protection may make applications for indefinite leave to remain on the basis of long residence, for example because they have lived in the UK lawfully for 10 years or more. The requirements are at paragraph 276B of the Immigration Rules. Consideration must be given to all the factors listed in paragraph 276B(ii) and in particular consideration must be given to the person's conduct which led to them being excluded from the Refugee Convention and/or Humanitarian Protection when looking at character, conduct and associations under paragraph 276B(ii)(c). Usually, given our international obligations to prevent the UK from becoming a safe haven for those who have committed very serious crimes, the conduct will mean that the application should be refused, but decisions should be taken on a case-by-case basis…
>
> 4.12.3 Excluded individuals may seek to rely on N, R (on the application of) v Secretary of State for the Home Department [2009] EWHC 1581 in which it was held at paragraphs 21 and 22:
>
> > "This policy relating to those who are not within the protection of the Refugee Convention because of Article 1F(b) seems to me to be entirely reasonable. The rationale behind it I have not had spelled out before me, but it seems obvious that what is desired is to keep open the possibility of return and the need to consider at regular and relatively short intervals whether return can be effected because, as a general approach, those who would not qualify because of the commission of a serious offence should not generally be considered to be able to remain within this country. One can understand why that policy has been adopted.
> >
> > Accordingly, in principle, to award only six months is not in the least unreasonable. But the policy has, as it were, a cap. It is recognised that there will come a time when – provided the individual has behaved himself in this country – it would be proper to regard him as having put behind him, as it were, the original offending. Thus if someone has been here for 10 years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here. The view is, again as it seems to me, entirely reasonably taken that generally speaking – and of course each case has to be considered taken on its own merits – such an individual will have leave to remain indefinitely and thus will be entitled to settle here."
>
> 4.12.4 Decision-makers must carefully consider the facts of an individual case against the specific facts in the case of R on the application of N to determine whether they are analogous and whether the principles set out in that case are applicable to the case under consideration.
>
> 4.12.5 Where a person does not qualify for indefinite leave to remain, consideration must be given to whether there continues to be an ECHR barrier to removal. If there is not, then the case must be prioritised for removal. If there is, then the person must be granted restricted leave within the terms of this policy.

56. The respondent has lodged witness statements. Firstly, a witness statement has been provided dated 29th May 2015 by Ms Louise Cole who is a higher executive officer at the Home Office working in their Criminality Policy Team. In her witness statement she contends that RLR is an immigration measure and not a national security measure.

She describes it as a means whereby the respondent meets her international obligations (by not removing a person in breach of the ECHR) without leaving them in limbo without leave to remain.

57. Ms Cole sets out the objectives of the RLR policy in terms of the public interest in maintaining the integrity of immigration control, public protection in relation to ensuring that the respondent is able to monitor where an individual lives and works together with preventing access to positions of influence or trust and, thirdly, upholding the rule of law internationally. She then observes the following in relation to risk a person poses in deciding the conditions to be imposed:

> 12. So, although in some cases the risk a person poses may be taken into account in the imposition of conditions – for example, a person's risk to a local community will be considered when deciding whether to impose a residence condition, and the reason a person is excluded from the Refugee Convention may inform whether they are permitted to take employment working with vulnerable members of society – conditions are primarily the means by which the Home Office maintains contact with those whose removal from the UK remains a priority, notwithstanding that there are legal barriers to removal at the point Restricted Leave is granted.
>
> 13. Restricted Leave is not the only aspect of immigration work which takes account of the risk a person poses. The Secretary of State and the courts are able to take account of both immigration factors and the risk a person poses to others when making decisions relating to immigration detention and immigration bail.

58. Ms Cole then turns to consideration of the imposition of conditions. In that regard, she observes as follows:

> 14. At paragraph 6 of Sonia Routledge's witness statement dated 25th March 2015 it is said that conditions are usually attached to limited leave which relate to the basis upon which that leave has been granted. That is correct, and the Restricted Leave policy is not inconsistent with that.
>
> 15. It seems to be contended that the conditions permitted under the Restricted Leave policy do not relate to the purpose of leave, in contrast with, for example, visitors who are not permitted to work or have recourse to public funds. It is accepted that there is a difference between those who come to the UK for a specific purpose to visit, study, work or join family, for example, whereas those subject to Restricted Leave are in the UK solely because notwithstanding the intention to remove them there are legal barriers preventing us from doing so. But the purpose of the leave is clear: a person cannot be left without leave when there is a legal barrier to their removal. The conditions which can be imposed in Restricted Leave case all relate to that purpose: ensuring that a person does not become established in the UK and can be removed at the earliest opportunity in compliance with the UK's international obligations.
>
> 16. At paragraph 5 of Sonia Routledge's witness statement dated 25th March 2015, it is stated that until the introduction of the Restricted Leave policy, those granted limited leave to remain on Human Rights grounds did not have conditions attached to their limited leave. This is correct. However it is entirely appropriate for a Government to decide to formulate a new policy which is different from previous policies. In addition, since the introduction of the Restricted Leave policy on 2nd September 2011, the Government has decided that those granted Limited Leave to Remain on the basis of ECHR Article 8 under paragraph 276ADE or Appendix FM of the Immigration Rules should not ordinarily have recourse to public funds.

59. Turning to the comparison between the RLR policy and Terrorism Prevention and Investigation Measures ("TPIM") Ms Cole observes as follows:

> 20. At paragraph 10(10) and paragraph 13 of Sonia Routledge's witness statement dated 25th March 2015, it is stated that there are no limits on the length of time for which Restricted Leave and associated conditions may be imposed. This is because it will often not be possible to know in advance how long the legal barrier to removal will remain in place. However, at each review of Restricted Leave the caseworker will consider for how long the next period of leave should be granted and whether or not any conditions previously imposed remain appropriate and proportionate. The person subject to Restricted Leave can also apply for a variation of conditions at anytime as long as full reasons for the request are provided.
>
> 21. It is also said that there is no requirement that the Secretary of State be satisfied to the balance of probabilities, or a lower standard that a person continues to be involved in terrorism – related activity. That it because Restricted Leave is an immigration policy based on past conduct (i.e. the reasons for refusal of asylum pursuant to Article 1F or Article 33(2) of the Refugee Convention) rather than a national security measure to prevent future criminal offences.
>
> 22. At paragraph 10(11) it is said that the Restricted Leave policy appears to proceed on the basis that it is legitimate to impose conditions in all Restricted Leave cases because there are always public protection issues in play. This is a misrepresentation of the policy. Conditions are imposed on a case-by-case basis for immigration reasons and where there is additionally a public protection issue in an individual case, the decision letter will explain the reasons for that assessment as required by the Immigration (Notices) Regulations 2003.

60. A witness statement dated 28th May 2015 has been provided by Ms Louise O'Sullivan who is the Head of Terrorism Prevention and Investigation Measures Policy and Litigation in the Office for Security and Counter Terrorism at the Home Office. In her witness statement, she describes the TPIM regime. She states that from the perspective of the TPIM team, the TPIM and RLR measures are not equivalent or alternative measures but have different purposes scope and statutory basis. She states that nationality and immigration status have no relevance to TPIM notices and that they do not have any immigration function. She notes TPIM notices can be made both against British nationals and foreign nationals irrespective of their immigration status.

61. The third witness statement provided by the respondent is dated 22nd May 2015 from Mr Chris Minchell who is a senior executive officer within the Home Office. He provided up-to-date evidence in relation to the application of the RLR policy. He confirms in his evidence that there are a total of 62 individuals with leave under the RLR policy, of whom 38 were excluded from the Refugee Convention under Article 1F(a), 4 under Article 1F(b), 14 under Article 1F(c) and 6 excluded under two or more of the exclusion clauses.

III. The Issues

62. Helpfully Ms Stephanie Harrison QC and Ms Charlotte Kilroy who appeared on behalf of MS and Ms Amanda Weston who appeared on behalf of MBT distilled the questions which they raised and therefore the issues which arise in each of these judicial reviews

claims for the purpose of focusing the hearing and assisting us with our decision making. That exposition of the issues and the relief sought is set out below:

1. These claims raise two broad questions:

   (1) Whether the RLR policy is lawful.

   (2) Whether, if it is, it has been lawfully applied to MS and MBT

   A third question concerns relief.

Question 1: The lawfulness of the RLR policy

1. The issues raised in relation to the lawfulness of the RLR policy are:

   (1) Is the policy ultra vires the enabling power in s.3(1)(c) of the 1971 Act? MS argues that it is using ordinary principles of statutory construction (Grounds 1-3):

      (a) The wording of the section in the context of the statutory scheme as a whole;

      (b) The statutory purpose;

      (c) The principle of legality;

      (d) The existence of a specifically tailored statutory scheme for those who cannot be removed from the UK but are assessed for public interest reasons to require restrictions.

   (2) Is the policy in breach of the requirement on the respondent at s.3(2) of the 1971 Act to set out how she intends to exercise her discretion on the grant of leave subject to conditions in Immigration Rules (the Alvi point)? (Ground 4)

   (3) Does the policy unlawfully fetter the respondent's discretion? (Ground 5)

   (4) Does the law and policy violate Article 8(1) ECHR read alone and/or with Article 14 ECHR because it is arbitrary and not in accordance with a procedures prescribed by law. Alternatively is the policy compatible with Article 8(2) because even if the interference is not arbitrary it is not for a legitimate purpose and/or is disproportionate and discriminatory? (Ground 6)

   (5) Is the policy compatible with s.55 of the 2009 Act and the duties to MS's 3 British children (Ground 7)

Question 2: The lawfulness of the decisions to grant RLR to MS and MBT

2. The issues raised in relation to the lawfulness of the individual decision to grant MS RLR with conditions are:

   (1) Was it unlawful not to grant MS ILR, and instead to grant him RLR, given that there was a nine-year delay in considering his application for ILR from 2005-2014 and he was deprived of the benefit of the grant of ILR to which he was entitled under the DLR policy from on and after 03.11.2011? (Ground 8)

   (2) Could the RLR policy rationally be applied to MS? (Ground 9)

(3) Did the decision to grant MS RLR with conditions violate his rights and the rights of his British wife and children under Article 8 ECHR and/or breach s.55 of the 2009 Act?

3. The issues raised in relation to the lawfulness of the individual decision to grant MBT RLR with conditions are:

(1) Was it unlawful to refuse to grant MBT ILR and to grant him RLR given that:

(i) The Respondent refused to consider whether he should be granted ILR until he had completed 10 years DL,

(ii) He had resided lawfully in the UK since 13 May 1999 as an asylum seeker, there was a delay of 5 years before he was granted DLR in July 2004, four years between his application of 2005 and grant of 2009 and four years between his application of 2009 and grant of 2013 during which periods there was little or no contact from the respondent;

(iii) He had not been subject to any national security or other restriction, had lived a law-abiding life in the UK and was 'rehabilitated';

(iv) He has a wife and four British citizen children all settled in the UK, the children knowing no life outside England.

(2) Could the RLR policy rationally be applied to MBT?

(3) Did the decision to grant MBT RLR with conditions violate his rights and the rights of his wife and British children under Article 8 ECHR and/or breach s.55 of the 2009 Act?

Question 3: Relief

1. In the event that the RLR policy is found to be unlawful for any of the reasons set out under Question 1 above:

(1) A declaration setting out the basis of the finding of unlawfulness;

(2) An order quashing the RLR policy.

(3) A declaration that the decisions to grant RLR to MS were unlawful.

(4) An order quashing those decisions

(5) An order that MS be granted ILR/ alternatively an order that his application for ILR be determined under the DLR policy, without reliance on the RLR policy.

2. In the event that the RLR policy is not found to be unlawful, but the decision to impose RLR on MS is:

(1) A declaration that the decisions to grant RLR to MS were unlawful.

(2) An order quashing those decisions

(3) An order that MS be granted ILR/ alternatively an order that his application for ILR be re-considered taking into account all relevant factors and the Court's judgment.

In MBT's skeleton argument dated 23rd April 2014, the following relief was sought:

(1) An order to quash the decisions of 21st August 2013 and 23rd September 2013 to impose restrictions/conditions on MBT's grant of RLR.

(2) A mandatory order requiring the respondent to reconsider whether MBT should be granted ILTR.

(3) A declaration that the RLR policy is unlawful in whole or in part.

(4) Such further or other relief as the court considers fit.

IV. The Lawfulness of the Restricted Leave Policy

(a) Is the RLR Policy *ultra vires* the enabling power in s.3(1)(c) of the 1971 Act?

63. As will be seen from the list of issues, this question of statutory construction is put in a number of ways. The argument initially focuses on the particular wording of the section and whether it can sustain the imposition of conditions in the circumstances of persons excluded from the Refugee Convention. It examines the statutory purpose and whether or not the use of conditions is outwith that statutory purpose examining, in particular, the availability of alternative statutory schemes for achieving the objectives of the RLR policy.

64. The starting point for the consideration of these arguments is s.3(1) which provides as follows:

> 3 General provisions for regulation and control
>
> 3(1) Except as otherwise provided by or under this Act, where a person is not a British Citizen…
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—
>
> (i) a condition restricting his employment or occupation in the United Kingdom;
>
> (i)(a) a condition restricting his studies in the United Kingdom;
>
> (ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;
>
> (iii) a condition requiring him to register with the police;
>
> (iv) a condition requiring him to report to an immigration officer or the Secretary of State; and
>
> (v) a condition about residence.

65. The argument based upon the statutory language focuses on the reference in s.3(1)(c) to leave being given "subject to" the conditions. The submission made is in essence that that phrase has to be read as requiring the leave to be subject to or compliant with the

conditions which are imposed. In other words, the conditions which are imposed must be integral to the grant of leave and if they are breached lead to that leave being curtailed. But for those conditions, leave would not be granted. It is argued that, in the scenario contemplated by the 1971 Act, both the respondent's officers and the individuals have a choice: the respondent has a choice whether to grant leave to enter and the individual has a choice as to whether to accept any conditions. If the individual does not accept the conditions he/she is not permitted to use the leave to enter. If the individual uses the leave to enter but breaks the conditions he is liable to criminal prosecution. The following two examples are given: entry clearance granted for the purpose of study is subject to restrictions on employment; entry clearance granted for the purpose of visits is subject to restrictions on access to public funds and employment. It is argued that the type of conditions in the list at s.3(1)(c) were designed to implement the substantive Immigration Rules permitting leave to enter or remain to be granted for specific and limited reasons whether to take employment, to study, or to join family and subject to meeting identified conditions as to duration and purpose.

66. Accordingly, it is argued that the language in s.3(1)(c) does not mandate or justify the imposition of conditions on those who cannot be removed because of acknowledged breaches of Article 3 that would arise from them being removed and therefore who must be granted leave. That leave cannot be contingent upon the imposition of conditions and could not be curtailed if the conditions were breached. Attention was drawn during the course of argument to the cases of R v Somerset County Council ex parte Fewings [1995] 1 All ER 513 and R v Richmond Upon Thames London Borough Council ex parte Watson [2001] QB 370 to support the proposition that in order to act, and in particular to impose the conditions in these cases, specific statutory authority was required. It was submitted that in construing statutory powers whose exercise restricts fundamental common law rights a strict and narrow approach to construction should be adopted (see R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245.) In particular in the present case, in that, human rights were at stake, express language was required from Parliament to justify a construction which would support interference with those rights (see R v Home Secretary ex parte Simms [2000] 2 AC, in particular in the speech of Lord Hoffmann at page 131 E-G).

67. All of these broad propositions of public law and statutory construction are uncontroversial, in our view, and provide an important bedrock for considering the nature of the applicant's submissions. However, we are satisfied that the statutory language, construed against the principles set out above and in the light of the overall statutory scheme provides power for conditions to be imposed on the leave of individuals in the excluded category of the applicants. Our reasons for reaching this conclusion are as follows.

68. Firstly, the terms of the provision, simply but strictly construed empower the imposition of conditions whenever leave is granted. There is nothing within the language of the statute itself that limits the imposition of conditions to certain types of leave or leave being granted in certain circumstances, nor is there anything in the language that requires the conditions imposed to relate to the purpose for which leave is being granted. Secondly, it is important to appreciate that the statute does not create

a general power to impose conditions of any kind but only particular types of condition. Contrary to the submissions made on behalf of the applicants, the types of conditions listed in s.3(1)(c) are not simply directed to the classes of leave (for example to work or as a student) but are also directed to issues which are plainly directed to enforcement; for example, registration with the police, reporting conditions and residence conditions. These classes of condition are not therefore simply limited to regulating the purpose for which leave is being granted but also have a direct bearing on ensuring that if removal is for whatever reason possible or necessary, enforcement of immigration control can be more easily achieved. Thus, the argument that the conditions imposed must somehow be integral to the grant of leave in the sense of being referable to its purpose is not supported by the statutory language.

69. Thirdly, we are unable to accept the proposition that the statutory language only mandates the imposition of conditions if breach of those conditions would lead to leave being curtailed. Such an interpretation is impossible to reconcile with the fact that s.3(1)(c) expressly permits the imposition of conditions requiring registration with the police, reporting conditions and conditions as to residence. Furthermore, amongst the battery of enforcement measures available to the respondent is, for instance, the ability under s.24(1)(b)(ii) to prosecute a person for breach of a condition on their leave. Thus there may be a variety of sanctions for breach of condition which fall far short of the curtailment of leave. Thus, the fact that leave could not be curtailed in the case of an excluded person who cannot be removed such as the applicants in this case, does not justify the construction claimed, namely that conditions cannot be imposed on their leave because conditions could only be imposed which could lead to leave being curtailed.

70. These conclusions arise simply from an examination of the statute itself and the statutory scheme of the 1971 Act.

71. The applicants' submissions went on to support their suggested construction by means of other arguments extraneous to the 1971 Act. Those arguments were as follows.

72. The first argument concerned the provisions of two Orders made under the 1971 Act. Under the Immigration (Leave to Enter and Remain) Order 2000, provisions are made as to the grant of entry clearance. In particular, article 3 thereof requires entry clearance to be endorsed with any conditions to which it is subject and under article 5 provision is made as to the imposition on leave of conditions empowered by s.3 of the 1971 Act. By contrast the Immigration (Leave to Enter) Order 2001 addresses specifically by article 2(2) a person who seeks leave to enter on asylum or human rights grounds. The 2001 Order does not contain any mention whatsoever of the imposition of conditions. It is submitted that this contrast between the two Orders points up the contrast between those who are granted leave to remain on human rights grounds where conditions under s.3(1) cannot be imposed and other types of persons upon whose leave conditions can be imposed.

73. This submission does not persuade us to depart from the principal conclusion as to the appropriate construction of s.3(1)(c) that we have set out above. It is important to

appreciate that these Orders were made deploying the power under s.3A(2) of the 1971 Act which provides as follows:

> 3A Further provision as to leave to enter
>
> (1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom.
>
> (2) An order under subsection (1) may, in particular, provide for:
>
> (a) …
>
> (b) the form or manner in which leave may be given, refused or varied;
>
> (c) the imposition of conditions; …

74. The first point which arises is that it can be seen from the power which is used that the Secretary of State is not obliged to provide Orders which deal exhaustively with all categories of persons or all categories of leave and conditions which might arise. The second point to note is that s.3A(1) and (2) specifically envisage that conditions may or may not be imposed when leave is given (see the words: "*in particular*" in the opening line of s.3A(2)).

75. Thirdly, we accept the submission made on behalf of the respondent by Ms Julie Anderson that the Orders do not and could not constrain the proper use of power under the primary legislation as they are a piece of secondary legislation.

76. The second argument raised by the applicants relates to considerations arising from the case of R (S and others) v Secretary of State for the Home Department [2004] EWHC 1111 (Admin); [2006] EWCA Civ 1157. The circumstances of that case were that the claimants were Afghan nationals who hijacked an internal flight in Afghanistan and arrived in the aircraft in the United Kingdom where they were charged and convicted of various offences associated with the hijacking (albeit that those convictions were later quashed). They claimed asylum and their claim was refused but it was concluded that their removal to Afghanistan would violate their rights under Article 3 of the ECHR. The Secretary of State refused to grant the claimants discretionary leave of any kind and instead placed them on temporary admission. This was pursuant to a modification to the Secretary of State's policy on humanitarian protection and discretionary leave whereby it was concluded that a person falling within the excluded category would not be granted leave but placed on temporary admission. Before Sullivan J (as he then was) the policy was declared unlawful and the delays involved in reaching a decision which implemented the decision reached on the asylum appeal were also found to be unlawful. At paragraph 67 of Sullivan J's judgment, he records the following exchange during the course of argument:

> When I asked Mr Jay what was the difference in deciding that it was "inappropriate to grant" the claimants leave and refusing them leave, Mr Jay replied that the former was a "purely administrative decision" which did not formally refuse leave". In response to the further question whether there was any difference in substance between the two decisions, he pointed to the practical consequences which flow from a decision to grant temporary admission as opposed to a grant of discretionary leave to enter. Some of these practical consequences have

been referred to above, for example that claimants are not allowed to work, and are subject to reporting restrictions etc. So far as removal from the UK is concerned, there is no difference in practical terms for these claimants. If they had been granted discretionary leave for an initial period of six months in accordance with the 2003 policy, then that leave could have been extended for further periods of six months, or longer if it was thought appropriate.

77. The applicants rely upon this exchange to found the submission that in effect what was being observed during the course of argument in that case contained the implicit submission that those who were excluded from the Refugee Convention but who could not be returned owing to breaches of Article 3 could not have conditions imposed on their leave. Furthermore, it was submitted that the effect of this case, in particular in the decision of the Court of Appeal, was that a person in that situation had to be granted a form of leave to remain and therefore it was Article 3 which created the right to remain further reinforcing the contention that such leave could not be made subject to conditions. The relevant extract from the Court of Appeal's judgment in this respect was as follows from the leading judgment of Brooke LJ:

44. In these circumstances the judge was right to hold that it was not open to the Secretary of State to determine, without obtaining the necessary authority from Parliament, that someone in the position of the respondents could be kept or placed on temporary admission. Parliament created that status (by which someone who has in fact entered this country is deemed not to have entered: see s.11 of the Immigration Act 1971) for those persons identified in para 21(1) of the Schedule. For the reasons we have given they do not include persons who are in the position of the respondents.

45. That the statutory scheme of immigration control postulated that someone who successfully maintained that their removal would constitute a violation of their European Convention Rights should be entitled to leave to enter, for however limited a period, became apparent from the clear submissions addressed to the court by Mr Rabinder Singh QC, who appeared for the respondents. In short, the essence of his argument is that those who do not have the "right of abode" here must obtain "leave" in order to enter the country (see Immigration Act 1971, section 3(1)). Asylum and human rights applicants (like everyone else who does not possess the right to abode) are subject to the same statutory controls on entry. This is reflected by the terms of the Immigration (Leave to Enter) Order 2001 which provides that both categories of applicant may be granted "leave to enter", even if in the latter case all they may have established is that they cannot lawfully be removed without an infringement of their European Convention rights.

46. Mr Singh pointed out that, where such applicants are refused leave to enter, they have a right of appeal. If their appeal succeeds, on asylum or human rights grounds, they are entitled to leave to enter and remain here, in the latter case, until they can be safely returned without violation of their European Convention rights. This status cannot be taken away from them by the Secretary of State conferring on them a new status which does not in this manifestation form any part of the statutory scheme. We accept Mr Singh's submission.

47. Nothing in this judgment should be interpreted as meaning that it would not be open to confer power on the Secretary of State to introduce a regime similar to the regime he sought to introduce through the August 2005 Discretionary Leave API (so long as the arbitrary elements of it are removed). If it is considered that a person (or a group of persons) has by his conduct disentitled himself to any discretionary leave at all, then it would be open to Parliament, if it thought fit, to create a new statutory category to accommodate it. The present twilight zone occupied by persons entitled to temporary admission was not designed for him. The only effect of the present judgment is that it

was beyond the powers of the Secretary of State to introduce this new category of "persons temporarily admitted" of his own motion without Parliamentary sanction.

78. We are unable to accept that the observations in this case are capable of bearing the weight and meaning attributed to them by the applicants. Paragraph 44 of the judgment draws attention to the fact that Parliament created the status in question (i.e. someone who has in fact entered the United Kingdom but is deemed not to have entered) for those persons identified in paragraph 21(1) of Schedule 2 of the 1971 Act. Under Schedule 2 with particular reference to paragraphs 2(1), 16(1) and 21(1), an Immigration Officer had the authority to grant temporary admission instead of detaining persons who are required to submit to examination pending a decision as to whether to give or refuse leave to enter. That was the purpose for which temporary admission could be given, whereas the Secretary of State had used the power to grant temporary admission to a different category of persons (those who could not be removed without infringing their ECHR rights).

79. Plainly, the case is authority for the proposition that persons who are excluded from the Refugee Convention but who cannot be removed due to Article 3 of the ECHR cannot be granted temporary admission and must be granted some form leave. It is not authority for the proposition the applicants seemingly advance, that conditions cannot be imposed on those who must be granted leave. There is nothing in the judgment of Sullivan J in the High Court or Brooke LJ in the Court of Appeal that supports the proposition advanced by the applicants, nor is there anything in those judgments that supports the suggestion that there is no power within the 1971 Act to grant RLR as contemplated by the RLR policy.

80. The final element of the applicants' argument in this part of the case is reliance on provisions in the Criminal Justice and Immigration Act 2008 (the "CJIA 2008"), in particular ss.131-133. It is important to note that these sections have yet to be brought into force. Under s.131 a person is a "foreign criminal" if, amongst other circumstances, he or she is not a British citizen and is excluded from the Refugee Convention by virtue of Article 1F. Under s.130, the Secretary of State may designate a person (subject to certain exceptions) who is a foreign criminal and who is liable to deportation but cannot be removed from the United Kingdom because of s.6 of the Human Rights Act 1998. The effect of designation is described by s.132 as follows:

132 Effect of designation

(1) A designated person does not have leave to enter or remain in the United Kingdom

(2) For the purposes of a provision of the Immigration Acts and any other enactment which concerns or refers to Immigration or nationality (including any provision which applies or refers to a provision of the Immigration Acts or any other enactment about immigration or nationality) a designated person –

(a) is a person subject to immigration control,
(b) is not to be treated as an asylum seeker or a former asylum seeker, and
(c) is not in the United Kingdom in breach of the immigration laws.

(3) Despite subsection 2(c), time spent in the United Kingdom as a designated person may not relied on by a person for the purpose of an enactment about nationality.

(4) A designated person

(a) shall not be deemed to have been given leave in accordance with paragraph 6 of Schedule 2 to the Immigration Act 1971 (c.77) (notice of leave or refusal), and
(b) may not be granted temporary admission to the United Kingdom under paragraph 21 of that Schedule…

S.133 makes provisions in relation to the imposition of conditions as follows:

133 Conditions

(1) The Secretary of State or an immigration officer may by notice in writing impose a condition on a designated person.

(2) a condition may relate to –

(a) residence
(b) employment or occupation, or
(c) reporting to the police, the Secretary of State or an immigration officer.

(3) Section 36 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (c.19) (electronic monitoring) shall apply in relation to conditions imposed under this section as it applies to restrictions imposed under paragraph 21 of Schedule 2 to the Immigration Act 1971…

(4) Section 69 of the Nationality, Immigration and Asylum Act 2002 (c.41) (reporting restrictions: travel expenses) shall apply in relation to conditions imposed under subsection (2)(c) above as it applies to restrictions imposed under paragraph 21 of Schedule 2 to the Immigration Act 1971.

81. The section goes on to provide for criminal sanctions if without reasonable excuse a condition is breached. Section 136 provides that the designation of a person as a foreign criminal lapses upon them being granted leave to enter or remain amongst other circumstances.

82. The applicants' submission arising from ss.131-133 of the CJIA 2008 (albeit not yet in force) is that this status was designed to cure the illegality of the policy in the case of S. Further, and perhaps more importantly, the applicants draw attention to the fact that under s.133 the conditions are imposed "on a designated person" and not on the leave which they are granted. Thus, it is submitted that in circumstances which apply to the present applicants, namely that leave must be granted because of the breach of Article 3 that would result from their removal, it is not possible under the 1971 Act to impose conditions on those persons in the way which has been done by the RLR policy. It is submitted that the only way that this could be achieved would be by the specific statutory mechanism created under the CJIA 2008 to enable that to occur.

83. Again, although attractively made, we are unable to accept that proposition. It may well be the case that the designated person scheme was created under the CJIA 2008 in response to S. When it comes into force, it will create a new category of persons who will not have leave and yet will not be treated as being in the United Kingdom in breach of the Immigration Rules. Since such persons will not have leave, it was necessary for specific statutory provision to be made for the imposition of conditions

on them. That is the reason why the designated person scheme created under the CJIA 2008 provides for conditions to be imposed on the person. The existence of that separate statutory regime creating a particular class of person that did not exist previously does not justify construing differently the plain words of s.3(1) of the 1971 Act which clearly in our view empower the imposition of certain types of condition when leave is being granted. Again, the fact that leave has to be granted to persons in this category does not affect the power enabling conditions to be imposed. It is not legitimate to imply that the words "subject to" justify the contention that conditions could only be imposed where but for those conditions leave would be refused. In our view even where there is no choice other than to grant leave (in particular, for instance, as a result of the effect of the case of S) the leave which has to be granted can be regulated by the imposition of the types of condition identified in s.3(1)(c).

84. The alternative way in which the submissions as to the vires of the RLR policy are developed relates to the contention that the policy is outwith the statutory purpose. The principles of public law applicable in this context are straightforward. A power cannot be construed in a way which widens the purpose of the Act containing it or departs from or varies its primary objective (see, for instance, Utah Construction and Engineering PTY Limited v Pataky [1966] AC 629 and R (Public Law Project) v Lord Chancellor [2015] 1 WLR 262 paragraph 40 – 41.)

85. Here it is submitted that the conditions which are imposed go beyond any conditions necessary to give effect to the purpose of the Act which is an immigration measure. In particular, attention is drawn to, for instance, the public protection element of the purpose of the RLR policy and the use of conditions for instance to obviate the risk of potential radicalisation of communities (through the imposition of residence conditions) or preventing contact with vulnerable people (through, for instance, the conditions in relation to permission for work) as having an ulterior purpose, in particular related to threats to national security, which are beyond the purpose of the 1971 Act and in particular s.3 of the 1971 Act. It is in this connection that again attention is drawn to the provisions of the TPIMA 2011 and the statutory requirements which are created before a TPIM can be imposed. Section 2 of the TPIMA 2011 requires the conditions within s.3 to be met. It is unnecessary for the purposes of this decision to set out each of the five conditions which are identified. Suffice it to say that the Secretary of State must show that it is necessary to impose a TPIM on an individual *"for purposes connected with protecting members of the public from a risk of terrorism"* and *"preventing or restricting the individual's involvement in terrorism-related activities"*. In other words, individuals on whom TPIMs may be imposed present an active terrorist threat.

86. Within Schedule 1 of the TPIMA 2011 a range of measures are provided. They include measures in relation to overnight residence, measures in relation to travel, exclusion from particular areas or places and measures connected with the restriction of work and study. The existence of these measures is relied upon by the applicants to demonstrate that the RLR policy has in effect developed an enlarged ulterior purpose engaged with threats to national security which are outwith the purpose of s.3 of the 1971 Act as an immigration instrument. Whilst it is accepted by the applicants that considerations of public protection can arise in detention and deportation cases this

dimension is, it is submitted, specifically recognised in s.3(6) of the 1971 Act. Detention is a parasitic power upon this particular purpose of the 1971 Act. By contrast it is submitted there is nothing in s.3(1) which justifies or is referable to public protection.

87. In her submissions in response, Ms Anderson draws attention to the three purposes set out at [56] above (namely the public interest in maintaining the integrity of immigration control, public protection to ensure monitoring of where an individual lives and works and preventing their access to positions of trust, and upholding the international rule of law by supporting broader international obligations to remove individuals excluded from the Convention as soon as possible) which are the specific rationale for the RLR policy. She contends that they do not directly identify current active national security protection.

88. In our view, the key is to understand the different purposes of the TPIMA 2011 and the RLR policy. As we have said, individuals on whom TPIMs may be placed present an active terrorist threat; the measures are imposed to protect members of the public from a risk of terrorism and preventing or restricting the individual's involvement in terrorism-related activities. In contrast, those who are subject only to the RLR policy may not present an active terrorist threat notwithstanding that one purpose of the RLR policy is stated to be public protection in furtherance of which conditions are imposed to monitor where the individual lives and works and/or prevent the individual's access to positions of trust. It is perfectly rational and lawful for the Secretary of State to seek to impose such conditions on those who have been involved in terrorism-related activities in the past but may not currently present an active terrorist threat. Although individuals subject only to the RLR policy may not be considered by the Secretary of State to be an active terrorist threat, it is nevertheless perfectly rational and lawful for her to protect the public by imposing conditions to ensure that contact is maintained with them whilst they are in the United Kingdom as well as prevent them gaining positions of trust and therefore influence until such time as removal is possible or they must be granted settlement. The necessity to do so arises from the fact that they engaged in terrorism-related activities in the past.

89. There may be certain individuals who are within the purview of both the TPIM regime and also the RLR policy, and to whom both regimes may apply. However, that does not in our view justify the conclusion that the RLR policy is outwith the purpose of the 1971 Act. We are therefore unable to accept the implicit submission that there is a covert or unspecified purpose of the RLR policy related to national security which is to be inferred and which is illegitimate.

90. In our view, each of the three purposes which have been identified as the rationale for the imposition of conditions pursuant to the RLR policy are obviously and self evidently part of the purpose of immigration control which is enshrined within the 1971 Act. We are unable to accept some distinction or ring fencing of the engagement of public protection as a purpose of immigration control or the contention that public protection is irrelevant to the imposition of conditions upon the grant of leave. It is not a consideration which is solely and exclusively confined to the consideration of deportation under s.3(6) but, where it arises in the circumstances of any individual case, is a factor which is clearly engaged in the purpose of having immigration control

which is efficient and effective. Therefore, insofar as the RLR policy seeks to impose conditions on the basis of public protection, it does not stray beyond the purpose of the 1971 Act in controlling and regulating immigration. Insofar as there may be some individuals who are subject to the RLR policy and who also, simultaneously, present a current and active national security risk, then there may be some overlap between the objectives of immigration and also national security objectives which are the subject of the TPIMA 2011. The existence of those individuals and the possibility that parallel measures would be required does not justify concluding that the use of conditions under the RLR policy for the purpose of national security takes the RLR policy beyond the purpose of the Act. It is simply the statement that in those cases there will be a public protection dimension to their cases which comprehends national security.

91. The final argument under this particular heading deployed by the applicants is the contention that the existence of a specific statutory power, namely that which is contained within the TPMIA 2011, precludes the use of the RLR policy in relation to the purpose of protecting national security and renders it unlawful. It is contended that any general power under the 1971 Act to impose conditions should not be deployed where there is a specific power under the TPIMA 2011 to accomplish the end in mind. The generality of this proposition was supported by reference to R (Lapporte) v Chief Constable of Gloucestershire [2007] 2 AC 105 and in particular the speech of Lord Bingham at paragraph 46. Whilst this authority related to the potential intervention of the common law over and above powers and duties carefully defined by Parliament (which was considered illegitimate) there are authorities which bear more closely on the circumstances of this case and the concern that general powers should not be used if a specific power has been provided for the purpose. In particular, the applicants drew attention to Birmingham City Council v Shafi [2009] 1 WLR 1961 which concerned a local authority's application for an injunction under s.222 of the Local Government Act 1972 instead of their use of powers provided to them under the Crime and Disorder Act 1998 to seek an anti-social behavior order. In the leading judgment of Sir Anthony Clarke MR and Rix LJ the following was observed:

> 43. In Hein's case [2005] LGR 797, which was a very unusual case on its facts, Waller LJ considered the decision of this court in Worcester County Council v Tongue [2004] Ch 236, where a local authority was seeking orders which would enable it to enter land in order to rescue animals which were at risk of being cruelly treated. It was ultimately decided that there was no power to fill gaps in the criminal law but, in the course of his judgment, Peter Gibson LJ quoted at para 29 this statement by Hoffmann J in Chief Constable of Leicestershire v M [1989] 1 WLR 20, 23: "The recent and detailed interventions of Parliament in this field suggest that the court should not indulge in parallel creativity by the extension of general common law principles."
>
> That principle was applied in the context of animal cruelty in Hein's case: see per Waller LJ at paras 66-70. See also per Clarke LJ at para 48.
>
> 44. The significance of the principle stated by Hoffmann J in this appeal is this. The terms of the injunction sought in this action are typical of an ASBO and, as already indicated, on the facts of this case they are identical or almost identical to the terms of an ASBO. We have already referred to what is in our view a striking feature of the council's approach in this case, namely that it seeks ASBOs against those under 18 and injunctions in identical terms against those over 18. Parliament has laid down a number of specific requirements which apply to ASBOs, some of which may not apply to injunctions granted at common law. In so far as it may be said that it is easier to obtain an injunction than an ASBO, the

> granting of an injunction in such circumstances would in our view be to infringe Hoffmann J's principle. In any event, it appears to us that where, as here, Parliament has legislated in detail to deal with a particular problem, the courts should in general leave the matter to be dealt with as Parliament intended and, save perhaps in exceptional circumstances, refuse to grant injunctive relief of the kind which can be obtained by an ASBO.

92. Similar arguments were also deployed in the case of Langley v Liverpool City Council [2006] 1 WLR 375. That was a case concerned with emergency protection orders under s.44 of the Children Act 1989 (the "1989 Act") and the emergency powers given to the police to remove and accommodate children in cases of emergency under s.46 of the 1989 Act. The Court of Appeal concluded that in the light of the specific provisions and safeguards of s.44 it had primacy within the statutory scheme and therefore where there was an emergency protection order in place the court held that the s.46 powers should not be exercised unless there were compelling reasons to do so.

93. Against the background of these principles it was contended on behalf of the applicants that the existence of the powers to impose a TPIM under the TPIMA 2011, that was the measure which should be used in cases engaging national security and that the use of the RLR policy in such cases was unlawful because of the existence of this alternative statutory power. It was observed as part of these submissions that the power under the TPIMA 2011 contained specific safeguards and procedures which could be circumvented by the imposition of the RLR policy.

94. We are not persuaded that there is validity in the applicants' submissions in this respect. The TPIMA 2011 applies to British citizens and foreign nationals alike, provided they present an active terrorist threat. The RLR policy applies only to foreign nationals, since they must be granted some form of leave (whereas British citizens obviously do not require leave) and the purpose of the RLR policy is to set out the policy and guidance concerning the duration of the leave and the conditions to be imposed. It follows that foreign nationals who are subject to the TPIMA measures present an active terrorist threat whereas those who are not subject to TPIMA measures but whose leave is granted under the RLR policy may not present such a threat, notwithstanding that there may be public protection issues in their case in the sense that their past involvement in terrorism-related activity justifies the Secretary of State imposing conditions to ensure that contact is maintained with them and prevent their access to positions of trust and therefore influence. Thus it is important to observe that, so far as concerns foreign nationals who are excluded and cannot be removed, the TPIMA 2011 could only potentially apply to those who present an active terrorist threat. There will be very many persons who are excluded from the Refugee Convention and who cannot be returned for Article 3 reasons who will not present any such threat (and the applicants in the present cases are two such examples).

95. Secondly, it is important to appreciate that the RLR policy and its public protection dimension may in some cases have a national security content but it is in reality an immigration measure in which national security may in some limited number of cases be a dimension of its purpose. That is very distinct from the TPIM regime which is unarguably a national security measure which has no immigration dimension to it at all. These two regimes are therefore fulfilling two very different roles in the regulation

of particular individuals. That is not to say that there may not be cases, as Ms Anderson submitted, where both regimes may be in play. There may be an excluded foreign national individual who cannot be removed for Article 3 reasons who is properly regarded as a threat to national security as a result of active engagement in terrorist activities. Such a person would be granted RLR and consideration given to the imposition of conditions upon them. They could simultaneously be the subject of a TPIM notice. Consideration in both regimes would need to be given to the imposition of conditions and no doubt duplication of conditions and the avoidance of it would be part of the consideration in relation to exercising those powers. However, it is clear to us that the existence of the separate TPIM regime and the powers which it contains does not obviate the need for the RLR policy and the limitations which it places on the extent of leave being granted and the conditions under which it is being imposed.

96. In summary therefore we are entirely satisfied that the RLR policy is not, for any of the reasons offered by the applicants, ultra vires the 1971 Act.

(b) Is the policy in breach of the requirement under s.3(2) of the 1971 Act?

97. The nature of this argument is that, by virtue of s.3(2) of the 1971 Act, the Secretary of State ought to have placed the RLR policy before Parliament for endorsement before its lawful operation. The starting point for this argument is, of course, s.3(2) itself which provides as follows:

> 3 General provisions for regulation and control
>
> (2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and s.1(4) above shall not be taken to require uniform provision to be made by the rules as regards admissions of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

98. The effect of s.3(2) and the requirement to lay rules before Parliament was considered by the Supreme Court in the case of R (Alvi) v Home Secretary [2012] 1 WLR 2208. Lord Hope analysed the effect of the 1971 Act and the requirements in relation to s.3(2) at paragraph 41 as follows:

> 41. There is, of course, no enabling statute in this case. But the 1971 Act must now be seen as the source of the powers vested in the Secretary of State, and it is the Act which provides the statutory machinery for their exercise. The content of the rules is prescribed by sections 1(4) and 3(2) of the 1971 Act in a way that leaves matters other than those to which they refer to her discretion. The scope of the duty that then follows depends on the meaning that is given to the provisions of the statute. What s.3(2) requires is that there must be laid before Parliament statements of the rules, and of any changes to the rules, as to the practice to be followed in the administration of the Act for regulating the control of entry into and stay in the United Kingdom of persons who require leave to enter. The Secretary of State's duty is expressed in broadest terms. A contrast may be drawn between the rules and the instructions (not inconsistent with the rules) which the Secretary of State may give to immigration officers under paragraph 1(3) of Schedule 2 to

> the 1971 Act. As Sedley LJ said in ZH (Bangladesh) v Secretary of State for the Home Department [2009] Imm AR 450, para 32, the instructions do not have, and cannot be treated as if they possessed, the force of law. The Act does not require those instructions or documents which give guidance of various kinds to caseworkers, of which there are very many, to be laid before Parliament. But the rules must be. So everything which is in the nature of a rule as to the practice to be followed in the administration of the Act is subject to this requirement. Resort to the technique of referring to outside document, which the Scrutiny Committee can ask to be produced if it wishes to see them, is not in itself objectionable. But it will be objectionable if it enables the Secretary of State to avoid her statutory obligation to lay any changes in the rules before Parliament.

99. Lord Hope went on to consider the definition of those matters which pursuant to s.3(2) should be laid before Parliament and observed at paragraph 63 of his judgment as follows:

> 63. Various expressions have been used to identify the test which should be used to determine whether or not material in the extraneous document is a rule which requires to be laid before Parliament. It is not easy to find a word or phrase which can be used to achieve the right result in each case. I agree with Lord Dyson JSC (see para 88, below) that it is not helpful to say that there is a spectrum. A more precise expression is needed. The word "substantive" was identified by Foskett J in the English UK case and by Singh J in *Ahmed's* case. But even this word needs some explanation. I would prefer to concentrate on the word "rule" which, after all is the word which s.3(2) uses to identify the Secretary of State's duty and to apply the test described in para 57, above. The Act itself recognises that instructions to immigration officers are not to be treated as rules and what is simply guidance to sponsors and applicants can be treated in the same way. It ought to be possible to identify from an examination of the material in question, taken in its whole context, whether or not it is of the character of a rule or is just information, advice or guidance as to how the requirements of a rule may be met in particular cases.

100. In his judgment agreeing with Lord Hope, Lord Dyson JSC concluded that the approach should be as follows:

> 94. In my view, the solution which best achieves these objects is that a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision "as to the period for which leave is to be given and the conditions to be attached in different circumstances" (there can be no doubt about the latter since it is expressly provided for in s.3(2)). I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if nor satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of s.3(2). That is what Parliament was interested in when it enacted s.3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined.

101. These principles were also engaged in the case of R (Munir) v Secretary of State for the Home Department [2012] 1 WLR 2192. That case concerned policy DP5/96 which was withdrawn in 2008 and the claimant contended that its withdrawal was unfair and further amounted to a change in the Immigration Rules within the meaning of s.3(2) that ought to have been laid before Parliament. In giving his judgment (with which all other judges sitting in the Supreme Court agreed) Lord Dyson JSC concluded as follows:

44. In my view, it is the 1971 Act itself which is the source of the Secretary of State's power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion under ss.3, 3A, 3B and 3C to control the grant and refusal of leave to enter or remain: see paras 4-6 above. The language of these provisions, especially s.3(1)(b)(c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules.

45. The question remains whether DP5/96 was a statement of practice within the meaning of s.3(2). If a concessionary policy statement says that the applicable rule will always be relaxed in specified circumstances, it may be difficult to avoid the conclusion that the statement is itself a rule "as to the practice to be followed" within the meaning of s.3(2) which should be laid before Parliament. But if the statement says that the rule may be relaxed if certain conditions are satisfied, but that whether it will be relaxed depends on all the circumstances of the case, then in my view it does not fall within the scope of s.3(2). Such a statement does no more than say when a rule or statutory provision may be relaxed. I have referred to DP5/96 at para 9 above. It was not a statement of practice within the meaning of s.3(2). It made clear that it was important that each case had to be considered on its merits and that certain specified factors might (not would) be of particular relevance in reaching a decision. It was not a statement as to the circumstances in which overstayers will be allowed to stay. It did not have to be laid before Parliament.

Conclusion

46. For the reasons that I have given, I will reject Mr Swift's submission that the issuing of a concessionary policy (or indeed the waiving of a requirement in the rules in an individual case) is an exercise of prerogative power which for that reason does not come within the scope of s.3(2). But, subject to the constraints to which I have referred and any relevant public law principles, the Secretary of State is authorised by the 1971 Act to make policies setting out the principles by which she may, as a matter of discretion, grant concessions in individual cases to those seeking leave to enter or remain in the United Kingdom. The less the flexibility apparent in the concessionary policy the more likely it is to be a statement "as to the practice to be followed" within the meaning of s.3(2) and therefore an immigration rule. But DP5/96 was amply flexible and was therefore not an immigration rule and did not have to be laid before Parliament.

102. The question of whether or not the RLR policy ought to have been the subject of the s.3(2) procedure was considered by Patterson J in the case of <u>R (YA) v Secretary of State for the Home Department</u> [2013] EWHC 3229 (Admin). For reasons which we do not need to go into, the judge concluded that the claim which was before her was academic. She nonetheless went on to consider the substantive grounds on which the claim had been brought, amongst other things on the basis that the RLR policy was caught by the <u>Alvi</u> principle, but her conclusions were (as she herself observed in paragraph 39 of the judgment) all *obiter dicta*. Her conclusions in this respect were set out in her judgment from paragraph 58-70 as follows:

58. Applying the test posed in <u>Alvi</u> at paragraphs 94 and 97, and the words of Lord Clarke at paragraph 120 together with the approach of Lord Dyson in <u>Munir</u> at paragraphs 45 and 46, whilst I accept that the Restricted Discretionary leave policy applies to all cases who are excluded from the Refugee Convention by virtue of Article 1F but who cannot be removed by virtue of Article 3 of ECHR I find that the policy is not dealing with whether leave to remain has to be granted. That has to be taken as a given because of the contravention of the Human Rights Act should deportation be exercised. The objective of

the policy is to guide decision makers as to how long leave should be granted for and what, if any, conditions need to be attached to the grant of leave. As such it is a concessionary policy concerning the grant of leave to persons outside the immigration rules. In other words the policy is dealing with how the grant of restricted discretionary leave should be administered. In dealing with that issue the policy does not lay down a rigid framework which has to be followed. Rather, it provides guidance to assist the decision maker as to the duration of leave and which conditions should be attached but it does not compel any particular outcome in all cases.

59. That is evident from the flexibility within the policy itself. In the summary of the policy at paragraph 1.4 it refers to the cases usually only being granted restricted discretionary leave to remain for a maximum of six months at a time. It follows from that that the duration of the leave could be any period up to six months in a normal case but even beyond that should the case require it. The matter is within the discretion of the decision maker.

60. The attachment of some or all of the conditions relating to employment, residence, reporting or studying to the grant of leave again is a matter for the decision maker. The rationale for the imposition of the conditions is explained in paragraph 1.6 but again does not predicate any particular outcome and certainly contains no requirement that they all have to be imposed on all grants of leave to remain.

61. In relation to employment, s.3 makes it clear that there is the option of a total ban on employment in any capacity which should be used exceptionally in cases imposing a particularly high public protection risk and the option of restrictions on working in particular occupations or professional fields. The nature of the work and degree of restriction depends on what is, in effect, a risk assessment. There is guidance as to the giving of consent to proposed employment under paragraph 3.5 but that goes to inform the judgment which the decision maker has to take in the particular case. Whilst there is a presumption under paragraph 3.6 that a person subject to the policy should not be permitted to work or volunteer in roles that require a standard or an enhanced CRB check it is not a prohibition.

62. There is mandatory language used in paragraph 3.2 about the operation of employment restrictions but that is in the context of the procedural requirement that a letter must accompany the immigration status document to explain that consent to employment will only be given in relation to one specific job or business related activity. If the individual seeks to change his employment or take up another role he has to apply for fresh consent. Because that is dealing with the procedure to be followed it does not compel a particular decision but goes to how the decision which is made is to be implemented.

63. Section 4 deals with residence restrictions. Having set out that it may be legitimate to require a person to live in a specific area to reduce the cost of providing housing it then contains in paragraph 4.2 a series of options for residence conditions. Paragraph 4.4 says that the first of the options should usually be imposed in all cases. Option 1 is to notify the Secretary of State of the Home Office of any address or change in address. The language is of preference rather than compulsion. Paragraph 4.8 reads: "Each case should be considered on the individual facts and risks…." That makes it clear that in dealing with the residence restriction there is inherent flexibility and each case should be individually considered on its own merits.

64. Paragraph 4.9 reads "residence restriction may also be imposed where it would facilitate the case for removal". Again the language is of discretion. Whilst there are parts of s.4, for example 4.7 which reads,

> "a person subject to condition (iv) must also be subject to a condition not to spend more than three consecutive nights away from that address without the prior written consent of the Secretary of State. In addition, the person must not spend

> more "than ten nights away from that address in any rolling six month period. These conditions must be specified in the letter explaining the conditions attached to the leave."
>
> That follows the pattern in s.3 when mandatory language was used in relation to the procedural requirements as opposed to the discretion given as to the decision to be reached.
>
> 65. Section 5 deals with reporting restrictions. It opens by setting a presumption that all cases subject to the policy will be subject to a condition to report. But a presumption is not determinative. It leaves discretion with the decision maker.
>
> 66. The section then goes on to provide criteria against which the precise frequency and location of the reporting event are to be determined. Paragraph 5.2 then sets as a guide monthly reporting restrictions but makes it clear that the frequency can be modified up or down taking into account the criteria which are to be considered in deciding the frequency and location of the reporting event.
>
> 67. Paragraph 5.5 says in terms reporting conditions are not set in stone. An individual may apply for a condition to be varied to take into account domestic or work commitments. Such requests are to be considered in line with the overall aims of the policy and, if appropriate, the conditions should be amended in writing. That wording makes it clear that there is an inherent flexibility which is of ongoing adaptability to the individual circumstances of the case.
>
> 68. Section 6 deals with the restriction on studies. Again, that sets out an approach which should generally be followed.
>
> 69. Section 7 of the guidance is dealing with matters of quality, assurance and oversight. They are not determinative of the outcome in any particular case.
>
> 70. It follows from the analysis of the provisions of the policy that it is flexible. There are some presumptions but they are clearly rebuttable. It is providing a framework of guidance to enable caseworkers administering the restricted discretionary leave policy to determine the nature and, where relevant, duration of conditions to be attached to any decision on leave. It does not compel a particular outcome. In my judgment it is a concessionary policy outside the immigration rules and did not have to be laid before Parliament.

103. The contentions of the applicants in relation to this part of the case were advanced principally by Ms Weston. She submitted both orally and in writing that the RLR policy was in truth in the nature of a rule for a number of reasons. Firstly, it is inflexible in that every person who is excluded from the Refugee Convention but who would be at risk of a breach of Article 3 if they were returned is made the subject of the RLR policy and will only be granted RLR. This demonstrates inflexibility in the RLR policy making it in effect a rule. Further she relied upon the evidence obtained under the FOI request which demonstrated that in all cases of this kind RLR had been granted and without exception for a period of six months. The inflexibility of the RLR policy was demonstrated therefore in its application to all persons irrespective apparently of their personal circumstances. Furthermore, it appeared from the decision letters and other correspondence in MBT's case that the fact that a person had not reoffended in the United Kingdom was irrelevant and further the existence of dependent children did not appear to deflect the respondent from applying the RLR policy. Submissions were also made both in this part of the case and elsewhere

contending that the conditions were inflexible as they were uniformly applied and although the detail of conditions might vary, the types of condition contemplated by the RLR policy (restricting residence, employment, reporting for example) were applied in all cases. This approach was borne out, again, by the evidence which had been obtained under the FOI request and that within the respondent's evidence.

104. Clearly the key question for determining whether or not the RLR policy is caught by the s.3(2) procedure is the question of whether or not it is flexible. Is it drafted and designed to operate as being in the nature of a rule? Whilst her observations were, as set out above, *obiter dicta* we have no difficulty in accepting the conclusions which were reached by Patterson J in YA insofar as they bore upon the question of flexibility contained within the RLR policy so far as conditions were concerned. We would respectfully adopt the reasoning which has been set out above from her judgment in paragraphs 59-70. There are however a number of matters which we would wish to add to her conclusions.

105. Firstly, when Patterson J observed that she accepted "*that the RLR policy applies to all cases who are excluded from the Refugee Convention by virtue of Article 1F but who cannot be removed by virtue of Article 3 of ECHR I find that the RLR policy is not dealing with whether leave to remain has to be granted,*" she was not to be taken to be concluding that the question of the application of s.3(2) did not arise at all. In our view, the question plainly does arise because s.3(2) is directed, amongst other matters, to rules which address the imposition of conditions. Thus, insofar as the RLR policy is concerned with the imposition of conditions the question needs to be asked as to whether or not it is in the nature of a rule that ought to be placed before Parliament. Our conclusion in this respect is reinforced by the decision of Upper Tribunal Judge O'Connor in R (on the application of Fakih) v Secretary of State for the Home Department [2014] UKUT 0513 (IAC). That case concerned the application of a condition prohibiting an applicant having recourse to public funds where the policy in respect of the imposition of the condition was so inflexible that the judge concluded it was in the nature of a rule which ought to have been placed before Parliament pursuant to the s.3(2) procedure.

106. Secondly, in the most recent iteration of the guidance (the "Asylum Policy Instruction: Restricted Leave" dated 23rd January 2015) accompanying the RLR policy (which was not before Patterson J), it is not correct to conclude that, although the RLR policy will apply to all persons in the excluded category that the outcome will always and inevitably be the grant of RLR. Paragraph 1.2.5 observes that although it is likely to be a very rare occurrence, there will be exceptional circumstances in some cases where eligibility for settlement and subsequently citizenship may arise. That is further elaborated in section 4.12 of the guidance adopting the principles set out in the case of N which, it will be recalled, recognise that there would come a time when in some individual cases that the grant of ILR might be appropriate. Thus as presently formulated the policy has additional flexibility to that which was noted by Patterson J.

107. Thus, in summary, whilst the RLR policy is an instrument about which the s.3(2) question should be posed, we are satisfied that the combination of the flexibility in the RLR policy, flexibility which is further enhanced in the most recent policy effective from 23 January 2015 indicating that there will be some albeit rare cases in which RLR

will not be imposed, together with the flexibility in relation to the conditions noted by Patterson J, lead us to the conclusion that the RLR policy is not in the nature of a rule which should have been laid before Parliament. True it is that the evidence obtained by the applicants in response to the FOI request which is described at [20] (showing that all 56 people currently granted RLR had reporting, prohibition of study without written consent and residence conditions imposed upon them, all bar two had employment conditions imposed, all 56 had been granted RLR for a duration of six months at a time and none had been granted RLR for a period more or less than six months) suggests that in the relatively limited number of cases in which the RLR policy has been applied, similar outcomes in respect of the various applicants have arisen. We are satisfied that, whilst the outcomes show that the decision makers placed weight (which they were fully entitled to do, as the individuals concerned had engaged in terrorist-related activity in the past) on the presumption that the duration of leave will usually be six months and the presumption in favour of the imposition of all four conditions, the fact is that employment restrictions were not imposed on two out of fifty-six individuals. In our view, this does not show inflexibility but it shows weight being placed on the presumption. It is also important in our view to examine the RLR policy itself and its terms to see whether it is in reality a rule as to the practice to be followed in respect of these cases. On examination of the RLR policy, we are satisfied that it is not.

(c) Does the RLR policy unlawfully fetter the respondent's discretion?

108. The leading case in relation to the principles in respect of this ground is R v SSHD ex parte Venables [1998] AC 407 where at page 496-7 Lord Browne-Wilkinson explained as follows:

> When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such an exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying the policy as to the approach which he will adopt in the generality of cases:… But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful.

109. Similar reasoning can be found in the case of A-G ex rel Tilley v Wandsworth London Borough Council [1981] 1 WLR 854 in which there was a challenge to a policy adopted by a local authority that, where it had been determined that a family with young children were intentionally homeless if a subsequent approach was made to its social services department assistance with alternative housing would not be provided under the provisions of the Children and Young Persons Act 1963 albeit consideration

would be given to the reception into care of the children if the circumstances warranted it. Templeman LJ observed at page 857H-858D as follows:

> Construction being out of the way, we have to consider whether the council can properly order its committees and its officials not to provide alternative housing under the Act [of 1963] in the case of children of parents who are intentionally homeless. On well recognised principles public authorities are not entitled to fetter the exercise of discretion or to fetter the manner in which they're empowered to discharge the many duties that are thrust on them. They must at all times, in every particular case, consider how to exercise their discretion and how to perform their duties.
>
> Although the resolution appears to be mandatory and prevent alternative housing being provided under the Children and Young Persons Act 1963, nevertheless Mr Beloff said, and the judge accepted that there was evidence, that exceptions were in practice made to the resolution. On a question of ultra vires the practice of making exceptions is irrelevant, but, for my part, even if the resolution had provided for exceptions and even if, as Mr Beloff urged, this was a general policy and not a mandatory order, the resolution would not get rid of the vice that a local authority, dealing with individual children should not make a policy or an order that points towards fettering its discretion in such a way that the facilities offered to the child do not depend on the particular circumstances of that child, or of the child's family, but follow some policy which is expressed to apply in general cases.

110. It is important to observe that both Brandon LJ and Lawton LJ agreed in the decision with Templeman LJ but on the basis that the Council's resolution laid down a policy without making any exceptions at all and was invalid. In his very short judgment Brandon LJ reserved his opinion as to whether a resolution which laid down a general policy with a specific number of exceptions would also be invalid. That reservation was shared by Lawton LJ. We accept this authority as demonstrating quite clearly that a policy which admits of no exception and which therefore fetters the operation of a discretion is unlawful; we are unable to accept that it is binding authority for a broader proposition that a policy containing exceptions is an unlawful fetter upon discretion. The essential question is whether there is sufficient flexibility.

111. A further case cited to us in respect of this issue was R v Warwickshire County Council ex parte Collymore [1995] ELR 217. This was a case concerning the award of discretionary grants to students in particular those training for the legal profession. The evidence before the court demonstrated that whatever the individual circumstances of the case every application of such discretionary award was automatically rejected but along with the rejection there was notification that the applicant might seek a review of the decision. That notification included the following:

> You should note that the decision to refuse your application will only be amended on an individual basis if there are the most extraordinary circumstances that justify treating your application differently from all others.

The evidence demonstrated that all reviews had failed and the submission was made that the terms and effect of the policy were so as to unlawfully fetter the discretion of the education authority. Judge J (as he then was) concluded as follows at page 226F-H in respect of those submissions having referred to the ex rel Tilley case:

> Applying that principle to this case, a policy in absolute terms prohibiting any discretionary awards could not be remedied by evidence that on occasions exceptions might be permitted.

The policy would remain unlawful. However in the present case, as already indicated, the conclusion to be drawn from the evidence as a whole is that although the policy, generally, was to refuse applications for discretionary awards, an integral aspect of it was the review and appeal procedure. Although in one sense that could be regarded as an exception to the overall policy, in my judgment, it was not an exception in the sense regarded in Attorney General ex rel Tilley v London Borough of Wandsworth as unacceptable, but rather the implementation of the principle that the policy should not be applied rigidly or inflexibly. If the applicant's case had been regarded as exceptional then, as a matter of policy, her application would have been granted and funds made available. Accordingly I do not accept that the Attorney General ex rel Tilley v London Borough of Wandsworth principle applies to this case.

My reservation about the policy arises from a different aspect of the evidence, and is encapsulated in the language used by Lord Scarman in Re Findlay sub nom Findlay v Secretary of state for the Home Department [1985] 1 AC 318 at page 336:

'(2) Consideration of the case not being excluded by a policy which provides that "exceptional circumstances or compelling reasons must be shown"'.

If the only permitted exceptions are those where the circumstances are 'most extraordinary' the authority appears to be very close to instituting a blanket policy which while in theory admitting of exceptions, may not, in reality, result in the proper consideration of each individual case and its merits. In other words, while the approach set out in the letter of 15th April 1993 to Miss Collymore would be, in my judgment satisfactory, I have grave doubts about the language in the form attached to it. It is unnecessary to resolve this issue, but I should not want the respondents to regard to fact that on the basis of all the evidence before me I have not struck down the policy as unlawful to lead them to conclude that I have approved the phrase 'most extraordinary circumstances' as indicating a proper approach in this type of case…

Without suggesting that, in this case, what happened resulted from the adoption of an unavowed rule to refuse all cases, or bad faith, it is impossible to escape the conclusion that in practice the policy has been implemented far too rigidly and that, as a result, Miss Collymore's application was not properly considered.

112. Similar propositions in relation to the inflexibility of the policy as were advanced in relation to the Alvi point set out above were made in this part of the case. It was submitted that the inflexible features of the RLR policy rendered it an unlawful fettering of discretion and further with reference to the Collymore case that the evidence which was available as to how the RLR policy had been operated showed that it was implemented far too rigidly and as a result proper consideration was not being given to individual cases.

113. We have already set out above our conclusions in relation to the flexibility inherent in the RLR policy. It is in our view entirely understandable that when dealing with individuals who have been excluded from the Refugee Convention as a result of Article 1F that the RLR policy will refer, as it does, to exceptional circumstances in relation to the consideration of settlement for such individuals. It is unsurprising that the number of individuals in this class of persons qualifying for settlement would be "rare". We have already set out above, drawing on the conclusions of Patterson J in YA our agreement with her findings that the approach to the conditions to be applied under the RLR policy provides for flexibility as to how those conditions are firstly applied and secondly tailored to the circumstances of the individual. The application of the RLR policy in accordance with the guidelines in the "Asylum Casework Instruction" dated 28 May 2012 (and also the recent "the "Asylum Policy Instruction:

Restricted Leave" dated 23rd January 2015) facilitates that approach. Although there is some evidence that some features of the RLR policy have been applied in a similar fashion to all cases (for instance the provision of six months and nothing other than six months leave) and also that certain conditions such as reporting, not studying without written consent from the respondent and not being absent from home for more than three nights consecutively or more than ten nights in a rolling six month period have been consistently applied the detail in relation to the conditions does, on the evidence, vary from case to case.

114. For all of these reasons, we are not satisfied that the approach to decision making set out in the RLR policy results in there being insufficient flexibility and that the discretion of the decision maker is illegitimately fettered so as to render the RLR policy unlawful.

(d) Article 8

115. The first element of the challenge brought by the applicant in relation to Article 8 is the contention that the purpose of the RLR policy in placing obstacles in the way of the development of family and private life so as to facilitate removal is not a legitimate aim. The provision of obstacles was contrary to the objective of Article 8 which was to secure the development of a full private and family life. In support of this submission the applicants commenced their arguments with reference to the case of Marckx v Belgium [1979] 2 EHRR 330 in which the European Court of Human Rights observed as follows ([31]):

> By proclaiming in paragraph 1 the right to respect for family life, Article 8 signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2. As the Court stated in the Belgian Linguistic case, the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life.

116. It was the "positive obligations" that were the focus of the applicants' submissions. In a domestic context, our attention was drawn to the case of Pawandeep Singh v Entry Clearance Officer, New Delhi [2005] QB 608 in which, in the course of delivering the leading judgment in the Court of Appeal, Dyson LJ (as he then was) observed as follows:

> 38. One final point. Mr Garnham submits that it is irrelevant that it is the decision under challenge (in the present case the refusal of entry clearance) that prevents the development of family life. He submits that the obligation under article 8 to grant entry clearance could only arise if the existence of family life had been established in the first place. The source for this submission is the statement in Marckx (para 31): "By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family". Mr Garnham submits that, with the exception of the decision in Pini, the ECtHR has recognised that "potential" family life may be relevant in determining whether family life exists for the purposes of article 8 only in the context of a child and his natural father (see Nekvedavicius v Germany App No 46165/99 (2004) 38 EHRR CD 12 and Nyluind v Finland App No 27110/95, decision of 29 June 1999). But as we have seen

(para 29 above), the decision in Pini (para 143) shows that the potential for development of family life is relevant in determining whether family life already exists, and that this is not confined to cases involving children and their natural parents. I cannot see in principle why the potential for development may only be taken into account in relation to family life between children and their natural parents. Para 143 of Pini is plainly inimical to such a restricted view of the scope of the principle. I acknowledge, however, that unless some degree of family life is already established, the claim to family life will fail and will not be saved by the fact that at some time in the future it could flower into a full-blown family life, or that the applicants have a genuine wish to bring this about.

117. Against the background of this approach to Article 8, the applicants submitted that the rationale of the RLR policy, namely placing obstacles in the way of the establishment of family and private life, could not be a legitimate aim and therefore the RLR policy was not compliant with Article 8 and unlawful. This submission was reinforced by the importance of children who were British citizens being able to develop their family life as part and parcel of the Article 8 rights at stake.

118. We propose to deal with this submission before turning to questions of discrimination and proportionality which were raised by the applicants under the Article 8 heading. Our approach would in the first instance be governed by examining first the principles in relation to the question of whether or not the RLR policy pursues a legitimate aim. In that respect the starting point must be the seminal statement of the law in relation to the questions arising under Article 8 provided by Lord Bingham in the case of R (Razgar) v Home Secretary [2004] 2 AC 368. At paragraph 17 of his speech he analysed the position as follows:

> 17 In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

119. In dealing in passing with the requirement that the interference with Article 8 be in accordance with the law, we have already addressed above questions associated with whether or not the RLR policy is lawful in terms of being within the powers provided by the 1971 Act and whether or not there are other aspects of illegality such as the fettering of discretion or being beyond the purposes of the statute. The question of legitimate aim arises under the fourth limb of the five-step approach explained in Razgar. We are in no doubt for reasons which will already have become obvious that the interference which arises under the RLR policy, both as to time limited periods of

leave and also as to the conditions which are imposed upon that leave, is necessary for public safety, the economic wellbeing of the country, the prevention of crime and disorder and, in some cases, national security. Leaving aside the fact sensitive assessment of proportionality, we see no objection in principle to the interference with Article 8 rights which may arise through the limitation of the time period for leave or the conditions placed upon it. The reasons why they are necessary are appropriately and adequately explained in the guidelines in the "Asylum Casework Instruction" dated 28 May 2012 (and also the recent "the "Asylum Policy Instruction: Restricted Leave" dated 23rd January 2015) providing the rationale for the RLR policy. Understood in this way and in accordance with the approach in Razgar, the interferences with Article 8 which occur are lawful and within the scope of Article 8. Although as a generality Article 8 may contain in its application some positive obligations, it is a qualified right. The issue in relation to any interference with Article 8, or any obstacle to the development or enhancement of Article 8 rights, is whether that interference is necessary in the various interests of a democratic society set out above. Once it has been concluded that it is necessary then the interference is justifiable and within the scope of the Article 8 right.

120. We would have reached these conclusions without the assistance of other authority. However, it is important to recall that observations were made by the Court of Appeal in the case of R (on the application of Kardi) v Secretary of State for the Home Department [2014] EWCA Civ 934 in which the question of the RLR policy and its application to the claimant was the subject of a judicial review. It needs to be borne in mind, as was observed by Ms Harrison, that the Court of Appeal in that case were not concerned, as we are, with a challenge to the validity of the RLR policy itself. The ambit of the challenge in that case was to its application to the particular circumstances of that claimant's case. Moreover, as part and parcel of that challenge, it was accepted that the imposition of the RLR policy did interfere with Article 8 rights. There is no question therefore but that Article 8 rights are in play in the application of the RLR policy. Bearing these points in mind we nevertheless have derived support for our conclusions in relation to whether or not the RLR policy is in pursuit of a legitimate aim for the purposes of Article 8 from the observations made in the leading judgment of the Court of Appeal by Richards LJ as follows:

> 29. The various elements of the stated rationale are all in principle legitimate aims, though it will be necessary to consider the extent to which they are specifically engaged in the appellant's case. More needs to be said, however, about the stated wish to give a clear signal that the person should not become established in the United Kingdom. The rationale of the previous discretionary leave policy was described by Cranston J in R (Mayaya) v Secretary of State for the Home Department [2011] EWHC 3088 (Admin), [2012] 1 All ER 1491, at paragraph 57, as being "not simply to ensure regular reviews so that foreign national prisoners [the specific category of persons in issue in that case] can be removed from the United Kingdom when the opportunity arises", but also "to plant road blocks in the way of foreign national prisoners settling here", though settlement might in practice still occur. In other words, the grant of short periods of leave emphasised the intended impermanence of the individual's stay in this country and made it more difficult to put down roots here and to build up a private life, thus reducing the prospect of removal being prevented on Article 8 grounds when the opportunity otherwise arose. The current restricted discretionary leave policy, by providing for the imposition of specific conditions on the grant of leave, is intended to reduce further the opportunity to put down roots and thereby to reinforce the road blocks planted in the

way of settlement here. It does not prevent the establishing of a private life but makes it more difficult and so increases the chance that the delay before removal can be effected does not operate to prevent removal altogether. That is a legitimate aspect of immigration control.

121. We are therefore satisfied that the RLR policy is in pursuit of a legitimate aim for the reasons set out above.

122. Turning to questions of discrimination and proportionality, the applicants place reliance on the case of A and others v Secretary of State for the Home Department [2005] 2 AC 68. That case concerned the position of foreign nationals who were suspected of terrorism and who were made the subject of detention under the Anti-Terrorism, Crime and Security Act 2001 (the "ATCSA 2001"). The arguments before the House of Lords ranged across, amongst other matters, whether or not the measures involved in that case were proportionate and whether or not they were unlawfully discriminatory. Dealing firstly with the question of proportionality, the leading speech of Lord Bingham commenced his consideration with citation of de Freitas v Permanent Secretary of Minister of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 said (at [30]):

In determining whether a limitation is arbitrary or excessive, the court must ask itself:

'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.

123. In order to understand the conclusions reached by Lord Bingham with whom the majority of the House of Lords agreed, it is necessary to set out his summary of the appellant's argument under proportionality which he accepted as being entirely valid. The argument was summarised in paragraph 31 of his speech as follows:

31. The appellants' argument under this head can, I hope fairly, be summarised as involving the following steps:

(1) Part 4 of the 2001 Act reversed the effect of the decisions in Hardial Singh [1984] 1 WLR 704 and Chahal *(1996) 23 EHRR 413* and was apt to address the problems of immigration control caused to the United Kingdom by article 5(1)(f) of the Convention read in the light of those decisions.

(2) The public emergency on which the United Kingdom relied to derogate from the Convention right to personal liberty was the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters.

(3) While the threat to the security of the United Kingdom derived predominantly and most immediately from foreign nationals, some of whom could not be deported because they would face torture or inhuman or degrading treatment or punishment in their home countries and who could not be deported to any third country willing to receive them, the threat to the United Kingdom did not derive solely from such foreign nationals.

(4) Sections 21 and 23 did not rationally address the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters because (a)

it did not address the threat presented by UK nationals, (b) it permitted foreign nationals suspected of being Al-Qaeda terrorists or their supporters to pursue their activities abroad if there was any country to which they were able to go, and (c) the sections permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qaeda terrorists or supporters.

(5) If the threat presented to the security of the United Kingdom by UK nationals suspected of being Al-Qaeda terrorists or their supporters could be addressed without infringing their right to personal liberty, it is not shown why similar measures could not adequately address the threat presented by foreign nationals.

(6) Since the right to personal liberty is among the most fundamental of the rights protected by the European Convention, any restriction of it must be closely scrutinised by the national court and such scrutiny involves no violation of democratic or constitutional principle.

(7) In the light of such scrutiny, neither the Derogation Order nor ss.21 and 23 of the 2001 Act can be justified.

124. Lord Bingham accepted the validity of these arguments and concluded in relation to proportionality in paragraph 43 of his speech as follows:

> 43. The appellants' proportionality challenge to the Order and s.23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer. In a discussion paper "Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society" (Cm 6147) (February 2004) the Secretary of State replied to one of the Newton Committee's criticisms in this way:
>
> '32. It can be argued that as suspected international terrorists their departure for another country could amount to exporting terrorism: a point made in the Newton Report at para 195. But that is a natural consequence of the fact that Part 4 powers are immigration powers: detention is permissible only pending deportation and there is no other power available to detain (other than for the purpose of police enquiries) if a foreign national chooses voluntarily to leave the UK. (Detention in those circumstances is limited to 14 days after which the person must be either charged or released.) Deportation has the advantage moreover of disrupting the activities of the suspected terrorist.'
>
> This answer, however, reflects the central complaint made by the appellants: that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that the Order and s.23 are, in Convention terms, disproportionate is in my opinion irresistible.

125. Lord Bingham then turned to the question of discrimination. The issue of discrimination was advanced on the basis of breaches of Article 14 of the ECHR. That article sets out as follows:

ARTICLE 14

Prohibition of discrimination

> 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.

126. Lord Bingham's conclusions in relation to this aspect of the case were as follows:

> 52. The Attorney General submitted that the position of the appellants should be compared with that of non-UK nationals who represented a threat to the security of the UK but who could be removed to their own or to safe third countries. The relevant difference between them and the appellants was that the appellants could not be removed. A difference of treatment of the two groups was accordingly justified and it was reasonable and necessary to detain the appellants. By contrast, the appellants' chosen comparators were suspected international terrorists who were UK nationals. The appellants pointed out that they shared with this group the important characteristics (a) of being suspected international terrorists and (b) of being irremovable from the United Kingdom. Since these were the relevant characteristics for purposes of the comparison, it was unlawfully discriminatory to detain non-UK nationals while leaving UK nationals at large.
>
> 53. Were suspected international terrorists who are UK nationals, the appellant has chosen comparators, in a relevantly analogous situation to the appellant's? The question, as posed by Laws LJ in R (Carson) v Secretary of State for Work and Pensions [2003] 3 All ER 577, para 61, is whether the circumstances of X and Y are so similar as to call (in the mind of a rational and fair minded person) for a positive justification for the less favorable treatment of Y in comparison with X. The Court of Appeal thought not because (per Lord Woolf CJ, para 56) "the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed". This is, however, to accept the correctness of the Secretary of State's immigration control as a means to address the Al-Qaeda security problem, when the correctness of that choice is the issue to be resolved. In my opinion, the question demands an affirmative answer. Suspected international terrorists who are UK nationals are in a situation analogist with the appellants because, in the present context, they share the most relevant characteristics of the appellants.
>
> 54. Following the guidance in the Belgian Linguistic Case (no 2) it is then necessary to assess the justification of the differential treatment of non-UK nationals "in relation to the aims and effects of the measure under consideration". The undoubted aim of the relevant measure, s.23 of the 2001 Act, was to protect the UK against the risk of Al-Qaeda terrorism. As noted above (para 32) that risk was thought to be presented mainly by non-UK nationals and to a significant extent by UK nationals also. The effect of the measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context since the threat presented by suspected international terrorists did not depend on their nationality or immigration status.

127. Having considered the submissions in respect, firstly, of discrimination, we are not satisfied that there is any relevant analogy to be drawn from the case of A or that the principles involved in that case are engaged in the consideration of the lawfulness of the RLR policy. The purpose of the RLR Policy is not simply to protect the United Kingdom against the threat of terrorism (as was the ATCSA 2001). True it is that one of the purposes of the RLR policy engages public protection and that as part of that aspect of the RLR policy on occasion questions of national security may be engaged. But the purpose of the RLR policy is far broader and is directed at the undesirability of having

persons excluded from the Refugee Convention under Article 1F within the United Kingdom, in that, as their removal cannot be achieved for Article 3 reasons, measures should be taken to maintain contact and to facilitate removal at the first opportunity notwithstanding that leave must be granted in the interim. That is the operational objective of the policy. It is, as we have emphasised above, an immigration measure and not a national security measure where considerations of the kind raised in the case of A arise. The underlying purpose of the RLR policy is to retain the ability to remove the individuals concerned if and when it is possible to do so. Insofar as the applicants have sought to compare their position with British nationals who have engaged in terrorist-related activity in the past but who no longer present an active terrorist threat, the reality is that British nationals do not require leave and cannot be removed. They are therefore not an appropriate comparator.

128. Turning to questions of proportionality, as we have already observed in relation to the conditions which were imposed in the particular case the decision of the Court of Appeal in Kardi concluded that the application of the RLR policy and conditions which flowed from it were in that case proportionate. It is unnecessary given that the consideration was specific to the circumstances of that claimant to set out the conclusions reached in paragraphs 34-44 but it suffices to cite the overall conclusion reached by Richards LJ in paragraph 47 as follows:

> 47. Pulling the various strands together, I am satisfied that the judge was right to dismiss the appellant's claim under Article 8. Whether one looks individually or cumulatively at the limitation on the period of leave and the restrictions imposed, they give rise to only a limited interference with the appellant's private life and their imposition was justified, in terms of legitimate aim and proportionality, on the information available to the Secretary of State at the time of the decision. The restriction on study will have to be revisited, in the light of the additional information now available, when a decision is taken on the application for further leave, but my concerns on that issue do not provide a basis for striking down the decision of 1 March 2012.

129. The essence of the conclusions of the Court of Appeal in Kardi were that the restrictions in that case had a limited impact and were slight restrictions. The factual circumstances of the instant cases (to which we shall turn below) illustrate that the imposition of short periods of leave together with restrictions of the kind described by the RLR policy can have greater impacts than they did in that case. However, there are a number of important points which need to be made about the RLR policy in connection with Article 8.

130. Firstly, the decision to grant, if this is the case, six months leave to remain does not interfere with the development of family life in principle. At its height, it may have an impact on the quality of that family life bearing in mind the potential insecurity which being granted successive periods of time limited leave may create. However, bearing in mind the objective of retaining the opportunity to remove someone excluded from the Refugee Convention by virtue of Article 1F at the earliest opportunity, the provision of such time limited leave is not in and of itself disproportionate in so far as it may interfere with the quality of the development of Article 8 rights and insofar as it is subject to the overall governing consideration that there may come a point in time when the failure to grant ILR will be unreasonable bearing in mind the particular circumstances of the case.

131. Secondly, similar considerations apply to the restrictions which can be imposed by way of conditions on the time limited leave. In our view in principle they are a proportionate interference provided that they are carefully measured against the individual circumstances of the case (as required by the policy itself) and are no more than is necessary to achieve the objective of the policy set out above. This conclusion does not mean that in each and every case the imposition of time limited leave and all of the conditions contemplated by the policy would be proportionate. The policy must be applied in a fact sensitive manner on a case by case basis.

132. Given that family life may continue notwithstanding a time limited grant of RLR, very strong evidence would be needed to prevail over the public interest and public protection considerations which are given effect in the three purposes of the RLR policy (see [56] above) so as to make it unreasonable for the respondent not to grant RLR for more than six months or not to impose the usual conditions. This is only likely to occur very rarely indeed, save that it may be easier, depending on the circumstances, for an individual to establish a case for departing from the usual condition prohibiting studies than the other three conditions mentioned.

(e) Is the RLR policy compatible with s.55 of the 2009 Act?

133. Section 55 of the 2009 Act provides as follows:

> 55 Duty regarding the welfare of children
>
> (1) The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are -
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer…

134. The application of this duty was considered by the Supreme Court in ZH (Tanzania) v Secretary of State for the Home Department. The appellant in that case was a national of Tanzania who had two children born in the United Kingdom who were both British citizens. By the time the case reached the Supreme Court it had been conceded by the Secretary of State that it would be disproportionate in the circumstances to remove the appellant from the United Kingdom. However, the case proceeded so as to establish general principles in relation to the s.55 duty and Article 8, bearing in mind that any decision maker would need to have regard to the interests of not simply an appellant

but all those members of their family with whom they shared family life. Lady Hale's judgment contains the following analysis of the approach which should be taken.

> 31 … They [the claimant's children] are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community … But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.
>
> 32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults…
>
> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as Edore v Secretary of State for the Home Department [2003] EWCA Civ 716; [2003] 1 WLR 2979 where Simon Brown LJ held that "there really is only room for one view" (at [26]). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.

135. We have already dealt with the submissions that the terms of the RLR policy are such that there was insufficient flexibility and that the decision maker's discretion was unlawfully fettered. These arguments were also advanced in relation to the duty under s.55. There is no need to repeat our assessment in the context of the s.55 duty. We turn now to the contention that the existence of the RLR policy itself gives rise to a breach of the duty under s.55. That is a proposition which we are unable to accept. Firstly, it is important to recall that the requirements of the duty are specifically referred to in the guidance with respect to the RLR policy itself together with a cross reference to other guidance in respect of the application of the s.55 duty. Secondly, we can see no reason why the RLR policy is in principle in conflict with the s.55 duty. There is no doubt, in the light of the principles which are to be derived from ZH, that the best interests of any children including in particular children who are British citizens must be a primary consideration when decision makers consider the imposition of a period of RLR and any associated conditions. As we have set out above, whilst the imposition of time limited leave may have an impact on the quality of family life, that is a matter which can, consistent with the s.55 duty, be properly taken into account at the time when decisions are reached. Similarly, the imposition of any conditions which might impinge upon the best interests of a child (such as a residence condition) will also

require the best interests of the child to be a primary consideration. We note that the need to have regard to the s.55 duty is specifically recognised in paragraph 4.5.9 of the current version of the RLR policy. Nevertheless, given that family life may continue notwithstanding the imposition of the conditions, very strong evidence would be needed to prevail over the public interest and public protection considerations which are given effect in the three purposes of the RLR policy so as to make it unreasonable for the respondent not to grant RLR for more than six months or not to impose the usual conditions. This is only likely to occur very rarely indeed, save that, in our view, it may be easier, depending on the circumstances, to demonstrate unreasonableness in relation to the restriction on studies.

136. For these reasons we are, therefore, not able to accede to the proposition that the RLR policy is unlawful as being in principle inconsistent with the s.55 duty. That is not to say, in a similar vein to our conclusions in relation to Article 8, that in each individual case a careful evaluation of the best interests of any children involved in the decision making process should not be a primary consideration in the Article 8 assessment of an individual case.

V. Was the decision in respect of MS lawful?

137. As will be clear from the distillation of the issues arising in the case, there are a number of facets to the argument in relation to whether or not the decision to grant MS RLR under the RLR policy was lawful. The first of those is an argument related to the extensive delays involved in his case including in particular the nine years which it took to determine his application for ILR during the course of which, and as a result of the introduction of the RLR policy on 2 September 2011, he was deprived of the potential benefit of the respondent's DLR policy in respect of the grant of ILR under the DLR policy. It is important that it is remembered that when MS's claim was originally launched, it was based on the delays in dealing with his application and commenced at a time when there was no decision in his case. It was a claim which was, understandably, formulated on the basis of both illegality in the overall delay in dealing with his claim and "historic injustice" on the basis of a change in policy. This latter point was thrown into sharp focus by the decision reached in his case on 2nd May 2014 applying the RLR policy.

138. For some time there has clearly been unease in the courts in relation to arguments based upon "historic injustice" or the argument that because of procedural default or changes in policy a benefit that a person might have had had procedures been properly operated or decisions promptly reached has evaporated putting them in a less advantageous position. These issues were recently considered by the Supreme Court in TN and MA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40. During the course of the leading judgment of the Supreme Court given by Lord Toulson JSC consideration was given to the Court of Appeal's decision in R (Rashid) v Secretary of State for the Home Department [2005] EWCA 744 which was subsequently criticised in R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546. In Rashid it was held that the conspicuous unfairness which arose from the withdrawal of a policy which would have afforded the claimant refugee status which was withdrawn by the final stage of the decision making process outweighed the

Ravichandran principle that asylum appeals should be determined by reference to the position at the time when the appellate decision is being reached (Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97). Lord Toulson's analysis of Rashid and S is to be found in paragraph 42 of his judgment as follows:

> 42. The reasoning in Rashid has been criticised. In R (S) v Secretary of State for the Home Department … para 39 Carnwarth LJ described the reasoning as "not altogether convincing", and that it appeared to turn "abuse of power" into a factor able to achieve remedial results not open to the courts in other instances of illegality. He also had doubts about the weight placed by the court on the Department's conduct. The court's proper sphere is illegality, not maladministration. If the earlier decision to refuse the asylum application was unlawful, it was the unlawfulness rather than the cause of it (whether bad faith or muddle) which justified the court's intervention and provided the basis for the remedy. Having made these criticisms, Carnwarth LJ said that the court's task was to try to extract a principled basis for the decision, which must be found in the majority judgment of Pill LJ. Although Pill LJ appeared to have expressed the result as an exercise of the court's remedial discretion, the court had no power to grant indefinite leave to remain; the power and discretion rested with the Secretary of State, and it was not open to the court to assume that function. The principled basis for the decision must be that it was open to the court to determine that a legally relevant factor in the exercise of the discretion was the correction of injustice, and that in an extreme case the court could find that the unfairness and the remedy was so plain that there was only way in which the Secretary of State could exercise his discretion.

139. Having reviewed this conundrum and other cases in which the question of "historic injustice" had arisen particularly in the factual context of the case, Lord Toulson returned to resolving the position at paragraph 70-72 as follows:

> 70. I turn next to Ravichandran and Rashid. The principle in Ravichandran is sound. As Simon Brown, LJ said in that case, on an asylum appeal the subject matter is whether the appellant requires refugee protection. The function of the court is quite unlike its function when adjudicating, for example, on a private law claim for breach of contract or tort. A claimant who establishes that there has been a breach of contract or tort is entitled to be put, so far as the court is able to do so, in the same position as if the wrong had not been committed. In Ravichandran the court rightly held that on an asylum appeal the question is one of present status: does the appellant meet the criteria of the Refugee Convention or is he in need of humanitarian protection?
>
> 71. I agree with the criticisms made of Rashid by Carnwath LJ in R (S) v Secretary of State for Home Department and by Sir Stanley Burnton in EU (Afghanistan) v Secretary of State for the Home Department. In Rashid the sloppiness of procedures in the Home Office resulted in the appellant being unfairly denied refugee status when he applied for it; but refugee status is not bound to endure for ever. By the time that his case reached the Court of Appeal the source of persecution in Iraq had been overthrown, and the effect of the court's decision was to give him a right which he did not need for his personal protection. Because the Rashid exception to Ravichandran lacks a satisfactory principle, it is also impossible to state its scope with any degree of clarity. In KA (Afghanistan) v Secretary of State for the Home Department Maurice Kay LJ (para 17) described it as a "complicated question" whether the facts of the cases under consideration gave rise to the Rashid principle, and the court struggled in its attempt to articulate what needed to be shown for the principle to apply.
>
> 72. I would hold that the Ravichandran principle applies on the hearing of asylum appeals without exception, and Rashid should no longer be followed. The question whether the appellant qualifies for asylum status is not a question of discretion. It is one which must be decided on the evidence before the tribunal or court, and there is no legal justification

for approaching that question with a presumption that the appellant is credible arising from a failure of the respondent properly to discharge her obligation in relation to family tracing. Discretionary leave by definition involves a discretion, but it is a discretion which belongs to the respondent and not to the court. The respondent must of course exercise her discretion lawfully, with proper regard to any policy which she has established, but I agree with Sir Stanley Burnton that it is not proper for a court to require the respondent to grant unconditional leave to an appellant who would not be entitled to such relief under current policy (or have a current right to remain in the UK on other grounds, such as article 8), as a form of relief for an earlier error or breach of obligation.

140. We have formed the view that this recent decision of the Supreme Court effectively disposes of the arguments raised in MS's case in relation to the delays in his case and the intervening cancellation of the DLR policy in his case as giving rise to any viable argument based upon a "historic injustice". Whilst Ms Harrison sought to contend that, by virtue of paragraph 42 of Lord Toulson's judgment, the approach which was taken by the Court of Appeal in S was still good law, in our view paragraphs 70-72 of Lord Toulson's judgment made plain that the Rashid line of authority (including the case of S) are no longer to be followed or be regarded as representing the law. The Ravichandran principle applies and the question arising in relation to any review is whether the decision was lawful measured against the relevant facts and any relevant policy as they stand at the date of the review. In that context, the question of whether or not there has been lengthy delay and whether or not a claimant has lost an advantage as a result of an intervening change in the respondent's policy, simply does not arise. Clearly there may be cases when the delays involved are so egregious as to amount to illegality. But that is a separate point and we shall examine it separately below in relation to MS's case. Incompetent delay and inefficient decision making processes which may lead to the loss of benefit which might have arisen under a superseded policy can no longer amount to a basis of claim. There is, of course, a symmetry between this approach and the approach which was taken by the House of Lords in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230 in relation to the effect of changes to the Immigration Rules and the impact of those changes upon an applicant whose application is still current at the time when the Immigration Rules are changed.

141. In deference to the submissions which were made in relation to this aspect of the case, we would simply wish to add the following observations albeit that for the reasons we have already given we no longer think it sustainable for MS to argue that the delays coupled with the change in policy on 2 September 2011 from the DLR policy to the RLR policy for excluded persons who cannot be removed from the United Kingdom due to Article 3 of the ECHR entitles him to substantive relief.

142. The causative delay on which MS could rely is the delay between the date when his application for further leave to remain was made on 7th July 2005 and 2nd September 2011 when the RLR policy was introduced. That is the delay which occurred prior to the change in the policy upon which his contentions depend. We would not regard that six year delay as being sufficient to amount to illegality on the part of the respondent *per se*. It is undoubtedly incompetence for such a significant period of delay to occur without any explanation being offered by the respondent in respect of it. However, the incompetence involved does not extend to illegality.

143. The second element of the case specific to MS is whether or not the RLR policy has been properly understood and applied to him. As articulated in the skeleton, the case is put on the basis that, if contrary to MS's contentions, it was appropriate for him to be considered to fall within the RLR policy, there was no proper basis for the imposition of the conditions and a time limited period of leave. For the reasons which we have already given, we regard the RLR policy as in principle lawful and there can be no doubt that MS is within the class of persons to which it applies. The question of the imposition of conditions we propose to deal with when dealing with the Article 8 dimensions of MS's case.

144. The aspect of the decision making process in MS's case which has caused us considerable misgivings is that related to the time limited period of leave and the question posed by Collins J in N and recited in the most recent iteration of the guidance, namely whether a time had come in MS's case "*when – provided the individual has behaved himself in this country – it would be proper to regard him as having put behind him, as it were, the original offending*." The arrival of this end point was also specifically contemplated in Kardi in Richards LJ's judgment at paragraph 32:

> 32 … There may of course come a point where the appellant has been in the United Kingdom for so long and/or the prospect of his removal to Tunisia is so remote, that the only course reasonably open to the Secretary of State is to grant him indefinite leave to remain.

145. As explored during the course of argument the consideration of whether or not this end point to the reasonable application of the RLR has been reached will depend upon a wide variety of factors. These will include not simply the question alluded to by Collins J as to whether the applicant has remained blamelessly in the United Kingdom for a lengthy period of time or the prospect of removal of the applicant to his or her home country identified by Richards LJ but also an appraisal of the political circumstances of the home country bearing in mind the international reputation of the United Kingdom which can be in point in these cases, and other case specific issues concerned with the particular circumstances of the original reason for exclusion from the Refugee Convention and the particular circumstances of the applicant and his life in the United Kingdom. This is not an exhaustive list since, in particular, any consideration of this aspect of the case would need to engage probably first and foremost, with the current state of the Immigration Rules in relation to long residence cases. Whilst it may be in relatively rare cases that this point is reached, nevertheless the inclusion of consideration of this issue within the RLR policy is for the reasons which we have given above an important feature of its flexibility in the context of the arguments as to its lawfulness. We add that it will also be necessary to take account of the reasons why the individual was excluded from the Refugee Convention. In some cases, the end point may never come.

146. The difficulty which we have with the decision which was reached in MS's case, in particular in the most recent decision of 16th January 2015, is that there is no evidence of any consideration of this aspect of the RLR policy having been considered. The best that Ms Anderson could do was to point to the sentence in paragraph 6 of the decision letter noting that MS remained a priority for removal owing to his exclusion from the Refugee Convention. In our view, that simply does not amount to any evidence of

consideration of this aspect of the RLR policy. Further, we do not consider that the case of MS is one where it is so obvious that consideration of this aspect of the RLR policy is so unrealistic that no assessment should be made of it. It should be recalled that by the time of this decision MS had been in the United Kingdom for nearly 20 years. There will be cases when the suggestion that the end point has been reached is so hopeless that reasons are not required in relation to this aspect of the policy. However, this is not one of those cases (see also [150]). We are satisfied that consideration of the point raised in N and Kardi (set out above) should have been considered in his case and that there is no evidence that it was, and the failure to do so was a legal error, in that, it was a failure to apply the respondent's RLR policy to his case.

147. Turning to the conditions which were imposed, we do not consider that, in the light of the legitimate purposes of the RLR policy which we have set out above, it was disproportionate to require MS to reside at a particular address subject to restrictions that he could not spend more than three consecutive nights away for ten nights away within a six month period without the prior written consent of the respondent. Bearing in mind the respondent's desire to prioritise removal of MS, being aware of his whereabouts to the extent required by the condition is proportionate.

148. Similarly, requiring consent to work is not disproportionate as the Court of Appeal concluded in Kardi at paragraph 35 of Richard LJ's judgment. It does not preclude obtaining work but rather requires the respondent's approval to it bearing in mind MS's exclusion from the Refugee Convention and the reasons for that exclusion. Further, we do not consider that requiring MS to report on a six monthly basis is in any way disproportionate.

149. Turning to the question of restrictions on study, whilst concerns were expressed by Richards LJ in paragraphs 41-44 of his judgment, those concerns were not as to the principle of such a condition but rather that at least specific application for consent would need to be carefully justified by the respondent if study was to be restricted. Unlike the position in Kardi, the condition imposed in MS's case is not an absolute prohibition but rather one which requires him to seek consent. No explanation has been provided for why his application to take up a course as a domestic gas engineer should be precluded in order to fulfill the purposes of the RLR policy and we would have difficulty in accepting that it would be proportionate in the circumstances to prevent MS studying in order to obtain a skill which would potentially be as relevant to his life abroad as it would in the United Kingdom. It is important to note that the course of study about which he sought consent is vocational and of short duration.

150. We do not consider that the imposition of any of these conditions was precluded or affected by the s.55 duty. Whilst the time limited character of the leave granted will obviously engage a consideration of the best interests of the children, that was a matter which was expressly considered in particular in paragraphs 20 and 21 of the most recent decision in MS's case which started from consideration of the children's best interests and the extent to which they would be undermined by the uncertainty created by the grant of time limited leave but counter-balanced that with the public interest in the removal of MS from the United Kingdom. We can see nothing unlawful in that approach save that for the reasons set out above we remain concerned about the failure

to engage with the possibility of an end point having been reached as contemplated by N and Kardi and the RLR policy itself in which the s.55 duty will also be at large.

151. It follows from what we have set out above that we do not consider that there is substance in the arguments raised in respect of delay and the change on 2 September 2011 of the respondent's policy for excluded persons who cannot be removed from the United Kingdom from the DLR policy to the RLR policy in MS's case. In any event additional to the matters which we have set out above we are not persuaded that we could grant MS relief on the basis of those submissions. Insofar as it could be concluded that the delays in his case were unlawful, that would entitle him to a fresh decision which has already occurred not once but twice since proceedings were commenced. We are satisfied that the imposition of the conditions which were imposed in his case were compliant with Article 8 and the s.55 duty. Our concern is in relation to the failure to consider whether or not the end point had been reached in his case. This is not on the basis that we consider that it has been reached in his case: that is a matter for the respondent to reach a decision based on the particular merits of his case and for her to explain. For example, she may be aware of details of the reasons for MS's exclusion from the Refugee Convention not made known to us. She may have other reasons. Our point is that undertaking a review of the legality of the decision, we cannot be satisfied that the respondent has applied this aspect of the RLR policy in considering MS's case.

152. The failure to apply the RLR policy is an error of law which would ordinarily lead to that decision being quashed and retaken. The difference in the present case is that, as a result of the time of the limited nature of the decision which was made, by the time our decision is published a further application for leave to remain will have been made by MS and the respondent will in any event be required to take a decision upon it. Therefore the grant of relief in the particular circumstances of this case would be otiose. We do not consider therefore that it is necessary in the circumstances of the case to quash a decision the effect of which has already expired and where a fresh decision will inevitably have to be taken. It will no doubt need to be taken bearing in mind the matters which we have raised in our adjudication on MS's case.

153. We have also considered whether in the circumstances we should grant a declaration to the effect that the decision reached in MS's case was unlawful as a result of the failures in the application of the policy that we have identified. However, declaratory relief is discretionary and in our view there are good reasons for exercising our discretion not to grant a declaration in this case. The decision in the present case is time-limited and indeed has expired during the course of this litigation. There will inevitably be a further decision to be made, and it will have to be made in the context of the conclusions that we have reached in our decision. That context will include in particular the views that we have expressed about the proper interpretation of the policy and the questions which will have to be addressed in applying it to the particular facts of MS's case. In those circumstances there would be little purpose to the grant of a declaration. The reality here is that the effect of the lawful decision is now time-expired and the respondent will have to make a further decision taking account of the substance of this decision in any event.

VI. Was the RLR policy lawfully applied to MBT?

154. The first tranche of issues raised in MBT's case again relate to the delays involved in dealing with the application for further leave to remain in his case and the change on 2 September 2011 in the policy applicable to excluded persons who cannot be removed from the United Kingdom from the DLR policy to the RLR policy which occurred whilst his application was being considered. For the reasons which we have set out above in relation to the case of TN, we do not consider that an argument of this kind based on delay and the loss of a potential benefit or advantage as a result of such a change in policy during that delay are sustainable. We therefore do not consider that the arguments raised in MBT's case on this basis are anymore viable than those which we have already dismissed in the case of MS. However, akin to the case of MS, we propose to offer some observations on the points in any event.

155. It will be recalled that MBT was first granted DLR for six months on 22nd July 2004. Further periods were granted including on 17th February 2009. The application with which we are concerned was made on 30th July 2009 and then lost by the respondent. It was re-submitted on 25th March 2011 and a decision made on 21st August 2013. Again, for the purposes of considering delay causative of prejudice or disadvantage in MBT's case, the focus must be upon the period which elapsed from the submission of the application to the alteration of the policy on 2nd September 2011. In his case, that was a period of a little over two years and we would not regard that as a delay which could properly be characterised as unlawful. Indeed, at the time when the policy changed, he had not accrued ten years of DLR and, in any event, even if he had for the reasons which we have expressed above in the case of MS any grant of ILR would have been discretionary as opposed to an entitlement.

156. Ms Weston submitted that the respondent unlawfully failed to consider whether the DLR policy as opposed to the RLR policy should be applied at MBT. It was argued that it was necessary for the respondent to conduct a balancing exercise and consider proportionality to reach a lawful decision as to whether the DLR policy or the RLR policy should be applied to him. Ms Weston put the argument in terms of MBT having been unlawfully diverted from the DLR policy or an unlawful failure to consider whether he should be diverted from the RLR policy.

157. At the date of the decision in MBT's case (21st August 2013), the DLR policy that was in place was the November 2012 DLR policy and the RLR policy in place was the RLR policy of 28th May 2012. It was stated in the November 2012 DLR policy (fourth paragraph of the "Introduction") that the RLR policy will apply unless exceptional circumstances justify divergence from the RLR policy. On its face, this may appear to contradict the following sections of the same policy quoted at [39] above:

(i) the last paragraph under section 3 which states that excluded persons must be considered under the RLR policy;
(ii) the second paragraph of section 7 which states that excluded persons must not be granted further DLR; and

(ii) the second paragraph of section 11 (transitional arrangements) which states: "*Decision makers must apply the following guidance*" in the cases of persons granted DLR on a date prior to 8 July 2012.

158. However, in our view, when the RLR policy of 28th May 2012 is considered alongside the November 2012 DLR policy, it is plain that the respondent's policy was that all excluded persons who could not be removed were to be dealt with under the RLR policy unless there were exceptional circumstances in which case they were to be diverted to the DLR policy. In other words, the respondent had what was in effect an overarching policy of applying the RLR policy and not diverting individuals from the RLR policy unless there were exceptional circumstances. That is a lawful and rational policy.

159. True it is that, once an individual has been diverted to the November 2012 DLR policy, the provisions of the November 2012 DLR policy as to what is to happen then was unclear, in that, whilst the "Introduction" envisaged that individuals may be diverted from the RLR policy to the DLR policy, section 3 said that the RLR policy applied and section 7 said that DLR must not be granted.

160. This problem has been rectified in the June 2014 DLR policy which replaced the November 2012 DLR policy. The fourth paragraph of the "Introduction" provides, as did the November 2012 DLR policy, that the RLR policy is to apply to excluded persons who cannot be removed unless there are exceptional circumstances to justify diverting them from the RLR policy. The June 2014 DLR policy then goes on to make specific provision, in section 2.5, for those excluded persons who cannot be removed due to Article 3 of the ECHR and who do not fall within the RLR policy, i.e. it makes specific provision for those persons who have been diverted from the RLR policy.

161. Considering the policies as a whole, it is plain, in our view, that the sentence: "*Decision makers must apply the following guidance*" in the section entitled: "Transitional Arrangements" in the November DLR 2012 and the June 2014 DLR policies only applies to those who fall under these polices, i.e. the DLR polices. They do not apply to individuals who are subject to the RLR policy and have not been diverted from it.

162. Thus, in our view, Ms Weston's submission, that the respondent unlawfully failed to consider whether the DLR policy as opposed to the RLR policy should be applied to MBT, is misconceived. It presupposes that MBT had some right to have the status quo of being considered under the DLR policy continue or that he had some right to be considered under the DLR policy, whereas the correct position is that the policy which applied to him was the RLR policy unless the respondent considered that there were exceptional circumstances to justify diverting him to the DLR policy. Accordingly, it is not the case that the respondent had to justify diverting MBT from the DLR policy. To the contrary, any diversion of MBT from the RLR policy had to be justified. It is implicit in the respondent's decision to apply the RLR policy to MBT that she considered that there were no exceptional circumstances to justify diverting him from the RLR policy. She did not need to give reasons to apply her overarching policy (see R (Mohammed) v Secretary of State for the Home Department [2014] EWHC 98 (Admin), Lewis J), unless there are plainly exceptional circumstances which she may have

overlooked capable of outweighing the public interest in the three purposes of the RLR policy.

163. Another argument advanced in MBT's case is that the respondent erred in failing to apply the transitional arrangements in the DLR policy to him. However, as we have explained, the DLR policy was not applicable to him. Accordingly, the transitional arrangements did not apply to him.

164. Turning to the application of the policy in MBT's case, and in particular whether the point had been reached where ILR should be granted, in his case in the most recent decision of 20th March 2015 specific consideration was given to whether or not ILR should be granted in response to the application, at paragraphs 11-18 of the decision letter. In those paragraphs the provisions of the Immigration Rules are considered and applied in particular in the context of MBT's conviction and five year sentence in France. We are satisfied therefore that in his case this dimension of the RLR policy has been considered and a decision reached which is fully reasoned and rational. In respect of this aspect of the case, Ms Weston drew attention to the respondent's reply to the pre-action protocol letter in this case dated 25th October 2013 in which it was suggested that MBT would not be considered at all in relation to ILR until he had completed ten years of limited leave. It is unclear to us why that observation was made but in any event whether or not it was correct for that observation to be made, consideration has now been given to the question of whether ILR should be granted to MBT. Ms Weston also pointed out the suggestion within that letter that the fact that MBT had not committed any criminal offences since arriving in the United Kingdom was irrelevant. In our view that observation was clearly erroneous in the light of Collins J's observations cited above in respect of the potential relevance of the absence of further criminal convictions, but in any event it appears to have played no part in the most recent decision reached in MBT's case.

165. Whilst Ms Weston made submissions in respect of the s.55 duty, that duty has been adverted to and applied in the most recent decision in MBT's case in paragraphs 32-36 of the decision. The reasoning provided explains that the children's best interests in the resolution of uncertainty in respect of MBT's immigration status in the United Kingdom are outweighed by the public interest reasons for removing him from the United Kingdom. We are unpersuaded that that reasoning process is inconsistent or falls foul of the approach to be taken to the s.55 duty expressed in ZH. Thus, in our view, the policy in respect of the provision of time limited leave in MBT's case has been lawfully applied subject to the consideration of the conditions imposed to which we now turn.

166. It will be recalled that in MBT's case he was made the subject of a residence condition, the requirement that he notify the respondent prior to taking up or changing employment, that he report on a monthly basis and that he not enrol on a course of study without the respondent's prior consent.

167. We have set out above the evidence which has been provided in the context of the case as to the effect of the imposition of the conditions on MBT. We recognise that the imposition of conditions in respect of employment has presented difficulties for MBT

in securing a job and that that has undoubtedly placed him in a stressful position in relation to his financial circumstances. However, it has to be noted that the condition does not preclude MBT from working or obtaining a job and we are satisfied that the imposition of this condition along with the time limited nature of his leave is a proportionate response to his status as someone who is excluded from the protection of the Refugee Convention. We do not underestimate the difficulties that MBT may face in obtaining work but having considered his evidence those issues are multi-factorial and the condition and the limited nature of his leave are part but by no means all of the problem. We are not satisfied that this condition is disproportionate.

168. There is, further, evidence which MBT provides in relation to stress which he was caused by the reporting condition. However, the frequency of the reporting is at a low level and again bearing in mind the purpose of the RLR policy which we have identified as being legitimate the imposition of the condition is not disproportionate.

169. So far as the restriction on studies is concerned, on the evidence as it currently stands, there is little or no specific evidence of a course which MBT would wish to pursue. Therefore, on the evidence presently presented, we are not satisfied that the requirement for him to seek permission is disproportionate.

170. Furthermore, although MBT expresses his concern about the restrictions placed upon him in terms of not spending more than three consecutive nights away from his home or more than ten nights away in any rolling six month period, it is important to observe that that condition contains within it the opportunity for him to seek the consent of the respondent to spend longer away than this. Whilst that may, as he observes, constrain spontaneity, it does not necessarily involve a prohibition unless having notified the respondent she has good reason consonant with the policy for preventing it. In that respect, there is no evidence of any application having been made. We are unable to conclude that, in the particular circumstances of his case, the imposition of this condition is disproportionate.

171. It follows from what has been set out above that we do not consider that in the specific instance of MBT's case and the evidence pertaining to it that the application of the RLR policy has been unlawful nor that there is any illegality in the conditions which have been imposed upon him.

Conclusions

172. Our conclusions are as follows:

(i) For the reasons which we have set out above we are satisfied that the RLR policy originally published on 2nd September 2011 and as understood and applied by virtue of the guidance published by the respondent is lawful.

(ii) We are also satisfied that RLR was lawfully applied in the case of MBT.

(ii) In the case of MS, we are not satisfied that the policy was applied lawfully, in that, in granting RLR for a period of six months, the respondent has failed to

consider whether the end point has been reached in his particular circumstances. In addition, in imposing the restriction on studies, we are not satisfied that the respondent has considered his request that he be permitted to undertake a course of study as a domestic gas engineer. However, for the reasons we have given and on the basis that there will need to be, following on from the receipt of our determination, a further decision in his case in which these legal errors can be addressed, we do not consider it to be expedient to grant relief in this case.

Signed Date: 4 September 2015

Mr Justice Dove