HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 42

on appeal from: [2006]EWCA Civ 1619

[2007]EWCA Civ 1326

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

AL (Serbia) (FC) (Appellant) v Secretary of State for the Home Department
R (on the application of Rudi) (FC) (Appellant) v Secretary of State for the Home Department

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellant in first appeal:
Rabinder Singh QC
Nicola Rogers
Joanna Stevens
(Instructed by Brighton Housing Trust)

Appellant in second appeal
Andrew Nicol QC
Mark Henderson
(Instructed by Howe and Co)

Respondents in both appeals:
Monica Carss-Frisk QC
Lisa Giovannetti
Rory Dunlop
(Instructed by Treasury Solicitor)

Hearing dates:
10, 14 APRIL 2008

ON
WEDNESDAY 25 JUNE 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

AL (Serbia) (FC) (Appellant) v Secretary of State for the Home Department
R (on the application of Rudi) (FC) (Appellant) v Secretary of State for the Home Department

[2008] UKHL 42

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinions of all my noble and learned friends. In the result, I reach the same conclusion as my noble and learned friend Baroness Hale of Richmond, for whose exposition of the issues I also am grateful. But, for reasons given by my noble and learned friends Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood, I reach this conclusion with fewer misgivings than she expresses.

2. Viewed through the eyes of the appellants, the Home Secretary's family policy seems harsh: they have suffered the misfortune of losing their parents and now suffer the additional misfortune of losing a benefit which they would have enjoyed had they arrived here with their parents. But viewed through the eyes of the Home Secretary, the policy looks very different: he faced a formidable administrative problem caused by the difficulty, delay and expense of removing families, and the solution was to grant an indulgence to them which was not called for in the case of young, unaccompanied adults who were no part of the problem. If any of the latter had strong claims to remain on article 8 grounds, they could be addressed on a case-by-case basis.

3. The task of the court is not, however, to view the policy through the eyes of one party or another but to make an objective overall judgment. In my opinion the policy was justified by the administrative

exigency which inspired it, and it was not disproportionate because it permitted compelling claims by those falling outside the policy to be recognised and accommodated. The appellants may yet be able to advance such claims.

LORD HOPE OF CRAIGHEAD

My Lords,

4. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond in which she describes the background to these appeals. As she has explained, the appellants' complaint is that, having arrived in this country as children without families and being still without families, their claims for asylum have been treated differently by the Secretary of State from those of other people who arrived here as children with their families and are still with their families. They are both young adults who reached the age of 18 between 2 October 2000 and 24 October 2003. If they had been living here as members of a family they would have been eligible for indefinite leave to remain under the one-off exercise that was announced on 24 October 2003, as updated on 20 August 2004. As it is, they are not being permitted to stay here without their cases being submitted to individual scrutiny. This is simply because they are single and because on the relevant dates they were not living here as part of a family.

5. It is common ground that both cases are within the ambit of article 8 of the European Convention on Human Rights. It is not suggested that the way the appellants have been treated was in itself a direct violation of their rights under that article. But the Secretary of State accepts that the fact that the appellants' cases fell outside the scope of the updated policy engages, in a general way, their right to respect for their private lives. The question to which these appeals are directed arises under article 14. It is whether this difference in treatment in the application of the policy can be justified. Mr Rudi also claims that the decision to remove him was unlawful at common law because it was irrational. The same question lies at the heart of this argument too. The issue in both cases is essentially one of proportionality.

6. The policy from which so many others have benefited was not devised as a piece of social engineering with a view to safeguarding the

welfare of families. It had a much more pragmatic purpose: see Neuberger LJ's careful analysis in the Court of Appeal [2006] EWCA Civ 1619, paras 25-39. It was to save public funds by clearing the ground to promote greater efficiency in the future. The administrative and financial burden that had resulted from a huge growth in asylum applications and from an ever increasing backlog in the removal of those whose claims had been held to be unsuccessful was a clog on the promotion of efficiency that had to be addressed somehow. The policy was directed in a broadly defined way to those areas where savings could be achieved to best practical effect. An administration which did not attempt to address these problems would be failing in its duty of sound government. It seems to me to be beyond question that the original policy had a legitimate aim. It was directed to improving the system of asylum control in the general public interest. The policy was updated in August 2004 to remove what were described as a number of anomalies. Here too the aim was a legitimate one.

7. Eligibility was not extended to young adults who were not living as part of a family because this was not where the problem was thought to lie in clearing the backlog. Was the updated policy which contained this feature proportionate? This question demands a practical, commonsense answer. Three points indicate that the answer should be in the affirmative.

8. First is the nature of the problem to which the policy was directed. I think that this carries the Secretary of State a long way. His policy was devised as a solution to pressing administrative and financial problems in the sphere of immigration control. These problems lay peculiarly within the executive's area of responsibility. They had to be solved if the decks were to be cleared for achieving greater efficiency. How best to deal with them was primarily a matter for the exercise of judgment by the executive. Once it was decided that the policy could not be unlimited in its scope, it was inevitable that the release from immigration control could not be extended to everybody. This was likely to give rise to some anomalies. Its area of judgment included their detection and how far it was appropriate to go in securing the removal of those anomalies.

9. Second is the appellants' status as single young adults. It is accepted for present purposes that this description falls within the concluding words of article 14. Following the guidance given by the European Court in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, we can take it that status means a personal

characteristic by which persons or groups of persons are distinguishable from each other. The appellants' case differs from those such as *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, where the claimant's classification as a prisoner resulted in a difference in treatment but it was not possible to say that this was because of any status. Adulthood is a status, as is the state of being not married. But the status of adults is not one which has so far been recognised as requiring particularly weighty reasons to justify their being treated differently from others, as Baroness Hale points out. The less weighty the reasons that are needed, the easier it is to regard the fact that the appellants were treated differently as falling within the discretionary area of judgment that belongs to the executive.

10. Third, there is nothing to indicate that single young adults were being targeted for unfavourable treatment just because of what they were. It was the fact that the group to which they belonged was not seen to create a problem in the clearing of the backlog that was decisive in their case. Other groups which were excluded fell into the same category. This was the inevitable consequence of a policy that was, for legitimate reasons, selective in its approach to securing immigration control with greater efficiency. Of course, the fact that a policy favours one group does not mean that if it deals unfavourably with another group it can escape the criticism that it is discriminatory. The absence of deliberate targeting is an important factor in judging whether there is discrimination in the enjoyment of Convention rights. Deliberate discrimination will always risk intervention by the judiciary. But a difference in treatment of people outside the so-called suspect categories which is simply a by-product of a legitimate policy will not normally do so.

11. I would hold therefore that, looked at overall, the updated policy was a proportionate response to the very particular practical problem to which it was addressed. My reasons are essentially the same as those given by my noble and learned friend Lord Brown of Eaton-under-Heywood. I would dismiss these appeals.

LORD SCOTT OF FOSCOTE

My Lords,

12. I have had the advantage of reading in draft the opinion on these appeals that has been prepared by my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I am in full agreement, I too would dismiss both appeals.

BARONESS HALE OF RICHMOND

My Lords,

13. In October 2003, the Home Secretary, Mr David Blunkett, announced a one-off exercise to clear some long-standing asylum cases off the books by giving the claimants indefinite leave to remain in this country. Inevitably, there were winners and losers. The winners were families with children who had claimed asylum before 2 October 2000 and who were still living here as a family unit in October 2003. Among the losers were the appellants, who had arrived here as children and also claimed asylum before 2 October 2000, but were not part of a family unit. The appellants claim that to treat them less favourably than other people who arrived here as children, simply because they have no parents or children of their own in this country, is unlawful discrimination, either under the Human Rights Act or at common law.

The facts

14. The facts are very simple. The appellants are both from Kosovo. Mr Rudi was born on 27 January 1983 and arrived here aged 16 in August 1999. Mr AL was born on 28 April 1984 and arrived here aged 15 in January 2000. Both had been forced to flee their homes during Serb raids in 1999 and had become separated from their families during the flight. Neither knows what has become of his parents. They are either dead or cannot be found. After spending some time in Macedonia, each appellant made his way to this country and claimed asylum shortly after arrival. As an unaccompanied minor, each was at first looked after by social services. When they grew up, they found employment.

The proceedings

15. Although the underlying facts are the same in both cases, their legal claims have taken different routes. Mr AL's initial asylum claim was refused but on 4 January 2001 he was given limited leave to remain here until his 18th birthday. Before this expired he applied for it to be varied on asylum and human rights grounds, but only the human rights claim was pursued. It failed before the adjudicator. The Immigration Appeal Tribunal initially refused permission to appeal but this was reversed on statutory review in the High Court. However the Asylum and Immigration Tribunal dismissed the appeal as did the Court of Appeal: [2006] EWCA Civ 1619. During the course of the proceedings, Mr AL also applied unsuccessfully to the Home Office for inclusion in the one-off exercise.

16. Mr Rudi's initial asylum claim was refused and an appeal dismissed. He was not given any alternative form of leave. When the Human Rights Act 1998 came into force in October 2000 he applied again on human rights grounds. That too was refused and an appeal dismissed. In 2005, he too applied to be included in the one-off exercise, but this was rejected. The Secretary of State gave directions for his removal. He brought proceedings for judicial review, claiming that the decision to remove him was unlawful both at common law and under the Human Rights Act. His claim was dismissed by Ouseley J: [2007] EWHC 60 (Admin) and by the Court of Appeal: [2007] EWCA Civ 1326. The Court was unable to distinguish his case from the earlier decision in *AL*.

The one-off exercise

17. The "one-off exercise to allow families who have been in the UK for three or more years to stay" was first announced on 24 October 2003. The original criteria were (i) that the applicant had applied for asylum before 2 October 2000; and (ii) that the applicant had at least one child or step-child aged under 18 on 24 October 2003 who was financially and emotionally dependent upon him and had been living here as part of the family unit since 2 October 2000. Such families would be eligible if the asylum application had not yet been decided; or if it had been refused but was subject to appeal; or if it had been refused and there was no further avenue of appeal but for some reason the family had not yet left or been removed. Certain families were excluded, for example if a family member had a criminal conviction or anti-social behaviour order against him.

18. It will be noted that neither Mr Rudi nor Mr AL would have qualified under the exercise as initially announced had they arrived here with their parents. Mr Rudi turned 18 on 27 January 2001 and Mr AL turned 18 on 28 April 2002. Thus they were both over that age when the policy was announced on 24 October 2003. However, on 20 August 2004 the eligibility criteria were "updated to remove a number of anomalies" (Letter from Home Office Minister Des Browne to all MPs). The relevant change for our purposes was that the policy was extended to families with dependent children aged under 18 *either* on 2 October 2000 *or* on 24 October 2003. Thus families who had arrived and claimed asylum before 2 October 2000 but whose children had reached 18 after that date and before the announcement of the policy were now covered. Furthermore, a broad view was taken of whether a dependant who had left the family home before 24 October 2003 was still part of the family unit. Had Mr AL and Mr Rudi been here with their parents, they would have been covered by the amended policy.

19. Also relevant is the Home Office policy towards unaccompanied minors. It is acknowledged that unaccompanied asylum seeking children need especially sensitive treatment. The policy is not to remove them while they are children unless suitable arrangements can be made for their reception in their home country. If this is not possible, the policy before 8 November 2001 was to give them four years exceptional leave to remain, which would ordinarily lead to indefinite leave to remain thereafter. From 8 November 2001, the policy was to give them limited leave to remain for four years or until their 18th birthday, whichever was shorter. If they had not had the full four years, applications to remain would be dealt with on their merits (evidence given by Dr McLean in the case of *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41). Mr AL, however, was only given leave until his 18th birthday in January 2001.

Article 14 of the European Convention on Human Rights

20. Both appellants claim that they have been the victims of discrimination contrary to article 14 of the European Convention on Human Rights. Mr Rudi additionally claims that the decision to remove him was irrational on ordinary judicial review principles as well as contrary to the common law principle that like cases must be treated alike. It is convenient to consider the human rights claim first. Article 14 provides:

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

This deceptively simple provision has many times been explained by the European Court of Human Rights. Several important points emerge.

21. First, as was said in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, at para 71:

> ". . . Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter."

This instantly makes the article 14 right different from the open-ended guarantees of the "equal protection of the laws", such as are contained, for example, in the 14th Amendment to the United States' Constitution and in the 12th Protocol to the European Convention (to which the United Kingdom is not a party). Whether the difference in treatment "falls within the ambit" of a Convention right is not always straightforward: see the helpful explanation of Lord Nicholls of Birkenhead in *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, at paras 13 to 16. In this case, it is common ground that the "one-off exercise" fell within the ambit of the rights protected by article 8 of the Convention. Quite how it did so has not, therefore, been explored in argument before us. However, it does seem to me to be relevant, in a way which I shall try to explain when discussing the issue of justification.

22. Secondly, as the Court first explained in the *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, 284, at para 10:

> "In spite of the very general wording of the French version ('*sans distinction aucune'*), article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. . .

> . The competent national authorities are frequently confronted with situations and problems which, on account of the differences inherent therein, call for different legal solutions; moreover certain legal inequalities tend only to correct factual inequalities."

The Court then went on to "look for the criteria which enable a determination to be made as to whether or not a given difference in treatment . . . contravenes article 14". They found these in the principle which they articulated then and has since been repeated many times over. A recent example is in *Stec v United Kingdom* (2006) 43 EHRR 1017, at para 51:

> "A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

23. This instantly makes the article 14 right different from our domestic anti-discrimination laws. These focus on less favourable treatment rather than a difference in treatment. They also draw a distinction between direct and indirect discrimination. Direct discrimination, for example treating a woman less favourably than a man, or a black person less favourably than a white, cannot be justified. This means that a great deal of attention has to be paid to whether or not the woman and the man, real or hypothetical, with whom she wishes to compare herself are in truly comparable situations. The law requires that their circumstances be the same or not materially different from one another.

24. It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment". Lord Nicholls put it this way in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, at para 3:

> ". . . the essential, question for the court is whether the alleged discrimination, that is, the difference in treatment of which

> complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

25. Nevertheless, as the very helpful analysis of the Strasbourg case law on article 14, carried out on behalf of Mr AL, shows, in only a handful of cases has the Court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), p 144, quoted by Lord Walker in the *Carson* case, at para 65:

> "The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe,… 'in most instances of the Strasbourg case law . . . the comparability test is glossed over, and the emphasis is (almost) completely on the justification test'."

A recent exception, *Burden v United Kingdom*, app no 13378/05, 29 April 2008, is instructive. Two sisters, who had lived together for many years, complained that when one of them died, the survivor would be required to pay inheritance tax on their home, whereas a surviving spouse or civil partner would not. A Chamber of the Strasbourg Court found, by four votes to three, that the difference in treatment was justified. A Grand Chamber found, by fifteen votes to two, that the siblings were not in an analogous situation to spouses or civil partners, first because consanguinity and affinity are different kinds of relationship, and secondly because of the legal consequences which the latter brings. But Judges Bratza and Björgvinsson, who concurred in the result, would have preferred the approach of the Chamber; and the two dissenting judges thought that the two sorts of couple were in an

analogous situation. This suggests that, unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.

26. Thirdly, of course, the difference of treatment has to be on a prohibited ground. Article 14 does not purport to challenge all possible classifications and distinctions made by the law or government policy. The list of prohibited grounds is long and open-ended, but it must be there for a purpose and cannot therefore be endless: see *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196; and further in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484. In general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change. The *Carson* case is therefore unusual, because it concerned discrimination on the ground of habitual residence, which is a matter of personal choice and can be changed.

27. There are, also, as Lord Walker recognised in *Carson*, dangers in regarding differences between two people, which are inherent in a prohibited ground and cannot or should not be changed, as meaning that the situations are not analogous. For example, it would be no answer to a claim of sex discrimination to say that a man and a woman are not in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on the personal characteristics which are inherent in their protected status to argue that their situations are not analogous. That is the essential reason why, in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, the argument that same sex couples were not in an analogous position to opposite sex couples, because they could not have children together, did not succeed.

28. I say all this because so much argument has been devoted in this case, and in too many others, to identifying the precise characteristics of the persons with whom these two young men should be compared. This is an arid exercise. They complain that they, who arrived here as children without their families and are still without their families, have been treated differently from other people who arrived here as children with their families and are still with their families. That is obviously correct. It matters little whether this is described as being "parentless and childless" (as the appellants would have it) or as "not being part of a

family unit" (as the Secretary of State would now have it). It is common ground that their condition, however described, falls within the residuary category of "other status" for the purposes of article 14.

29. What does matter is whether this condition falls within the class for which "very weighty reasons" are required if a difference in treatment is to be justified. Thus, for example, Strasbourg has said that where a "difference of treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible" (*DH v Czech Republic* [2007] ECHR 922, App No 57325/00, Judgment of 13 November 2007, para 196), while "very convincing and weighty" reasons are required to justify a difference in treatment based on sex (eg *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, para 78*)*, or sexual orientation (eg *EB v France* [2008] ECHR 55, app no 43546/02, 22 January 2008, para 91), or birth or adopted status (eg *Inze v Austria* (1987) 10 EHRR 394, para 41; *Pla v Andorra* (2004) 42 EHRR 522, para 61), or nationality (eg *Gaygusuz v Austria* (1996) 23 EHRR 364, para 42).

30. It is obvious that discrimination on some grounds is easier to justify than others. In *Carson*, at paras 15-17, Lord Hoffmann explained that some grounds of distinction are so offensive to "our notions of respect due to the individual" that they are seldom if ever acceptable grounds for differences in treatment. The mere fact that it might be rational to distinguish, for example, between men and women because most women are not as strong as most men, is not sufficient to justify assuming that all women are weaker than all men, and thus refusing to consider the individual woman on her merits. He went on to say that other grounds of distinction do not fall within this "suspect" category. They usually depend upon considerations of the general public interest and might only require some rational explanation. And some grounds of discrimination might fall on the borderline between the two.

31. However, as Lord Walker pointed out (at para 55), the doctrine of "suspect" grounds is drawn from the United States' jurisprudence, although something similar is to be found in Strasbourg. But there are important differences between the 14th Amendment and article 14 which mean that it cannot simply be transplanted to the European situation. The American jurisprudence has had to devise a hierarchy of classifications because of the completely open-ended text of the 14th amendment. It applies to all the laws and to all types of classification. The courts have had to find some way of separating off the type of law,

together with the type of classification, for which no more than a rational explanation is required. Even so, the Americans have always subjected differences in treatment in respect of fundamental rights to closer scrutiny than differences in treatment in other areas of the law. Furthermore, their ideas of what amounts to a "suspect class" are not identical to the grounds of discrimination for which particularly weighty justification is required by Strasbourg: sex, for example, is in an intermediate class. The Strasbourg grounds, largely focussing on the personal characteristics of the individual which he cannot or should not be asked to change, are more likely to require more than just a rational explanation. Nor has Strasbourg ever substituted a simple "rational explanation" test for the proportionality test which has been its "clear and consistent jurisprudence" since first articulated in the *Belgian Linguistics* case.

32. Mr Rabinder Singh QC, on behalf of Mr AL, argues that being parentless or without a family requires very weighty reasons to justify a difference in treatment. Being without a family may not be immutable, like sex and race, but it is something over which the young person has no control. There is quite a close, though not exact, analogy between the state of being without parents in fact and the status of being without parents in law. Birth status has long been recognised as a prohibited ground under article 14 (*Marckx v Belgium* (1979) 2 EHRR 330) and particularly weighty reasons are needed to justify any discrimination, either against the child (*Inze v Austria* (1987) 10 EHRR 394) or the father (*Sahin v Germany* (2001) 36 EHRR 765, [2003] 2 FLR 671, para 57). If anything, children who arrived here without a family required more protection than those who arrived with the support of their families. International law recognises that children who are separated from their families need special protection. The United Nations Convention on the Rights of the Child (UNCRC), article 2(2) prohibits discrimination on the basis of, among other things, the birth or other status of the child or his family; the UN Committee on the Rights of the Child has emphasised that this prohibits any discrimination on the basis of the status of the child being unaccompanied or separated (General Comment No 6, 2005); UNCRC article 22 requires appropriate protection and humanitarian assistance in the enjoyment of applicable rights for all asylum-seeking children, whether or not accompanied.

33. The United Kingdom does, of course, have special policies designed to cater for the special needs of unaccompanied asylum-seeking children. In some respects they may be better treated than children who arrive here with their families. This can be justified, as the

Strasbourg court explained in *Stec v United Kingdom* (2006) 43 EHRR 1017, at para 51:

> "Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article (see *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, para 10; *Thlimmenos v Greece*, (2000) 31 EHRR 411, para 44)."

34. I am quite prepared to accept that, in certain circumstances, a difference in treatment between children who did or did not have parents to look after them, unless designed to correct the factual inequalities between them, would require particularly careful scrutiny. To deny a benefit to a child whose parents were dead, had disappeared, or were incapable of looking after him, which was available to a child who had parents available to look after him, might be very hard indeed to justify. Not all asylum-seeking children fall into this category. Some do have parents who may be traced and their children reunited with them in due course. But we are assuming for the sake of argument that that is not the case here. Had this policy discriminated between the children while they were children it would have been particularly hard to justify.

35. What difference does it make that the complaint is that the policy discriminates, not between children, but between young adults? On the one hand, the special care and protection which all children both need and deserve is in general no longer needed once they have grown up. On the other hand, the status which differentiates them, that of being without parents or family, remains with them for life (or until their parents can be found), just as does the status of being illegitimate or adopted. But it is not one which has so far been recognised as requiring particularly weighty reasons if a difference in treatment is to be justified.

Reasons for the policy

36. Against this background, it is necessary to turn to the reasons put forward for this policy. One point should be made at the outset. The fact that the policy was a special favour, going beyond anything which the state might be required to do to respect the rights protected by article 8 of the Convention, makes no difference. This was the whole point of the

decision in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, where it was said, in para 82:

> "The notion of discrimination within the meaning of article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention."

37. The object of the exercise (according to the evidence of Mr Ponsford, a senior policy officer in the Immigration and Nationality Directorate) was "to relieve the administrative and financial burden on the Home Office which had arisen due to (a) the large growth in asylum applications in preceding years and (b) a backlog in the removal of unsuccessful cases." Hence there was a need to "clear the decks" so that cases might be dealt with more efficiently in future. This must in principle be capable of being a legitimate aim for any administrative system.

38. But the issue is not whether some exercise of this sort might be justified, but whether this particular exercise, selecting some people for more favourable treatment than others, could be justified. It is, as Lord Bingham of Cornhill reminded us in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, at para 68, the discriminatory effect of the measure which must be justified, not the measure itself. There were several reasons for singling out these families. One was to save public money directly. Most of them were being supported at public expense, either through local authorities or through the National Asylum Support Service. If given leave to stay, the parents could find work and support their families. Another was to save public money less directly, through avoiding the costs associated with determining claims, resisting appeals and enforcing removal. The removal of families "places a particularly heavy administrative and financial burden on the Home Office and is generally considerably more difficult to achieve than the removal of an individual". This was because, under the law as it applied to the families in this group, other family members might make individual claims after the principal claim had been rejected. These could take a long time to dispose of and it was the practice only to remove the whole family group together. There were also particular difficulties associated with detaining family groups with children before their removal from the country.

39. These reasons related to the particular difficulties of enforcement against family groups and therefore the particular contribution which they could make to the overall aim of the exercise. But there were also compassionate reasons for adopting it. The families had been here for some time, the children would have made friends and been settled in schools, and they would all have developed ties with the local community. As the Home Secretary said when announcing the policy, "MPs from all sides appeal to me for such families to be allowed to stay in the UK every week".

40. To include unaccompanied minors in the exercise, on the other hand, would bring none of the above cost savings and administrative benefits. They had to be supported until the age of 18 in any event, so there would be no direct saving in giving them leave. They could not make serial claims. They could be removed as young single adults having reached the age of 18 without any of the special problems attached to removing families with children. The Secretary of State did acknowledge that those who arrived here as unaccompanied minors might have strong compassionate grounds for seeking leave to remain, but insisted that these could be considered on their individual merits rather than as part of the one-off exercise.

41. Mr Andrew Nicol QC, who appears for Mr Rudi, argues that these factors cannot provide a rational explanation for the extension of the policy to family groups containing young adults who reached 18 between 2 October 2000 and 24 October 2003. A young adult if granted leave to remain would also be able to find work and support himself, as indeed both these young men had done until Mr Rudi was prohibited from doing so pending his removal. A young adult could also be removed separately from the rest of the family without causing the problems associated with trying to remove the whole family together. The article 8 claims of adult family members are nowhere near as strong as those of husbands and wives or parents and children. The reluctance to detain families with children before removal did not apply to young adults. The compassionate factors might be just as strong for both groups. Hence if the Secretary of State was prepared to extend the policy to family groups containing young adults who had arrived as children, he should have been prepared to extend it to young adults without a family who had also arrived as children.

42. Mr Nicol made these points in support of his argument that the policy as it applied to young adults was both irrational on ordinary judicial review principles and contrary to the common law principle that

like cases must be treated alike: see *Matadeen v Pointu* [1999] 1 AC 98. Given, however, that the justification advanced for a difference in treatment covered by article 14 must be "objective and reasonable", it is difficult to see what the common law adds to the Convention in a case where it is accepted that article 14 is engaged.

Discussion

43. Like so many equality issues, the issue is relatively easy to state but not at all easy to answer. Instinctively one feels that to treat two young men so very differently, because one arrived here as a child with his family and one did not, has to be wrong. It would of course be different if the one who had arrived here without his family now had a family to whom he could return. However, given that he does not, it might be thought that, if either deserved more favourable treatment, it should be the one who lacks the emotional and material support which we all hope to have from our own families even after we have turned 18. If the aim of the policy had been to select the most deserving cases for special treatment, then the difference would have been difficult to explain, let alone to justify.

44. However, that was not the principal aim of the exercise. The overall aim was to "clear the decks", to reduce the back-log so as to make the system more efficient in the future. It is accepted that this was a legitimate aim, albeit a strictly pragmatic one. The easiest way to do this would have been to choose a neutral criterion, such as the date on which the person entered this country, as had been done in a previous such exercise. It is accepted that bright lines of this sort, even if they produce what appear to be arbitrary distinctions between one case and another, are often necessary and can be justified: see, eg, the age rules in *R (Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173.

45. Instead, the Home Secretary was more selective, concentrating on a group which it was thought would bring the greatest financial and administrative advantages. It is accepted by the Home Secretary that some criteria, however rational on pragmatic grounds, would not have been justifiable. It would obviously have been wrong to select only families headed by men rather than families headed by women, perhaps because it was believed that men could or would more readily find work to support the family; or to select families from some ethnic groups rather than others, perhaps for the same reason. That is one reason why

Mr Singh devoted so much time to trying to persuade us that being parentless or childless, or not being part of a family unit, was in the same sort of category as race or sex.

46. The administrative and pragmatic reasons put forward for the original policy are not difficult to accept. It is in the public interest that the administration of asylum and immigration control be as efficient as possible. Indeed, the original policy did not involve any less favourable treatment as between the two groups of children while they were children. It is rather less easy to accept that the same reasons applied to the 2004 extension to young adults. Then the difference in treatment between the two groups became acute, because one would be sent back to their country of origin and the other would not. But the administrative reasons for singling out the one for more favourable treatment make rather less sense. Indeed, there is very little evidence of what the reasons were for the 2004 extension. It did remain within the original concept of the policy, as applying to family units as a whole, rather than extending it to a quite different category. Young adults who are part of a family unit may find it easier to make a claim based upon the right to respect for their family life, than young adults who are not part of a family unit may find it to make a claim based upon the right to respect for the private life which they have established here. One suspects, but it is pure speculation, that the bright date lines drawn by the original policy had thrown up some particularly hard cases. And the justifications put forward for the original policy were never entirely administrative. It was recognised that there were also strong compassionate grounds in many of these family cases. No doubt this made it easier to "sell" the policy in some quarters where it might otherwise have been unpopular.

47. Once compassionate grounds come into the picture, it becomes rather more difficult to justify distinguishing between young men who do and young men who do not have a family in this country. It would be different if the latter had a family of some sort to return to in their home countries. But it is more difficult to draw a distinction on compassionate grounds between a person who arrived here as an unaccompanied child, who could not be returned to his home country while he was a child because there was no-one there to look after him, who had therefore to make a life for himself in this country, and who still has no family to return to, and a person who is here with his family, but whose family has no better right to be here under the asylum and immigration rules than does the single person who is being excluded. Whatever the outcome of these appeals it is to be hoped that the authorities will recognise the strength of the compassionate grounds in these cases. However, there may be many other people falling outside the policy where the

compassionate grounds are also strong. The essence of the policy was its efficiency, not its compassion.

48. It is also relevant that this was a policy aimed to benefit family groups. It was about who should be allowed to stay, whether or not they had a good claim to do so, and who should be obliged to go. The policy makers were not thinking in terms of the children, still less of the young adults, who were and were not to benefit from it. They did not address their minds to the unaccompanied minor asylum-seekers. It was not targeted *against* them. That is a relevant, although by no means conclusive consideration in article 14 cases. But the fact that it was aimed at family groups is relevant in another way. The favourable treatment given to the family groups was an aspect of the respect accorded by the state to family life, as, for example, was the favourable treatment given to husbands who wanted to bring their wives here in the *Abdulaziz* case. In the *Abdulaziz* case, it was that same right to respect for family life which was engaged by the differential treatment given to wives who wanted to bring their husbands here. In this case, however, it is not the same right which is in play. The family life of the family groups who are here is undoubtedly in play, whereas it is only the private life of the appellants which *may* be in play. Although both are protected by article 8, we are not therefore looking at differential treatment in relation to exactly the same Convention right. This makes this case very different from the usual article 14 case. Whether one regards it as a case in which the individuals are not in an analogous situation, or whether one regards it as a case of justification, one way or another it appears to me that the policy can withstand scrutiny in the sense explained by Lord Nicholls in the *Carson* case.

49. I therefore find it possible to conclude, although not without considerable misgivings and regrets, that there has been no violation of article 14 in this case. As already explained, if the claim cannot succeed on article 14 grounds, it cannot in my view succeed at common law. I would therefore dismiss both appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

50. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and am most

grateful to her for so thorough a recital of the relevant facts, law and arguments raised on these appeals. For my part I have found especially valuable Lady Hale's analysis of article 14 (and the comparison she makes between that article and both our own and the United States domestic jurisprudence on discrimination) in paras 20-31 of her opinion. It is also most convenient to find the reasons for the impugned policy so succinctly summarised in paras 37-40 (the latter emphasising why none of the benefits of the policy would accrue to the Home Office in the case of unaccompanied minors). All this has enabled me to express my own views on these appeals really very shortly.

51. In a sentence (although I shall have to expand upon it a little) it seems to me quite simply contrived and unreal to regard this policy as a violation of article 14 or of the common law principle of non-discrimination, either on grounds of disproportionality or for want of justification. Its plain intent was to improve the system of immigration control by releasing from it an easily identifiable group of people (of all nationalities, both sexes and various ages) who were causing it particular problems, essentially families with children. The policy was called the "family amnesty" policy and was clearly introduced rather for the benefit of the Home Office than for those whom it enabled to remain. Necessarily bright lines had to be drawn: the concession only availed the relevant family if the parent of the dependent child[ren] had applied for asylum before 2 October 2000 and dates were also specified (later extended) for when the dependency had to exist.

52. Of course a concession of this nature could have been applied across the board. But if it had been it would have allowed to remain in this country very many people whose removal would have presented no particular difficulty. Obviously this would have brought less net benefit in the way of immigration control: those additionally allowed to stay would have added to the numbers released from immigration control without corresponding benefit to its future efficiency. It necessarily followed from the policy actually adopted that all sorts of people fell outside it. Unaccompanied children were plainly amongst those who did not qualify—although they in fact benefited from another policy directly referable to children, ensuring that they would not in any event be removed during their minority. Also excluded were all those (even if otherwise within a qualifying family) on whose behalf no asylum claim had been made before 2 October 2000. Also all those outside the specified family structure—adults without dependent children or, indeed, grandparents, uncles, aunts, or anyone else except parents, even if they *were* living with dependent children.

53. There was plainly no question here of the policy intentionally disadvantaging children *qua* children (quite the contrary given, as I have stated, that they were not to be removed in any event) or unaccompanied children *qua* unaccompanied children (as opposed to unaccompanied children as one amongst a large number of disparate categories of people consisting of all those who failed to come within a specified family group on whose behalf an asylum application had been made by the due date). Even supposing that those coming within the policy and those falling outside it were in otherwise similar situations (in that all were aspiring to settlement in this country), if one asks whether the differences in their respective situations justified their different treatment (the question which Lady Hale at para 24 reminds us that Strasbourg asks in these cases), I would unhesitatingly answer "yes". The policy was introduced on a selective basis for sound pragmatic reasons. It involved no discrimination on any "suspect" ground. It was not sexist, nor racist, nor ageist.

54. Accordingly I see no possible basis for overturning this policy either under article 14 or at common law. In my opinion the claims of both appellants were rightly rejected at all stages below. In common with all your Lordships, I too would dismiss both these appeals.