Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Bah) v Secretary of State for the Home Department IJR [2015] UKUT 518 (IAC)

Judicial review Decision Notice

Before

UPPER TRIBUNAL JUDGE GILL

Between

The Queen (on the application of Hawa Bah)

Applicant

and

Secretary of State for the Home Department

Respondent

Application for judicial review: substantive decision and judgment

Having considered all documents lodged and having heard the parties' respective representatives, Mr D O'Callaghan of Counsel instructed by Sutovic & Hartigan Solicitors on behalf of the applicant and Ms J Anderson, of Counsel instructed by the Government Legal Department on behalf of the respondent, at a hearing at Field House, London, on 24 July 2015

Judgment
(Handed down on 7 September 2015)

Judge Gill:

1. The applicant has been granted permission to apply for judicial review of the decision of the respondent of 28 November 2013 by which she granted the applicant 30 months' discretionary leave to remain (DLR). The applicant contends that the respondent

unlawfully failed to grant her indefinite leave to remain (ILR). The parties agreed that the questions that arise in this case are as follows:

(i) Did the respondent make a clear unambiguous promise to review the applicant's case before July 2011?

If she did not make a clear unambiguous promise to review the applicant's case before July 2011, Mr O'Callaghan accepted that the applicant's judicial review claim cannot succeed.

(ii) If the respondent made a clear unambiguous promise to review the applicant's case by July 2011, did she make such a promise to do so before 20 July 2011?

(iii) If the respondent made a clear unambiguous promise to review the applicant's case before 20 July 2011, does para 4.2 of the respondent's Discretionary Leave Policy, version 6 (hereafter the "DLP"), which was in place from 24 June 2013, apply to the applicant? Alternatively, does the applicant have a legitimate expectation that para 4.2 of the DLP will be applied to her and ILR granted?

(iv) If the respondent made a clear unambiguous promise to review the applicant's case 'by July 2011' but it was not a promise to do so before 20 July 2011, was it unlawful for the respondent not to have considered, as a matter of fairness, whether her residual discretion should be applied in the applicant's favour and ILR be granted to her?

2. The relevant part of the DLP reads as follows:

4 Duration of grants of Discretionary Leave

- The duration of Discretionary Leave granted will be determined by a consideration of the individual facts of the case but leave should not normally be granted for more than 30 months (2.5 years) at a time.

- Subsequent periods of leave can be granted providing the applicant continues to meet the relevant criteria.

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

4.2 Exceptional circumstances

- Where removal is no longer considered appropriate following consideration of the exceptional factors set out in Paragraph 353B of the Immigration Rules and the guidance in Chapter 53 of the EIG, 30 months DL should be granted, unless one of the following situations applies:

  Where the UK Border Agency (as it was) made a written commitment that a case would be considered **either** before 20 July 2011 **or** before 9 July 2012, but failed to do so, and later decides that a grant is appropriate;

  Where the UK Border Agency (as it was) made a decision **either** before 20 July 2011 **or** before 9 July 2012 that a grant of leave on the grounds then listed in Chapter 53 was not appropriate, but after that date carried out a reconsideration of that decision and - on the basis of the same evidence - decides that the earlier decision was wrong and leave should have been granted.

- Where the above applies and the relevant date was before 20 July 2011 – Indefinite Leave to Remain (ILR) outside the Rules should be granted. This is because prior to 20 July 2011 ILR was normally granted to cases which met the exceptional circumstances in Chapter 53

> of the EIG. Where the above applies and the relevant date was before 9 July 2012, 3 years DL should be granted, with the person normally becoming eligible to apply for settlement after two periods of 3 years DL. This is because between 20 July 2011 and 9 July 2012 the UK Border Agency granted 3 years DL in cases that met the exceptional circumstances in Chapter 53 of the EIG. These cases will normally be eligible to apply for settlement after 6 years.

3. The significance of 'July 2011' and '20 July 2011' arises in the following way. The applicant's case was reviewed by the respondent under her 'case resolution programme', also often referred to as the 'legacy programme'. This was an operational programme launched by the UK Borders Agency on 25 July 2006 to resolve a backlog of unresolved asylum claims made prior to 5 March 2007 and which led to the setting up of a directorate called the 'Case Resolution Directorate'. It is not necessary for me to describe the legacy programme in detail. The programme is described and discussed in several judgments; for example, the judgments in R (Geraldo) v SSHD [2013] EWHC 2763 (Admin), R (Hamzeh) v SSHD [2013] EWHC 4113 (Admin), R (Jaku and others) v SSHD [2014] EWHC 605 (Admin) and SH (Iran) v SSHD [2014] EWCA Civ 1469.

4. In Geraldo, the applicants argued that the review decisions in their cases should have been made by 19 July 2011. They sought to argue: (i) historic injustice; (ii) that they had a legitimate expectation that their cases would be concluded or considered by 19 July 2011; (iii) that there had been illegality based on unlawful delay by the respondent failing to review their cases by 19 July 2011; and (iv) that the failure to grant ILR was inconsistent with the rationale of the legacy programme. None of the claimants in Geraldo received a letter which said anything more than "*we aim to deal with your case by July 2011*" (see [91] and [93] of Geraldo, relevant extracts of which are quoted at [20] below).

5. In Geraldo, King J held, *inter alia*, that the respondent had acted lawfully in granting the three claimants DLR as she had not been under any legal duty to consider their applications under the government's legacy programme by a particular date. King J observed that a claim based on legitimate expectation could not be established absent evidence of a clear unambiguous statement of practice or promise from which it would be contrary to the principles of good administration for the respondent to resile. Absent such a clear unambiguous statement of practice or principle, the only legitimate expectation that the claimants had was to have their cases determined under the then current law and policy.

6. Mr O'Callaghan accepted that, if the applicant's case falls within the generality of the cases considered in Geraldo, then her judicial review claim cannot succeed. In that event, the parties agreed that there would be no need for me to consider questions (ii)-(iv), since this case does not raise issues which are of general application or assistance. However, he suggested that it would nevertheless be appropriate for me to summarise the submissions of the parties on questions (ii)-(iv).

7. As will become apparent, I have concluded that the respondent did not make a clear unambiguous promise to the applicant that her case would be reviewed within any time frame or 'by 20 July 2011' or 'by July 2011', for reasons given below. Nevertheless, I agree that it is appropriate for me to summarise the submissions of the parties on questions (iii)-(iv) for the record, although in view of my conclusion on question (i), I have not gone into any significant detail; for example, concerning the jurisprudence on legitimate expectation and the detailed conclusions in the cases in which the respondent's legacy programme has been considered.

8. At this point, it is convenient to refer to the report of Mr. John Vine CBE QPM, Independent Chief Inspector of Borders and Immigration, for March – July 2012, entitled: '*An inspection of the UK Border Agency's handling of legacy asylum and migration cases'* (hereafter the "Vine report"). The applicant relies upon [7.30]-[7.46] of the report (set out in the Appendix to this judgment) as well as the following paragraph in the 'Foreword' from Mr. Vine, in particular, the text I have underlined:

> The implementation of a policy change in July 2011 to grant legacy asylum applicants Discretionary Leave for three years (where removal from the UK was not considered appropriate), rather than ILR as had been the case previously, was also flawed. Exceptions allowing for the continued grant of ILR to applicants whose cases the Agency had promised to resolve by July 2011 were not initially in place, nor were they communicated effectively to staff. This adversely affected a number of applicants, including former unaccompanied asylum seeking children, whose cases should have been dealt with in a timely fashion. These applicants were not at fault for the significant delays in their cases. It should make no difference whether they had been in contact with the Agency themselves, or whether any contact was via their legal representatives or MP, or whether litigation was contemplated or pending. I consider that applicants who had been told that their case would be dealt with by July 2011 had a reasonable expectation that their cases would have been resolved by that date. It was reasonable for them to expect that, if a decision to grant had been made in the stated time, the policy applied would be the relevant policy at the date of decision, which would have resulted in a grant of ILR.

Relevant background

9. The applicant is a national of Guinea. She entered the UK on 20 February 2007 and claimed asylum on 21 February 2007. Her asylum claim was refused on 4 April 2007. Her appeal was dismissed on 5 June 2007. She exhausted her appeal rights on 20 November 2007. Her case fell to be reviewed under the legacy programme by two routes. The first was that she had claimed asylum prior to 5 March 2007. The second was that, on 7 March 2008, she made further representations. She received the letter dated 18 December 2009 from the respondent, quoted at [11] below (hereafter the "applicant's 2009 Letter"). The respondent granted her discretionary leave for a period of 30 months by letter dated 28 November 2013, served on 11 December 2013.

10. The applicant lodged her claim for judicial review against the decision of 28 November 2013 on 27 February 2014. Permission was refused on the papers by Upper Tribunal Judge Gleeson. At the hearing of the renewed application for permission, Upper Tribunal Judge Storey granted permission stating that it was arguable that the "particular wording" in the applicant's 2009 Letter did not amount to an 'aim letter' but was a commitment. Judge Storey considered that the DLP at [4.2] envisaged that some 'commitment letters' were sent during the relevant period.

Submissions

Submissions on question (i): Did the respondent make a clear unambiguous promise to review the applicant's case before July 2011?

11. The applicant contends that the respondent *did* make a clear unambiguous promise in her particular case, that her case would be reviewed '*by July 2011'*. In this respect, reliance is placed on the applicant's 2009 Letter, the relevant part of which reads:

> On the 19th July 2006, the Home Secretary made a statement to Parliament about the then Immigration and Nationality Directorate's (IND) legacy of electronic and paper records relating to unresolved asylum cases. The aim is to resolve all of these case records by July 2011.

> Further information can be found at the UK Border Agency website, under http://www.ukba.homeoffice.gov.uk/asylum/oldercases/
>
> Cases will be considered in line with various priorities by the Case Resolution Directorate (CRD). Cases will not be considered out of turn unless there are exceptional circumstances justifying a quicker resolution of the case.
>
> Unfortunately we can not give any further indication as to when your case will be considered and dealt with accordingly, other than within the deadline of July 2011. However, I can confirm that your case has been allocated to CRT L8.

12. Mr O'Callaghan submitted that, when read as a whole, the applicant's 2009 Letter was not an 'aim' letter but a 'promise' letter. The words 'your', 'will', 'be' and 'within' are to be given their natural meaning. The word '*will'* confirms an inevitable event and 'within' establishes that an act will take place before the end of a period of time. The word 'your' individualises a promise made. They do not state an aim, as the words '*will'*, '*be'* and '*within'* cannot equate on their ordinary meaning to an 'aim'. The applicant's 2009 Letter did not amount to a promise that priority may be given to the applicant's case. Rather, the applicant's 2009 Letter confirmed that a decision will be taken and that it would be taken before the identified deadline of July 2011. The promise made was clear, unambiguous and devoid of any relevant qualification.

13. Mr O'Callaghan submitted that the applicant's 2009 Letter could not be a *pro forma* or standard letter because it was not being replicated generally. In Geraldo, none of the claimants received a letter in similar terms.

14. Mr O'Callaghan accepted that the date of 20 July 2011 did not have any significance until shortly before the change in policy. The policy was changed 11 days before the end of July 2011. In Geraldo, King J accepted that the change in policy was not connected to the aim to resolve legacy cases by any deadline of July 2011. Mr O'Callaghan acknowledged that the respondent contends that she did not have any deadline. He also accepted that King J found in Geraldo that there was no deadline. However, he submitted that the Secretary of State had nevertheless used the word 'deadline' in the applicant's 2009 Letter. Accordingly, as a matter of fairness, it was necessary to resolve what was meant by 'deadline' in the applicant's 2009 Letter.

15. In R (Kadyamarunga) v SSHD [2014] EWHC 301 (Admin), Green J appeared to suggest that, in 2006, the respondent did send out letters giving a commitment to 'conclude' cases by 20 July 2011. To this extent, he accepted that Kadyamarunga was inconsistent with Geraldo. However, he pointed out that the judgment in Kadyamarunga had not been appealed by the Secretary of State.

16. Although Mr O'Callaghan accepted that it was highly unlikely that in 2006, the respondent was sending letters mentioning a deadline of 20 July 2011, he submitted that the Vine report does show that the respondent was issuing individual commitments even before mid-July 2011, when the date of 20 July 2011 became significant as the date of the policy change.

17. Furthermore, Mr O'Callaghan asked me to compare the terms of the applicant's 2009 Letter with the terms of the examples taken from stock letters in the Vine report. There is one example at para 7.41 and one in table 24 at para 7.42 of the Vine report, relevant extracts of which are as follows:

> 7.41: We plan to do this within five years or less. We will prioritise those who may pose a risk to the public, and then focus on those who can be more easily removed, those

receiving support, and those who may be granted leave. All cases will be dealt with on their individual merits.

7.42 (table 24):

1. On 19 July 2006, the Home Secretary made a statement to Parliament about the then UK Border Agency's legacy of electronic and paper records relating to unresolved asylum cases. He stated that the aim was to clear these cases within five years or less, namely by July 2011. I can confirm that your client's case falls into this category but I cannot give any indication at this stage when it will be actioned. We will contact your client when your client's case comes up for decision.

2. Please send your photographs and any other documents along with the completed form sent with this letter, to the address at the top of this letter. You should do this within 21 days from the above date. If you do not return the documents requested above, we will consider your case on the documents available to us.

3. We ask that you do not make routine telephone or written enquiries about the progress of your case, as this diverts our resources from resolving cases. We will not confirm receipt of your reply to this letter or receipt of your photographs. Should we require any further information about your case, a UKBA colleague will contact you.

18. These were just two examples of stock letters. Mr O'Callaghan submitted that the terms of these letters were very different from the applicant's 2009 Letter that the applicant received.

19. Ms Anderson submitted that my decision as to whether the applicant's 2009 Letter gave the applicant a clear unambiguous promise must be informed by what is known about the legacy programme, as found in the judgments in Geraldo, Hamzeh and SH (Iran) and Jaku, amongst many others. She submitted that the Vine report is not a source of government policy: Jaku at [52].

20. Ms Anderson referred me to the fact that the Court in Geraldo had copies of letters to individuals which specifically mentioned the date of 19 July 2011 (at [90-91]) and yet King J found (at [104]) that it was impossible to read into the words an unambiguous commitment to 'conclude' the cases by a specific date such as 19 July 2011. In Geraldo, the letters read, insofar as relevant as follows ([91] and [93]):

> … The aim is to resolve these case records in five years or less, and by 19 July 2011

and

> The aim is to resolve these case records by July 2011.

21. Ms Anderson drew attention to the fact that the opening paragraph of the applicant's 2009 Letter mentioned the 'aim' of 'resolving all … records by July 2011'. She submitted that the subsequent paragraph in which the words 'will' and 'deadline' were used referred back to the 'aim' in the first paragraph. The paragraphs in between informed the applicant, in essence, that, if she had exceptional circumstances for her case to be considered out of turn, she would have to inform the UKBA. The next paragraph informed her that no 'further indication' could be given save that her case fell within the generality of cases.

22. Ms Anderson submitted that the applicant had to show that there was an intention on the part of the respondent to give a clear unambiguous promise. She submitted that there was no such intention.

23. In reply, Mr O'Callaghan submitted that the opening paragraph of the applicant's 2009 Letter stated a general aim but went on to give a specific promise.

Submissions on question (ii): If the respondent made a clear unambiguous promise to review the applicant's case by July 2011, did she make such a promise to do so before 20 July 2011?

24. If I were to decide that the applicant's 2009 Letter shows that the respondent had made a commitment that the applicant's case would be considered 'by July 2011', then the applicant contends that the respondent's commitment was to make a decision *before 20 July 2011*. In this respect, she relies upon the following:

    i) The last five lines of the Foreword in the Vine report (the underlined text at [8] above), which needs to be read in conjunction with paras 7.30 onwards of the report, set out in the Appendix to this judgment.

    ii) The judgment of Green J in Kadyamarunga, in which (the applicant contends) Green J was satisfied on the evidence before the Court that the respondent was sending letters in which she committed herself to resolve the case in question within 5 years, i.e. by July 2011. In Kadyamarunga, the letter said to contain the commitment to review the claimant's case by 20 July 2011 could not be produced for the hearing; it was believed that the letter had been lost. Green J accepted the evidence of the claimant that she *"absolutely recall[ed] without any doubt"* that she received a letter from the respondent *"sometime around 2006"* advising her that "*a decision would be made with regards to our case by 20 July 2011"* ([28] of Kadyamarunga). Green J considered that the claimant's evidence established that this was exactly the sort or type of letter that might very well have been sent in or about 2006; that it was clear that the Border Agency was, in or about 2006, proffering written commitments that cases would be considered before 20 July 2011; and that as of 2006, the Border Agency was: (a) seeking to resolve matters within 5 years, i.e. by July 2011; and (b) tendering written commitments to that effect.

25. Relying upon the judgment in R (Delipalta and others) v Secretary of State for the Home Department) [2014] EWHC 4218 (Admin) at [28], Ms Anderson submitted that the Vine report was not binding. Its remit was to report on administrative efficiency. It cannot be authoritative on issues before the courts, including issues of fairness.

26. Furthermore, what the Chief Inspector said at [7.31] about the rationale for the change in policy in July 2011 was rejected in Geraldo: King J accepted the Secretary of State's evidence that the change in policy was not connected to the legacy cases. The Chief Inspector attempted (at [7.39]-[7.40]) of the Vine report to expand the exceptions provided for at para 4.2 of the DLP on the ground of fairness. However, this was also rejected by King J in Geraldo, at [67]-[75]. Instead, King J (at [79]) accepted the evidence of Mr Neil Parkin (a grade 7 civil servant in the Asylum Policy Unit of the Immigration and Border Policy Directorate of the Home Office) on behalf of the respondent, that the timing of the introduction of the DLP (20 July 2011) was not linked to any specific end date for the legacy programme such as 19 July 2011; that the introduction of the DLP was not predicated on an assumption that the legacy programme had been completed and that the rationale for the introduction of the DLP was the application of key principles for the reform of the immigration cases that cases should be decided upon the basis of the individual merits according to the law and policy

in place at the time of the decision and was part of a larger revision of overall leave policy.

27. Ms Anderson submitted that Kadyamarunga was a decision on the facts. Green J accepted the evidence of the claimant in that case that she had received a letter in which a clear unambiguous promise was given that her case would be decided by 20 July 2011. On that basis alone, Kadyamarunga should not be followed.

28. In any event, to the extent that it was found in Kadyamarunga that the Secretary of State was sending letters in 2006 in which she gave commitments to review cases by 20 July 2011, Ms Anderson submitted that Green J had misconstrued the evidence and that his decision could not bind a subsequent court. For example, in the final two sentences of para 23, Green J said that, where a decision maker had made a clear promise to do something by a particular date, it may be unlawful to apply a new policy to 'old' circumstances, whereas King J was careful to make it clear that it is not that the deleted policy was being applied but that it was taken into account in applying the new policy. Ms Anderson submitted that, furthermore, it was not possible for the decision maker to write a letter in 2006 (when the claimant in Kadyamarunga said she received her 'commitment letter') committing to take a decision by 20 July 2011 given that the date of 20 July 2011 was not thought about in 2006.

Submissions on question (iii): If the respondent made a clear unambiguous promise to review the applicant's case before 20 July 2011, did para 4.2 of the DLP, which was in place from 24 June 2013, apply to the applicant?

29. If I were to decide that the commitment made by the respondent in the applicant's 2009 Letter was a commitment to review the applicant's case before 20 July 2011, then Mr O'Callaghan submitted that the applicant fell within the terms of para 4.2 of the DLP. In that event, the remedy sought is for the decision to be quashed on the ground that the applicant comes within para 4.2 of the DLP, a material consideration which it is said the respondent had failed to consider in the exercise of her discretion.

30. For the respondent, Ms Anderson submitted that the decision to grant the applicant DLR in November 2013 took into account the delay in reviewing her case. However, Mr O'Callaghan drew my attention to the fact that there was no evidence from the respondent that the applicant was granted DLR because of the delay in her case.

31. Ms Anderson submitted that the exceptions in para 4.2 of the DLP were brought in to prevent challenges by a narrow category of people, i.e. those who were given written unambiguous commitments in the Secretary of State's responses to pre-action protocol letters (PAP letters) or judicial review proceedings or letters from claimants' Members of Parliament, that their cases would be reviewed by a relevant date. Ms Anderson's position as to whether this exception to the DLP was limited to the three categories just mentioned changed as the hearing progressed, her final position being that the exception was not limited to these three categories but it was limited to those who had received commitments shortly before the change of policy in July 2011. She submitted that it was a matter for the court in the instant case whether the exception should be extended.

32. Ms Anderson submitted that, even if the respondent made a clear unambiguous promise to review the applicant's case 'by July 2011' (or, for that matter, before 20 July 2011 i.e. question (iv) below), she could not have a legitimate expectation in December 2009 that the policy would not change.

33. Ms Anderson also referred me to the fact that the judgment in Geraldo also recorded that the cases that were decided later had the benefit of delay and a more favourable policy because the period of significant residence was reduced from ten years/fourteen years to six years which could be significant. She submitted that the applicant cannot seek to take advantage of a favourable change (namely, the reduction in the period of significant residence to six years) without the adverse change, i.e. as to the nature of the leave granted (whether DLR or ILR) and the duration of the grant of leave, if DLR.

Submissions on question (iv): If the respondent made a clear unambiguous promise to review the applicant's case 'by July 2011' but it was not a promise to do so before 20 July 2011, was it unlawful for the respondent not to have considered as a matter of fairness whether her residual discretion should be applied in the applicant's favour and ILR be granted to her?

34. If I were to decide that the respondent gave an unambiguous promise to review the applicant's case 'by July 2011' but did not give an unambiguous promise to do so by 20 July 2011, then Mr O'Callaghan submitted that fairness dictates that the respondent should consider the exercise of her residual discretion in the applicant's favour and grant her ILR.

35. In this regard, reliance is placed upon the report of Mr. Vine in which he drew attention to the fact that those individuals who cooperated with the respondent's request not to contact her department lost out, in that, they did not get written commitments as did those, or some of those, who sent the respondent 'chaser' letters or sent PAP letters or issued judicial review proceedings or contacted their Members of Parliament.

36. Mr O'Callaghan submitted that the respondent had failed to consider this aspect of the Vine report in the context of her residual discretion. Essentially, the argument advanced on the applicant's behalf amounts to this: it is unfair that she lost on having a written commitment sent to her that the review of her case would be completed by July 2011 or 20 July 2011 simply because she did what she had been requested to do, whereas those who had taken such action received such commitments.

37. Mr O'Callaghan asked me to quash the decision on the ground that the respondent had failed to take into account a relevant consideration, i.e. the fact that the Vine report states that the Secretary of State should consider acting fairly to this group of people who were told that a decision would be made by July 2011 and who did not contact the Secretary of State as they had been requested. If the decision is quashed, the respondent would have to take another decision on the applicant's case. She may then grant ILR, although Mr O'Callaghan acknowledged that she is not obliged to do so.

38. Ms Anderson submitted that the argument that general fairness towards applicants who had acceded to the Secretary of State's request not to contact the department about their cases required the respondent to consider her residual discretion was rejected in Geraldo. She submitted that the Secretary of State always has a residual discretion to grant ILR in individual cases. Geraldo records the evidence of Mr. Parkin (at [73]) who referred to a residual discretion to depart from policy 'in compelling' exceptional circumstances.

39. Mr O'Callaghan accepted that, in Geraldo and in Jaku, the Courts rejected the argument that the Secretary of State's decision was unfair. However, he asked me to bear in mind that the claimants in Geraldo and Jaku did not receive clear unambiguous promises. There was no evidence in the instant case as to why the applicant had been granted

DLR; in particular, there was no evidence that she was granted DLR only because of the delay in her case. In any event, the applicant had been living in the UK for 4 years by July 2011.

Assessment

40. My answer to question (i) is a very clear "No". In the applicant's 2009 Letter, the respondent did not make a clear unambiguous promise to review the applicant's case before July 2011. My reasons are as follows:

41. The opening paragraph of the letter clearly referred to the 'aim' of resolving 'the case records' by July 2011. The applicant was then told in clear terms that cases would not be taken out of turn unless there were exceptional circumstances justifying a quicker resolution of the case. This paragraph is immediately followed by the word 'unfortunately' which was plainly, intended, in my judgement, to convey that the decision maker was aware that he was conveying news that the applicant might find disappointing, i.e. that he knew of no exceptional circumstances justifying a quicker resolution of her case than the time frame for the generality of cases being those that fell within the general 'aim' in the first paragraph. This ties in with the use of the word 'further', again referring back, in my judgement, to the information already conveyed in the first paragraph.

42. I do not accept that the words: 'your', 'will', 'be' and 'deadline' made this letter a letter by which a specific promise was given to review the case by July 2011. Mr O'Callaghan's submissions (summarised at [12] above) ignore the remainder of the letter. Furthermore, it was decided in Geraldo that there was in fact no deadline. I therefore do not accept the submission that any significance could be given to use of the word 'deadline' in the applicant's 2009 Letter, as contended on the applicant's behalf. In my judgement, the word 'deadline' in the third paragraph of the letter plainly referred back to the 'aim' in the first paragraph of resolving cases by July 2011.

43. It is clear from the letters considered in Geraldo (at [91]-[93]) that there were variations in wording in the general 'aim' letters that were sent. The applicant's 2009 Letter is another example of such a variation. No more and no less. The examples at [7.41] and [7.42] of the Vine report (quoted at [17] above) are two more such examples.

44. Judgments of the High Court are not, strictly speaking, binding on the Upper Tribunal, although, of course, they are persuasive. Mr O'Callaghan accepted that Green J appeared to suggest that, in 2006, the respondent did send out letters giving a commitment to 'conclude' a case by 20 July 2011 and that, to this extent, Kadyamarunga was inconsistent with Geraldo, which is also a judgment of the High Court and therefore also persuasive. As Geraldo has been upheld by the Court of Appeal, Geraldo is plainly to be preferred where there is any conflict.

45. In any event, it is plain that Green J accepted the subjective evidence of the claimant in that case that she *"absolutely recall[ed] without any doubt"* that she received a letter from the respondent *"sometime around 2006"* advising her that "*a decision would be made with regards to our case by 20 July 2011"* ([28] of Kadyamarunga). That is a sufficient basis to distinguish Kadyamarunga from the instant case, even if it were not the case that Geraldo is to be preferred even if there is any conflict between the two judgments.

46. For all of these reasons, I am satisfied that the applicant's 2009 Letter was a letter falling within the generality of 'aim letters' considered in Geraldo.

47. Mr O'Callaghan and Ms Anderson agreed that, if I were to decide that the respondent did not make any commitment or promise to review the applicant's case before 'July 2011', i.e. if I were to decide that the respondent did no more than convey to the applicant that her case fell within the generality of cases which the respondent aimed to resolve by July 2011, there would be no need for me to consider the remaining arguments.

48. However, as I have heard submissions from the parties, I shall offer some brief observations.

49. I accept Ms Anderson's submission that the Vine Report is not binding. Its remit was to report on administrative efficiency. It cannot be authoritative on issues before the courts: Delipalta at [28]. The Chief Inspector's opinion in the final two sentences of the paragraph from the Foreword quoted at [8] above, that applicants who were told their cases would be dealt with by July 2011 had a reasonable expectation that their cases would be resolved by that date, cannot be reconciled with Geraldo. I further agree with Ms Anderson's submissions summarised at [26] above. There is no need to repeat them.

50. Thus, even if I had decided (which is not the case) that the applicant's 2009 Letter recorded a clear unambiguous promise by the respondent to review the applicant's 'by July 2011', there would have been no basis for concluding that the promise made was to review her case by 20 July 2011. The answer to question (ii) would have been "No", in any event.

51. The short answer to question (iii) is that King J rejected in Geraldo that there were, or should be, any other exceptions where the individuals in question had not received a clear unambiguous promise that their cases would be dealt with by 20 July 2011. I also note that, at [126] of Geraldo, King J said that there was no evidence or other material put before the Court in that case to support the proposition that there was any undertaking given whether peculiar to legacy cases or generally, not to alter the guidance in Chapter 53 of the Enforcement Instructions and Guidance or policy or practice on the length of leave to be granted upon a successful application of Chapter 53 and that there was no evidence of any promise not to introduce a DLP under Chapter 53 during the lifetime of the legacy programme. The only expectation such individuals had was that a decision would be made in their cases on the basis of the law and policy applicable at the date of the decision. Fairness did not require anything else.

52. I do not need to decide whether the exception in para 4.2 of the DLP should be extended to include individuals who received a clear unambiguous promise that his or her case would be reviewed under the legacy programme by 20 July 2011 in circumstances where the letter was not written in response to a PAP letter or judicial review proceedings or letters from his or her Member of Parliament.

53. Again, the short answer to question (iv) is that King J rejected in Geraldo similar arguments based on fairness as regards applicants who had acceded to the Secretary of State's request not to contact the department about their cases and who were said to have lost out. The Secretary of State does have a residual discretion to depart from policy in 'compelling' exceptional circumstances, as recorded at [73] of Geraldo. However, King J did not see this as a reason for quashing the decisions made in the

cases of the individual claims, all of whom had received general 'aim' letters. There is no reason to do anything different in the case of the applicant who also received a general 'aim' letter.

Decision:

The application for judicial review is dismissed.

Signed Date: 7 September 2015
Upper Tribunal Judge Gill

July 2011 Policy change – Indefinite Leave to Remain (ILR) to Discretionary Leave (DL)

7.30 On 20 July 2011 the Agency changed its policy in relation to the type of leave that it would grant under Paragraph 395C of the Immigration Rules.60 This resulted in legacy asylum applicants being granted Discretionary Leave for three years where it was considered removal from the UK was not appropriate. This was a change from the previous position where Indefinite Leave to Remain (ILR) was routinely granted in asylum cases where a decision was made not to remove under Paragraph 395C.

7.31 The rationale for this policy change was that as the vast majority of legacy cases had now been cleared, it was no longer appropriate to grant ILR. The change was also justified on the basis that remaining legacy cases should not be treated more favourably than refugees who were normally granted five years' limited leave. The Agency recognised this policy change increased the risk of litigation and told us it considered the potential impact in detail when the change was made. This included the need to provide for certain exceptions whereby ILR could still be granted. While we make no comment on the new policy itself, we identified that the exceptions were not in place when the change took effect, nor were they subsequently clearly communicated to staff.

7.32 The Agency planned to allow CAAU caseworkers to retain their discretion to grant ILR in cases where it had 'made a written commitment that a case would be considered before 20th July 2011, but had failed to do so, and the Agency later decided that a grant was appropriate'.

7.33 The Agency intended that this exception would address situations where granting DL would be unfair. However, when the operational guidance was issued on 20 July 2011,61 caseworkers were not informed of this exception – indeed the guidance stated that:

> *'Where, as a result of considering the factors set out in 53.1.2, (the relevant factors set in Paragraph 395c of the Immigration Rules) removal is not considered appropriate, a maximum of 3 years Discretionary Leave (DL) should be granted.'*

7.34 On the same day, an email was circulated to CAAU senior caseworkers and above, setting out that:

> *'With immediate effect from this morning we can no longer grant ILR following consideration of Chapter 53.'*

7.35 An attachment to this email reinforced this message, stating:

> *'Section 53.1.1 will be amended to include a line stating that where, as a result of considering the factors set out in 53.1.2 (relevant factors in Paragraph 395C), removal is not considered appropriate, a maximum of 3 years Discretionary Leave (DL) should be granted. To be clear, from 20 July 2011, ILR should no longer be granted in any cases as a result of considering the factors in 53.1.2.'*

7.36 On 1 August 2011 revised training material was circulated to senior caseworkers in CAAU. This made no mention of any exception which allowed caseworkers to continue granting ILR in certain circumstances.

7.37 We were told that this exception was excluded from the Agency-wide guidance because it was only applicable to asylum legacy cases managed through CAAU, and not those cases decided under the New Asylum Model. Instead, the policy change was supported by local guidance, which was issued specifically to senior caseworkers within CAAU (who provide guidance and advice to case workers), setting out the exception under which they could grant ILR.

7.38 While the exception was considered prior to 20 July 2011, it was not actually approved until the last week in August. This meant the exception was not in place at the time the policy was changed. While the exception originally referred to a 'written commitment' being made in individual cases, we noted that senior caseworkers in CAAU were subsequently told on the 29 July 2011 that this discretion would only apply in cases where individual written commitments had been given in

response to Pre Action Protocol letters, Judicial Reviews or correspondence from MPs. This mitigation flowed from work that the Policy Unit had undertaken to mitigate risks linked to this policy change, which stated:

> *'CAAU report a number of cases were given an undertaking by CRD (in relation to PAPs, JRs or MPs' correspondence) that a decision would be made on their case by a date pre-dating the change in policy, but the undertaking has not been met. We will seek to distinguish these cases and grant ILR on the basis that it is in line with a previous undertaking. We recommend that we adopt this approach'.*

7.39 We noted that this risk mitigation plan went on to state that the Agency 'would defend challenges from older cases where the above does not apply'. From other written chains of evidence that we examined, it was clear that this aspect of the risk mitigation plan was based in part on earlier evidence from CAAU. This set out that CAAU wanted to distinguish cases given an undertaking by CRD in relation to PAPs, JRs or MPs' correspondence, granting ILR on the basis that it had failed to meet an earlier undertaking to make a decision prior to July 2011.

7.40 This approach excluded other types of written communication, for example from legal representatives (otherwise than in the context of litigation) or applicants themselves, including complaints. The written commitment had to have been given in individual cases, which therefore excluded those applicants who were sent letters and who were told to wait their turn for a decision by CRD. These applicants had sometimes waited over a number of years, due to the priority order in which CRD was working through asylum legacy cases. This disadvantaged applicants who were compliant and who had to wait for their case to be considered and had a reasonable expectation that a decision would be made by the summer of 2011.

7.41 This was a serious omission, because in many of the cases we sampled, we found that applicants or their legal representatives had been in contact with the Agency about their asylum claims over a number of years, sometimes repeatedly (Figure 17 refers). They were encouraged by the Agency not to contact it once they had provided the additional information requested, because of the way the Agency was prioritising its workload, which was set out originally in the IND Review:

> *'We plan to do this within five years or less. We will prioritise those who may pose a risk to the public, and then focus on those who can be more easily removed, those receiving support, and those who may be granted leave. All cases will be dealt with on their individual merits'.*

7.42 This approach saw hundreds of thousands of letters being sent out to applicants and their legal representatives during the lifetime of CRD, reminding them of the Agency's intention to conclude all legacy cases by July 2011. These letters were of particular significance to those applicants who were in contact with the Agency and complying with Agency requests, who were given an expectation that their cases would be concluded by July 2011. Figure 24 details two types of generic letters that were sent out to applicants by CRD.

Figure 24: Example of stock letters sent out to legacy asylum applicants

1 *'On 19 July 2006, the Home Secretary made a statement to Parliament about the then UK Border Agency's legacy of electronic and paper records relating to unresolved asylum cases. He stated that the aim was to clear these cases within five years or less, namely by July 2011. I can confirm that your client's case falls into this category but I cannot give any indication at this stage when it will be actioned. We will contact your client when your client's case comes up for decision.'*

2 *'Please send your photographs and any other documents62 along with the completed form sent with this letter, to the address at the top of this letter. You should do this within 21 days from the above date. If you do not return the documents requested above, we will consider your case on the documents available to us.'*
'We ask that you do not make routine telephone or written enquiries about the progress of your case, as this diverts our resources from resolving cases. We will not confirm receipt of your reply to this letter or receipt of your photographs. Should we require any further information about your case, a UKBA colleague will contact you.'

7.43 In September 2011, a CAAU manager asked the Home Office policy unit whether it could include cases within the first exception where CRD had not dealt with cases appropriately and there was

no obvious reason why it had not made a decision. For example, where applicants were in contact with the Agency and the delay in making the decision was not attributable to them. The communication went on to add that applicants could argue that 'they would be covered by the commitment to finish CRD by summer 2011'. The Home Office Policy Unit responded, stating that the policy position was that such cases would not fall within this exception, highlighting the importance of maintaining the principle 'that cases are decided according to the law and policy in place at the time of decision'.

7.44 However, this position changed in November 2011, when the Home Office policy unit stated that it had no objection to older CAAU cases receiving ILR, where it was clear that this was appropriate and where it would not undermine the principle of cases being decided according to the law and policy in place at the time of decision. The advice to CAAU then went on to identify a further exception which could result in a grant of ILR rather than DL, in addition to providing further advice on circumstances where it may be appropriate to depart from policy and exceptionally grant ILR – Figure 25 refers.

Figure 25: Two further scenarios where the grant of ILR might be appropriate

1 Where a decision was made prior to 22nd July that a grant of leave on these grounds was not appropriate, but after 22nd July 2011 the Agency reviews that decision and – on the basis of the same evidence – decides the earlier decision was wrong and that leave should have been granted.

2 Other cases where there are other compelling reasons to grant ILR rather than DL. Indicators that suggest a case may fall into this category include:

- having spent a very long time in the UK (say 7 years plus);
- having had multiple and serious administrative delays in a case being considered, through no fault of the applicant; and
- having had one or more periods of lawful leave (e.g. DL as a UASC) that meet / come close to meeting the six years of DL that an applicant would need to qualify for ILR.

These factors are not definitive and are cumulative, if several apply to one case it is more likely to fall into this category.

7.45 The above scenarios did not allow caseworkers to grant ILR themselves. they had to refer all such cases to a senior caseworker at Senior Executive Officer level. The Agency was unable to provide us with any evidence that local guidance had been issued to CAAU caseworkers setting out the exceptions (or the further advice provided), nor had any records being kept detailing when these exceptions were applied. This was unacceptable. Best practice is always to set out exceptions to the policy in guidance, which should be published for transparency purposes if possible. By failing to publish the exceptions and disseminate them widely, it was much more likely that the implementation of these exceptions would be adversely affected, with caseworkers either applying them inconsistently or not at all, as demonstrated by our file sampling findings.

7.46 If the exceptions had been implemented effectively, we would not have commented on this policy change. However, implementation was flawed. Our examination of cases where some form of leave was granted showed that adult applicants in four cases (9%) were granted ILR, while the remaining 42 (91%) got DL. We found nothing in either the paper file or on CID to indicate that those granted ILR fell under one of the exceptions. Furthermore, in our interviews with caseworkers none showed an awareness of any of the exceptions, they only spoke of ILR being replaced by DL.