



R (on the application of Gornovski) v Secretary of State for the Home Department (Extradition and immigration powers) [2021] UKUT 00321 (IAC)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

16 September 2021

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

Between:

THE QUEEN
on the application of
NIKOLAY GORNOVSKIY

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ben Keith

(instructed by Karen Todner Limited), for the applicant

Julie Anderson

(instructed by the Government Legal Department) for the respondent

Hearing date: 23 June 2021

Written submissions received: 11 and 18 August 2021

In considering the period of leave to remain which is to be granted to a person (P) who is subject to the Restricted Leave regime, the Secretary of State is required to consider, amongst other matters, the foreseeability of P's removal from the United Kingdom. In

considering that question, the fact that P has been discharged from extradition proceedings under the Extradition Act 2003 does not, of itself, prevent the Secretary of State from removing P from the United Kingdom in the exercise of the powers conferred by the Immigration Acts.

J U D G M E N T

Judge Blundell:

1. The applicant is a Russian national who was born on 8 January 1958. He applies for judicial review of the respondent's decision to grant him Restricted Leave for twelve months. The decision was made on 7 July 2020, in response to an application for Indefinite Leave to Remain.

Background

2. The applicant arrived in the UK as a visitor, on 7 August 2003. He was subsequently granted leave to remain as a work permit holder. Upon the expiry of that leave, in 2008, he claimed asylum.
3. In his claim for international protection, the applicant stated that he had risen to a senior position in the Russian gas industry with the assistance of his friend Nikolay Egorov. Mr Egorov is said to be closely connected to Vladimir Putin. The applicant stated that he had been responsible for siphoning money from his company (Mezhregiongaz), both for his own benefit and for the benefit of others, including Mr Putin. He had subsequently fallen out of favour with the regime and an Interpol Red Notice was issued for his arrest in connection with financial matters.
4. The applicant's claim for asylum was refused on the basis that he was excluded from the protection of the Refugee Convention under Article 1F(b) (i.e., that there were serious reasons for considering that he had committed a serious, non-political crime before his entry to the UK). He was nevertheless granted six months' Discretionary Leave on 10 November 2008. The respondent made the latter decision because it was accepted that the applicant could not be removed from the UK on Article 3 ECHR grounds.
5. The applicant sought ILR as a work permit holder in December 2008. The application was refused on character and conduct grounds in January 2009. The applicant then appealed to the Asylum and Immigration Tribunal against the asylum decision, contending that he was entitled to the protection of the Refugee Convention.

6. The appeal was heard at Taylor House by a panel comprising Senior Immigration Judge Nichols (as she then was) and Immigration Judge Tipping. The applicant was represented by leading and junior counsel. The respondent was also represented by counsel. The panel heard evidence from the applicant and from Professor Goodwin-Gill on the international interpretation of Article 1F(b) of the Refugee Convention.
7. The AIT's decision was issued on 10 July 2009. It is a lengthy and closely-reasoned document, running to 75 paragraphs over 28 pages. I need summarise only the essential conclusions. It was agreed between the parties that the only issue was whether the applicant was 'properly excludable under Article 1F(b)': [4]. The applicant had admitted to the embezzlement of substantial funds from a company of which he was the Chief Executive Officer: [11] and [62]. It was this conduct which led the respondent to conclude that the applicant should be excluded from the Convention on the basis that he had committed a serious non-political crime outside the country of refuge prior to his admission thereto. The AIT rejected Professor Goodwin-Gill's evidence that the applicant's crimes were neither 'serious' nor 'non-political' for the purposes of Article 1F(b), as that provision is applied internationally: [64] and [74]. In the circumstances, the appeal was dismissed on the basis that the applicant was properly excluded from the protection of the Refugee Convention: [75].
8. On appeal to the Upper Tribunal (Judges Latta and Eshun), there was no challenge to the finding that the crimes were serious. It was submitted that the AIT had erred in law in concluding that the crimes were non-political. The Upper Tribunal rejected that submission, holding that the AIT had been entitled to draw the inference it had drawn from the evidence before it; that it had applied the burden and standard of proof correctly; and that the applicant's crimes could not be classified as political: [36], [37] and [42].
9. There was no appeal to the Court of Appeal against the Upper Tribunal's decision.
10. The applicant was granted another six months' Discretionary Leave on 23 May 2011. The respondent then introduced Restricted Leave ("RL") and the applicant received periods of six months' RL on 14 September 2012, 11 April 2013, 9 September 2014 (following the refusal of a second application for Indefinite Leave to Remain), 21 April 2015, 13 November 2015, 17 January 2017 and 18 October 2018. He sought to appeal against the latter decision but the appeal was struck out by the FtT.

The Application for Further Leave or ILR

11. On 28 April 2019, the applicant made an application for further leave to remain, submitting that he should be granted either Indefinite Leave to Remain (“ILR”) or a longer period of RL. Further documents, including a lengthy witness statement from the applicant and an expert report from John Lough, were subsequently provided in support of the application. The witness statement explained the context of the applicant’s criminality in detail. It also described the attempts made by the Russian Federation to extradite him, first from Germany and then from the UK.
12. The expert report of John Lough is also a substantial document, running to 38 pages. There has never been any suggestion that Mr Lough lacked the qualifications or experience to opine on the applicant’s situation. He is, amongst other things, an Associate Fellow with the Russia and Eurasia Programme at Chatham House and is clearly knowledgeable about Russia. Mr Lough had been asked to consider nine questions, all of which concerned the background to the Russian regime’s antipathy towards the applicant and the likely treatment of him were he to return to Russia. Mr Lough charted the applicant’s rise and fall in some detail, including reference to the fact that his name had been published by the Russian Embassy in a 2017 press release entitled ‘Why are Fugitives from Justice Welcome in the UK?’
13. Mr Lough also considered the cases of several individuals who were sought by the Russian state in connection with similar crimes or alleged crimes. Mr Lough described how the ‘Putin-led system is not just corrupt. It runs on corruption.’: [77]. He stated that estimates of the President’s wealth varied from US\$40 billion to \$200 billion and that the Russian economy had ‘been transformed into a feudal system where businessmen are ‘serfs who belong to Putin’’: [83]. Mr Lough opined that the criminal proceedings against the applicant were political and that he could not possibly expect to receive a fair trial: [87]-[89] and [90]-[96]. There was a risk of torture in pre-trial detention: [97]-[98].
14. In the closing paragraphs of the report, there is a section which appears under the sub-heading “Has the political or factual situation in Russia changed since the original grant of limited leave to remain in 2009?”. It is necessary to reproduce the two paragraphs of that section in full:

[99] The years since 2009 have seen a significant retrenchment of the regime in Russia and a marked slide towards a more authoritarian and repressive state. The power of the FSB, the PGO and the law enforcement agencies has increased in order to narrow the space for dissent and civic unrest. As noted above, the authorities were deeply concerned by the protests of 2001 and 2012. They dealt with these robustly by jailing demonstrators and signalling to academics, artists, human rights activities and opposition politicians that they must take

care not to step out of line. Business has long since been cowed and has felt the changes less than other sections of society.

[100] The regime is clearly nervous about its future. The re-election of Putin in 2018 has secured its existence for now but it is clearly battering down the hatches in readiness for possible instability. Its nightmare scenario is a Ukraine-style revolution that it believes was a US special operation. Moves to reduce economic dependence on the West and insulate Russians from the global internet are part of the same picture. Structural reforms are off the agenda. Fortress Russia is taking shape. In this context, it is impossible at present to see any possibility of broader political reform that is a pre-requisite for an overhaul of the criminal justice system and the courts.

The Decision Under Challenge

15. The decision of 7 July 2020 acknowledged the representations made by the applicant, including the report of Mr Lough. The respondent noted, at [4], that the applicant had been excluded from the Refugee Convention as a result of the decision of the Upper Tribunal to which I have referred above. Those who had been excluded but were not removable as a result of the ECHR were subject to the Restricted Leave policy: [5]-[6].
16. At [8], the respondent set out the policy objectives behind granting shorter periods of RL:
 - (a) Public interest – the public interest in maintaining the integrity of immigration control justifies frequent review of these cases with the intention of removing at the earliest opportunity. Therefore, the Home Office wants to ensure close contact and give a clear signal that the person should not become established in the United Kingdom.
 - (b) Public protection – it is legitimate to impose conditions designed to ensure that the Home Office is able to monitor where an individual lives and works and/or prevent access to positions of influence or trust.
 - (c) Upholding the rule of law internationally – the policy supports the principle that those whose conduct excludes them from refugee status, including war criminals, cannot establish a new life in the United Kingdom and supports our broader international obligations: it reinforces the message that our intention is to remove the individual from the United Kingdom as soon as it is possible.
17. Insofar as it had been suggested that the applicant did not fall to be excluded from the Refugee Convention, the respondent rejected that submission for the reasons at [11]-[13]. At [14], the respondent accepted that the applicant ‘cannot be removed to Russia at the present time’ due to Article 3 ECHR.

She had decided to grant 12 months' RL, with conditions as to residence, activity, reporting and recourse to public funds.

18. At [16]-[21], the respondent set out her policy in relation to the duration of RL, pursuant to which leave would be granted in most cases for a maximum of six months, although all cases would be considered on their merits. At [18], the respondent stated:

[18] The temporary nature of restricted leave is due to the fact that it is anticipated conditions will change to allow you to return safely to Russia in the future and thus, a short duration and regular review period is necessary, particularly given the significant public interest in your removal. It is assessed that a period of 12 months leave is appropriate given the circumstances of the case in view of the crime you are suspected of (embezzlement) and your compliance with previous conditions. Furthermore, there is no evidence that period of leave would have an adverse impact on you or that there are exceptional grounds to warrant a longer period of leave.

19. At [19], the respondent stated that there would be no adverse impact on the applicant's family in the UK. At [20], she said that the situation in Russia would be reviewed regularly in order to determine whether the legal barrier to removal subsisted. The applicant remained 'a priority for removal given your past activities'.

20. Paragraphs [22]-[34] of the letter concern the conditions imposed by the respondent. Since there is no live challenge to the imposition of those conditions before me, I shall pass over that section of the letter. It is necessary to note some of what was said in the penultimate section of the letter, however. At [35]-[38], the respondent considered the request for ILR. The respondent directed herself to consider, in accordance with R (MS & MBT) v SSHD [2015] UKUT 539 (IAC), 'whether or not the point has been reached where the only reasonable course is to grant ILR': [35]. She continued:

[36] It is noted that you do not have any criminal convictions in the UK, that you live with your wife and son. It is not accepted that the duration of your stay in the UK, that members of your family are British citizens, or the absence of criminal behaviour mean that the only reasonable course now would be to grant you ILR.

[37] Consideration has also been given to the expert report you provided by John Lough. The report has been considered in line with your current situation. In his report Mr Lough mentions that if you returned to Russia you would not receive a fair trial (paragraph 90 of report). It is accepted that at this current time you cannot immediately be removed to Russia as this would breach your rights under the

European Convention on Human Rights and you are therefore subject to the Restricted Leave policy. The report also mentions (paragraph 101) that your exclusion from the refugee convention under Article 1F(b) does not take into account you were working at Mezhrefiongaz and that you were part of a system that operated on the basis of unwritten 'understandings', not law. However, as already outlined in this letter you are reminded that whilst working at Mezhrefiongaz you diverted company funds and admitted to personally benefitting from the scheme by US\$6 million. No charges were brought against you. In 2007 and 2011 the Russian Federation submitted requests for your extradition, based on two charges of 'abuse of official position'. The first request was stayed for legal reasons (abuse of process), the second was refused as you were granted protection-based leave. Mr Lough drafted his report whilst in possession of various documents and based his findings on his opinion and these documents. However, the Upper Tribunal upheld the determination of the Asylum and Immigration in that you committed a serious non-political crime and as such you are excluded from the protection afforded by the Refugee Convention under Article 1F of that Convention in accordance with paragraph 334 of the Immigration Rules. There is nothing contained in the report that changes this as your case had been considered and upheld by the courts.

[38] In view of your exclusion from the Refugee Convention as a result of embezzlement, the public interest remains in your removal and that you should not be entitled to settle in the UK.

The Application for Judicial Review

21. Pre-action correspondence having failed to persuade the respondent to revisit her decision, the applicant issued these proceedings in the Administrative Court on 25 August 2020. The five grounds, settled by Mr Keith, were as follows:
 - (1) The respondent was wrong to conclude that the applicant should not be granted ILR on the basis of long residence and Article 8 and misapplied rule 276ADE.
 - (2) The respondent unlawfully failed to consider whether a grant of Discretionary Leave would be appropriate. To the extent that the respondent's policy on RL required a positive application for DL, the policy is unlawful.
 - (3) The decision to grant 12 months' RL was irrational as there is no prospect that the applicant will be removable to Russia at any stage.
 - (4) The respondent paid insufficient attention the specific facts of the applicant's case and misapplied the case law on RL.

- (5) The respondent's practice of granting short periods of RL with significant gaps between each period is an unlawful interference with the Applicant's rights.
22. Permission was refused on the papers by Mostyn J. At an oral hearing on 2 February 2021, Mr Keith persuaded Richard Clayton QC, sitting as a Deputy Judge of the High Court to take a different view. Permission was granted, with the Deputy Judge observing that the third ground was the strongest.
23. The claim was apparently issued in the High Court because of the challenge to the lawfulness of the respondent's policy presented by the second ground. There is no reason that such a contention could not be considered and decided in the Upper Tribunal, however, and on 16 April 2021 the case was transferred to the Upper Tribunal by order of an Administrative Court Lawyer, acting pursuant to delegated powers.

Submissions

24. At my request, Mr Keith addressed a number of points before he made his submissions on the merits.
25. Mr Keith confirmed, firstly, that he did not pursue the request for anonymity which he had made in writing. He noted that the applicant had been named by the Russian Embassy in March 2017 and that the circumstances were therefore very different from those which obtained when the Upper Tribunal had been at pains, in its 2010 decision, to ensure that its published decision did not name the applicant, his former employer, or even his country of nationality. Given the nature of the case and the potential ramifications for international relations, I also asked Ms Anderson whether there was (unusually) any application by the respondent for the applicant's identity to be anonymised. Ms Anderson said that there was no such application and that the principle of Open Justice required publication of the applicant's name. In the absence of a request for anonymity from either party, I announced that my published judgment would bear the applicant's full name.
26. Secondly, Mr Keith confirmed that he was content formally to abandon the first, second and fifth grounds. His skeleton argument focussed on grounds three and four and it was only these points - taken together - upon which he proposed to rely.
27. I noted, thirdly, that there was a suggestion in the applicant's skeleton argument that the respondent operated a 'secret policy' in respect of those who were within the scope of the RL policy. The secret policy was said to be

not to grant ILR to such individuals. I noted that Mr Keith's instructing solicitors had sought 'disclosure' of various documents in an attempt to add substance to this ground but that they had been met with a terse response from GLD on 11 March 2021. The letter noted, amongst other matters, that the duty of candour only extended to providing information which was required to enable a court to determine the pleaded claim. The information sought by the applicant was said by the respondent 'not to be directed at pleaded issues of law at all'.

28. I suggested to Mr Keith that these observations appeared to be correct, in that the grounds upon which permission had been granted contained no reference to a 'secret policy' point. Mr Keith accepted that the point had not been pleaded and that it was too late to attempt to raise it. He was content to abandon any submissions made in writing on the point.
29. Finally, I asked Mr Keith to address me on the intensity of review in such a case. He accepted that the decision was only subject to 'low intensity' review on traditional public law grounds but that it would be for the Tribunal to consider for itself whether the decision was a proportionate one in Article 8 ECHR terms. (In the event, no submissions were made on Article 8 ECHR.)
30. As to the merits of grounds three and four, Mr Keith submitted that there were two bases upon which the respondent had erred in anticipating that the applicant could be removed safely to Russia in the future. The first was that the applicant could not be removed because to do so would be in breach of the Extradition Act 2003. The applicant had been discharged from extradition by Senior District Judge Workman, who had concluded that the proceedings were brought on an improper ground. That amounted, Mr Keith submitted, to an order not to remove the individual concerned to the country in question. The Immigration Act 1971 and the Extradition Act 2003 interacted 'imperfectly' but the legal restraint placed upon the respondent by the order of Westminster Magistrates' Court was clear from decisions such as District Court in Ostroleka, Second Criminal Division v Dytlow [2009] EWHC 1009 (Admin); [2009] Extradition LR 238. Whether there was a statutory bar to removal or whether it would be an abuse of process to remove in the face of the court's order, the result was ultimately the same.
31. I asked Mr Keith about the basis upon which the extradition request had been discharged. Mr Keith was unable to assist, other than stating on instructions that the basis had been on the ground specified in s81 of the Extradition Act 2003. There was no copy of the District Judge's judgment.
32. The second basis upon which Mr Keith submitted that the respondent had erred in concluding that the applicant might foreseeably be removed to

Russia was that she had made a finding which was unsupported by any evidence. The only relevant evidence was to be found in the expert report, which was neither considered nor addressed with reference to different evidence in the respondent's decision. Mr Lough had been clear about the prospect of there being any material change in Russia. It was accepted that there was a public interest in restricting the applicant's leave but the letter did little more than 'parrot' the policy; it failed to engage in any meaningful way with the reality of the applicant's situation.

33. Mr Keith submitted that the salient points which the respondent had failed to consider included the fact that the applicant could not ever be removed; the seriousness of the offence when set against the other types of case in which exclusion applied; and the context of the offending, as set out in Mr Lough's report. Only two individuals had ever been extradited to Russia and the decisions in their cases appeared in the authorities bundle. This was important because the situation in Russia was such that extradition was usually refused on Article 3 or 6 ECHR grounds. It was notable that the Russian authorities had lied to the UK authorities in one such case, seemingly in an effort to procure the extradition of a suspect.
34. In the circumstances, Mr Keith submitted that the respondent had erred on traditional public law grounds. She had failed to take material matters into account and she had reached an irrational conclusion on the facts. Mr Keith confirmed that he made no submissions based on Article 8 ECHR.
35. For the Secretary of State, Ms Anderson noted that the issues had narrowed considerably during Mr Keith's oral submissions. She submitted that the intensity of review was particularly low in a case such as the present. Issues of high policy were at stake - including the international relations of the United Kingdom - and the court should be slow to interfere with a decision taken in such a context. There were no human rights at issue, whether by reference to the applicant's family in the UK or by reference to the curtailment of his liberty by the conditions imposed by the respondent. All of the objectives which the RL policy sought to achieve were to the fore in a case such as this. The policy was of greater significance than, for example, a policy on Discretionary Leave.
36. The Upper Tribunal decision from 2010 was quite clear in concluding that the high threshold for exclusion had been met. The RL policy recognised that it was important to send a signal to others in a similar position that the UK was not a safe haven for them. As the policy stated, they were 'not welcome' in this country. Article 1F was very different from Article 33 of the Refugee Convention; the former applied to those who had done something so egregious that it would be unconscionable for them to receive protection.

The applicant's crime was a white collar crime but it was still a serious one for which he had been excluded.

37. Ms Anderson submitted that the applicant really contended for a *fait accompli*; if he could not be removed, he had to be granted ILR. But that was not the scheme of the policy, and for good reason. It was in the nature of the cohort that many individuals could not be removed for the foreseeable future but that did not mean that they should be granted ILR.
38. Ms Anderson submitted that the respondent was not prevented from removing the applicant by the decision in the extradition proceedings. She cited the decision of the Divisional Court in R (Troitino) v National Crime Agency [2017] EWHC 931 (Admin); [2017] ACD 78 in support of that submission. The Extradition Act 2003 implemented the European Extradition Treaty of 1957 and was not intended to cut across the respondent's power to remove under the Immigration Act 1971. No judicial legislation was needed to intermesh the two systems. The extradition decision was clearly not binding on the Secretary of State in the exercise of her powers under the Immigration Act 1971. There was evidently some commonality in the issues considered in the two sets of proceedings but that did not mean that the findings in one were binding in the second. In any event, the point had no evidential foundation in the absence of the decision in the extradition proceedings.
39. Addressing Mr Keith's second submission, Ms Anderson submitted that the respondent did not have to establish by evidence that democracy was soon to be restored in Russia. It was necessary to read the letter as a whole. The expert report was plainly borne in mind by the respondent, who had cited it at the start and the end of the letter. It was clear from R (George) v SSHD [2014] UKSC 28; [2014] 1 WLR 1831; [2014] Imm AR 958 that assumptions should not be made about country circumstances remaining the same. The changes brought about when Mikhail Gorbachev had entered power were sudden and significant. Arguments about changed circumstances fell to be made at the point that the applicant was threatened with removal, and what the applicant attempted to do was to take issues in an illogical order.
40. The applicant's argument that his circumstances had not been considered was without foundation. The letter clearly showed consideration of the relevant issues and the fact that 12 months' RL had been granted established that his circumstances had been borne in mind. The Upper Tribunal's decision showed how serious the crime was and that decision had been demonstrably considered by the respondent. There was simply no cogent basis for concluding that ILR should have been given, and the respondent would have to give the most cogent of reasons for concluding that a person such as the applicant should receive settlement. The applicant in MS (India)

had also been living a blameless life in the UK for many years and the refusal of his application for ILR was held to be rational. In the event that there had been any error in the respondent's approach, it was immaterial because of the terms of the policy.

41. In his concise reply, Mr Keith clarified that he did not submit that the applicant should be granted ILR simply because he was not removable. What was at issue was the adequacy and rationality of the respondent's consideration of whether ILR should be granted. Removability was a highly material factor in the assessment. Troitino, which Ms Anderson had cited, concerned a very different factual situation; the applicant had not succeeded in his extradition proceedings. The assessment was supposedly a holistic one but there were elements of it which were deeply flawed. The difficulty lay in the respondent's engagement with the facts of the applicant's individual case.
42. I reserved judgment at the conclusion of the submissions.

The Restricted Leave Policy

43. The RL policy which was in force at the time of the decision under challenge was published on 25 May 2018. That version of the policy also underpinned the decisions under challenge in R (MBT) v SSHD [2019] UKUT 414 (IAC); [2020] Imm AR 615. Rather than attempting my own summary of this comparatively lengthy policy document, I shall gratefully adopt the summary at [42]-[51] of that decision:

[42] The RL policy addresses the practical gulf that arises between those excluded from the scope of the Refugee Convention under Article 1F, or refugees who are deprived of the protection of the *non-refoulement* principle, on the one hand, and any applicable ECHR-based restrictions on their removal, on the other. It confers legal - albeit restricted - status on such individuals and seeks to enable the respondent to achieve certain objectives set out in the policy.

[43] The version of the RL policy under consideration in these proceedings was published on 25 May 2018. It was still in force at the date of both decisions. It opens in these terms:

"The government's policy is that foreign nationals who are not welcome in the UK because of their conduct will be deported or administratively removed from the UK, unless there is an [*sic*] European Convention on Human Rights (ECHR) barrier. This includes those whose conduct brings them within Article 1F or Article 33(2) of the Refugee Convention, or paragraph 339D of the Immigration Rules..."

[44] The RL policy identifies the following objectives in denying the benefits of protection status and instead conferring a shorter period of restricted leave with specific conditions. The objectives include the public interest in maintaining the integrity of immigration control through the conferral of short periods of leave, accompanied by regular reporting conditions. The policy seeks to enable frequent review by the respondent of those subject to the policy with a view to facilitating their removal, should circumstances change such that the previous barriers to removal no longer apply. This ensures “close contact” is maintained with the individual concerned, and also gives a “clear signal” that the person concerned should not become “established” in this country. The repeated grants of only short periods of leave emphasise the intended impermanence of the residence of a person subject to the RL policy. The policy is intended to make it more difficult for such persons to put down roots here, or build up private or family life which, if established, may later present difficulties for the removal of the individual, if and when conditions in the destination country change such that removal becomes feasible.

[45] The policy also states that it is for the purposes of public protection, adding that it is legitimate to impose conditions designed to ensure that the respondent is able to monitor where a person lives and works. In turn, this enables the respondent to prevent access by the individual to positions of influence or trust.

[46] Finally, a further stated policy objective of the policy is to prevent the United Kingdom becoming a “safe haven” for those whose conduct merits their exclusion from refugee status. This supports the principle that war criminals and persons with a reprehensible past cannot establish a new life in this country. The policy is also said to support the United Kingdom’s broader international obligations and commitment to supporting the rule of law at the international level. The RL policy contends that it reinforces the message that the United Kingdom’s intention is to remove such individuals from the country as soon as possible. The target audience of this “message” is the international community of States as a whole.

[47] The RL policy addresses indefinite leave to remain in similar terms. The policy is that there will “almost always be public interest reasons not to grant ILR” (page 33). It notes, at page 6, that granting those subject to the policy indefinite leave to remain would “send a message” that there is no longer any public interest in deporting or removing them from the United Kingdom. That would be “wholly contrary” to the RL policy, as set out above.

[48] The policy provides, at page 32, that there is no limit on how many times a person can be granted restricted leave, as long as they continue to fall within the scope of the policy. The policy states at page 33, with emphasis added:

“Where a person falls within this policy because of behaviour described in Article 1F or Article 33(2) of the Refugee Convention or paragraph 339D of the Immigration Rules (whether or not the person is made a protection claim) *there will almost always be public interest reasons not to grant ILR*. This is because the government’s view is that such persons are not welcome in the UK, even if the adverse behaviour was committed a long time ago and the person has not committed any crimes in the UK. In most cases, a decision to grant ILR would undermine the intention of the restricted leave policy...”

[49] It continues in these terms, on the same page:

“Where a person applies for ILR outside the Immigration Rules, consideration must be given to all relevant factors, including all representations that have been submitted, to determine whether the application should be granted or refused. It will only be in exceptional circumstances that those within the scope of the restricted leave policy will ever be able to qualify for indefinite leave to remain outside the rules, and such exceptional circumstances are likely to be rare. Usually, given our international obligations to prevent the UK from becoming a safe haven for those who have committed very serious crimes, the conduct will mean that the application should be refused, but decisions must be taken on a case-by-case basis applying the principles set out above and the general grounds for refusal in part 9 of the Immigration Rules, alongside the section 55 duty...”

[50] The conditions imposed on those subject to restricted leave is one of the means by which the policy objectives of the RL policy are said to be achieved. Once a person is granted indefinite leave to remain, the policy notes, the imposition of conditions is no longer possible. As such, granting indefinite leave to remain could lead to individuals obtaining employment or accessing positions of trust which are unsuitable, given the reasons they were initially subject to the restricted leave policy in the first place. The imposition of reporting conditions would no longer be possible, making it much harder for the respondent to keep track of those who would, circumstances permitting, otherwise be considered for removal.

[51] Finally, indefinite leave to remain would be contrary to the United Kingdom’s international obligations and the need to support the international rule of law. The policy considers that granting ILR to such excluded persons would damage the United Kingdom’s international reputation and would be contrary to the expected and accepted approach of the international community as a whole to such persons. Thus, at page 32, the RL policy notes that there is no period of time which is likely automatically to be regarded as too long as being subject to the RL policy, although it notes that all such applications must be considered on a case-by-case basis. Even long periods of expiation,

remorse and good behaviour are “neutrally balanced.” Compliance with the criminal law domestically is not a positive factor, but rather a minimum standard of behaviour expected of anyone present in the United Kingdom. The policy concludes on this point at page 33 stating that,

“it will only be in exceptional circumstances that those within the scope of the restricted leave policy will ever be able to qualify for indefinite leave to remain... And such exceptional circumstances are likely to be rare.”

There is no provision in the Immigration Rules to grant indefinite leave to remain to those subject to the RL policy; the policy envisages that any such grants will take place outside the rules.

The Restricted Leave Authorities

44. In R (MS & MBT) v SSHD (excluded persons: Restrictive Leave policy) IJR [2015] UKUT 00539 (IAC), Dove J and UTJ Gill held that the RL policy was lawful. The judicial headnote to the decision is lengthy but the salient parts of it for present purposes are as follows:

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

(...)

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

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

(i) The consideration of whether or not the point has been reached where the only reasonable course is to grant ILR will depend upon a variety of factors, including: (a) the reasons why the individual was excluded from the Refugee Convention; (b) whether the applicant has remained blamelessly in the United Kingdom for a lengthy period of time; (c) the prospect of removal of the applicant to his or her home country, involving an appraisal of the political circumstances of the home country bearing in mind that the international reputation of the United Kingdom which can be in point in these cases and (d) the

particular circumstances of the applicant and his life in the United Kingdom.

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

45. On appeal, in R (MS & MT) v SSHD [2017] EWCA Civ 1190; [2018] 1 WLR 389; [2018] Imm AR 117, the Court of Appeal held that the RL policy did not have the character of a rule such that it was required to be laid before Parliament. It accepted that the application of the policy was likely to interfere with Article 8 ECHR rights but there was nothing in the policy which was inherently contrary to the Rule of Law. Properly understood, the respondent's policy was held to mean that ILR would be granted only in exceptional circumstances to migrants who were excluded but irremovable and the phrase 'exceptional circumstances' did not connote a test of exceptionality but a situation involving a departure from the general rule.
46. At [118]-[124], Underhill LJ (with whom Gloster and Simon LJ agreed) gave guidance on the kinds of considerations which might render a case exceptional, citing: the length of residence in the United Kingdom; the gravity of the conduct which had led the migrant to be excluded from humanitarian protection; and the extent to which the migrant had changed since the commission of the offences. The appeals against the Upper Tribunal's decision were dismissed. The Secretary of State's appeal against the decision of Collins J in R (MS) v SSHD [2016] EWHC 3162 (Admin) was allowed, with the court holding *inter alia* that the judge had erred in importing into the policy a norm that ILR would be granted (all things being equal) after ten years: [39] and [136].
47. Considering MS's application for judicial review itself, the court concluded that the decision to refuse ILR was rational, notwithstanding the absence of any security risk and the fact that he had lived a 'settled and respectable life' in the UK for twenty years: [137]. In so finding, the court accepted the submission made by counsel for the Secretary of State that her policy of showing hostility to terrorist and not providing a safe haven for them was entitled to 'great weight'.
48. The claimant in MBT went on to make further applications for ILR, as had been anticipated in Underhill LJ's judgment. Those applications were refused in 2018 and 2019. In R (MBT) v SSHD [2019] UKUT 414 (IAC), the Upper Tribunal (Nicol J and UTJ Stephen Smith) considered challenges to both decisions. The Upper Tribunal's judgment deals primarily with matters which are not in issue before me – Article 8 ECHR and the public

sector equality duty in particular – but, as noted by Mr Keith in his skeleton, the decision reaffirms that it is only in exceptional cases covered by the RL policy that ILR is likely to be appropriate.

49. I do not propose to make reference to further authority at this stage. The governing principles emerge from the three decisions I have considered above. It will be necessary to consider some further decisions in confronting Mr Keith's submissions on ground four, however.

Analysis

50. Despite the wide-ranging challenges advanced in the original grounds for judicial review, the focus before me was considerably narrower. It is for that reason that I have not set out in any greater detail the way in which grounds one, two and five were originally developed, or the way in which the respondent sought to answer those grounds in the Detailed Grounds of Defence.
51. As will be apparent from the summary of the submissions which appears above, the narrowed focus of the applicant's challenge is primarily upon the respondent's conclusion that she 'anticipated' that conditions in Russia would change 'in the future', thereby enabling the applicant to return there 'safely'. Mr Keith does not submit – as Ms Anderson sought to suggest – that the applicant should be granted ILR if he cannot be removed. The principal submission, instead, is that the respondent erred in her conclusion that the applicant might be removed in the foreseeable future and that this error tainted the supposedly holistic assessment of whether ILR should be granted, as required by the authorities cited above.
52. The first point made by Mr Keith is that the respondent erred in law in concluding that she would ever be entitled to remove the applicant. The basis for that submission is that the respondent is said to be prevented from removing the applicant by the decisions which were made in the extradition proceedings. There are two fundamental problems with that submission, even before I come to test its correctness as a matter of law.
53. The first difficulty with this submission is that it has scant evidential foundation. The decisions in the extradition proceedings are not before me. Mr Keith acknowledged this and offered no explanation for their absence. If I am asked to accept that the Secretary of State is forever prevented from removing the applicant as a result of those decisions, I have grave difficulty in accepting that submission without a clear idea of the basis upon which the applicant was discharged from extradition.

54. The second difficulty is that there is a degree of conflict between the respondent and the applicant concerning the basis upon which the extradition proceedings were discharged. The respondent's version of events, as set out at [37] of the decision under challenge, is that the first extradition request was refused on grounds of abuse of process and the second was refused because the applicant was granted 'protection-based leave'. At [193] of the applicant's statement of 25 May 2019, however, he states that the extradition proceedings 'were heard before SDJ Workman who refused the application, twice, on the basis of section 81 of the Extradition Act 2003, namely that the extradition proceedings were politically motivated'. The same point was made in the submissions in support of a previous application for ILR which appear at p156 of the applicant's bundle. There is simply no consensus between the parties that the basis upon which the applicant was discharged was the basis contained in s81 of the 2003 Act. In truth, as I suggested to Mr Keith during his submissions, what I am invited to do is to assume that the discharge was on the basis claimed by the applicant. I see no reason to do so. The authorities actually favour proceeding on the factual basis put forward by the defendant in such circumstances: R v Board of Visitors of Hull Prison ex parte St Germain (No 2) [1971] 1 WLR 1401, at 1410H.
55. Be that as it may, the submission made by Mr Keith orally and in writing at [27] of his skeleton argument is that it would be a breach of the Extradition Act 2003 "the 2003 Act") to remove the applicant to Russia. It is perhaps unnecessary, in those circumstances, to know the precise basis upon which the applicant was discharged from extradition, since it is agreed that he was indeed discharged. In order to evaluate Mr Keith's submission, it is necessary to give something of an overview of the 2003 Act.
56. The Act separates the world into two categories: category 1 and category 2. The Russian Federation is a category 2 territory and it is not necessary to consider the process for category 1 territories in this judgment.
57. Part 2 of the Act concerns extradition to category two territories. The process of extradition is initiated when an extradition request is made to the Secretary of State, who must then decide whether to issue a certificate, having regard to the matters in s70. A judge then decides under s71 whether to issue a warrant for the arrest of the relevant person. The individual is arrested and brought before the court, at which point a date is set for the extradition hearing. At that hearing, the judge must be satisfied that the conduct in question amounts to an extradition offence; that none of the bars to extradition apply; that (in accusation cases) there is *prima facie* evidence of guilt; and that extradition would not breach the individual's human rights. If the judge is satisfied that all of the procedural requirements are met and that none of the statutory bars to extradition apply, the judge must send the

case to the Secretary of State for a decision to be taken on whether to order extradition. There is a right of appeal to the High Court against the judge's decision.

58. As above, the basis upon which the applicant was discharged from extradition is wholly unclear. For the purpose of evaluating Mr Keith's argument, I will assume that the applicant was discharged from extradition by reason of one or both of the statutory bars set out in ss81 and 87 of the 2003 Act. Those sections provide:

81 Extraneous considerations

A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that –

- (a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or
- (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

87 Human rights

(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c.42).

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited.

59. Mr Keith submits – and I have no reason to doubt – that only two Russian citizens have ever been extradited from the UK. He points to a number of first instance decisions in the authorities bundle in which an applicant has been discharged from extradition on one or both of the grounds above. He submits, and I accept, that it is entirely commonplace for it to be found that extradition is sought by Russia for one of the prohibited reasons in s81 or that extradition would be incompatible with Articles 3 and 6 ECHR.
60. If the applicant was discharged from extradition for one or both of these reasons, that decision represents a conclusion on the evidence presented to the extradition judge at that time. Subject to an appeal, that conclusion is determinative of the extradition proceedings and the process is concluded; the matter is not sent back to the Secretary of State for a decision on whether to order extradition.

61. There is no statutory mechanism by which the decision in the extradition proceedings has any specific effect on the power of the Secretary of State to remove (or deport) the relevant person. Mr Keith submits that the two statutory regimes sit uncomfortably together but I disagree. It is quite clear from the 2003 Act that Parliament intended certain immigration or protection related decisions to have specific consequences in extradition proceedings:
- (i) By s121 of the 2003 Act, a person must not be extradited (to a category 2 territory) before their asylum claim is finally determined.
 - (ii) By s70(2)(b), the Secretary of State may refuse to issue a certificate if the person 'has been recorded by the Secretary of State as a refugee'.
 - (iii) By s70(2)(c), the Secretary of State may refuse to issue a certificate if the person has been granted leave to enter or remain on the ground that it would be a breach of Article 2 or 3 ECHR to remove him to the territory to which extradition is requested.
62. It is significant, in my judgment, that there is no statutory mechanism which operates in the opposite way, barring the respondent from removing an individual who has been discharged from extradition. In the absence of such a bar, I am unable to accept Mr Keith's submission that it would be in breach of the 2003 Act for the respondent to seek to remove such a person.
63. Mr Keith submitted that it would be an abuse of process for the respondent to seek to remove an individual who has been discharged from extradition. I see no support for that submission in the authorities. It might, depending on the facts, be unlawful for the Secretary of State to surrender a fugitive to another state except in accordance with the safeguards provided in the extradition statutes: R v Governor of Brixton Prison ex parte Soblen [1963] 2 QB 243, at 302 and Andre Caddoux v Bow Street Magistrates Court [2004] EWHC 642 (Admin), at [11]. But there would be nothing abusive, to my mind, about the respondent seeking to pursue the applicant's removal to Russia in the event that the conditions changed so that she was able to do so without a breach of her obligations under the ECHR. She would not be attempting unlawfully to circumvent the decision in the extradition proceedings; she would be taking a removal decision on the basis of the facts presented to her at the time.
64. Poland v Dytlow, to which Mr Keith referred in his oral submissions, is of no assistance. That case concerned two Polish individuals of Roma ethnicity who had been granted refugee status and ILR in the United Kingdom. Having noted the prohibitions in the 2003 Act on the extradition of those

with a pending asylum claim, Keene LJ (with whom Roderick Evans J agreed), stated that it was implicit in the scheme of the Act that 'if the asylum claim is eventually granted, the refugee cannot then be extradited': [11].

65. As Keene LJ went on to explain, that conclusion was consistent with the Refugee Convention itself, which prohibits (subject to Article 33(2)) the refoulement of a refugee to a country in which his life or freedom would be threatened on account of a Convention reason: [14]-[15]. Keene LJ noted that refugee status could be ceased or revoked and analysed the safeguards provided to the refugee by the Convention itself and the Qualification Directive. At [24], he noted that the process by which refugee status might be brought to an end 'is a necessarily elaborate one' upon which a District Judge in extradition proceedings should not pronounce; such matters should instead be left to the Secretary of State and the AIT, then the specialist appellate body charged with considering appeals against cessation decisions. It was indeed common ground before the Divisional Court that the District Judge should not have assessed whether or not there was a continuing entitlement to refugee status: [25]. So long as the status persisted, and in the absence of any suggestion that cessation was under consideration, the only proper course was to discharge Dytlow from extradition on the basis of abuse of process: [30].
66. Keene LJ's analysis was therefore rooted in the fact that Dytlow's status was that of a refugee, with all the protections conferred by that status. This applicant holds no comparable underlying status. He was excluded from the protection of the Refugee Convention and the decision of the Magistrates' Court conferred no ongoing status, whether in domestic or international law. Whether the applicant was discharged from extradition on the basis set out in s81 or s87 of the 2003 Act, that conclusion represented nothing more and nothing less than a conclusion that the applicant's extradition to Russia at that time was impermissible on the ground in question.
67. Ms Anderson countered Mr Keith's citation of Dytlow v Poland with reference to Troitino v National Crime Agency. This case in the Divisional Court (Burnett LJ, as he then was, and Ouseley J) also concerned the prohibition in the 2003 Act on the extradition of those with a pending asylum claim, which for category 1 territories is to be found in s39. The central issue was whether Troitino (a Basque separatist from Spain) had made an asylum claim so as to engage that prohibition. For reasons given at [36]-[53], the court concluded that no such claim had ever been made. That issue having been resolved adversely to the claimant, the court made some *obiter* observations about the interaction between s39 of the 2003 Act and an asylum claim. The court underlined the need for the extradition courts to be

kept fully informed of the precise position of any asylum claim. It stated that any human rights or 'extraneous considerations' bars to extradition should be 'fully presented and resolved in the extradition proceedings.': [56].

68. In its concluding *obiter* observations, the court added this:

[57] The extradition courts and the FtT and UTIAC should be astute to prevent any abuse of their procedures. Where the human rights issues have been resolved in the extradition proceedings, or where no bars were raised, it is difficult to see on what basis those issues should be reconsidered, let alone determined differently, in FtT or UTIAC proceedings, or why, if the human rights basis for an asylum claim has been disposed of in extradition proceedings, the empty husk of an asylum claim should not be disposed of rapidly by the Tribunal. After all, the former must operate to a fast timetable, the extradition order must be given effect, and the requesting judicial authority is not in a position to respond to the asylum claim allegations. At the very least, the Magistrates' Court decision on a human rights claim, and even more so the decision of the High Court on appeal, must be a very powerful consideration for the Tribunal, as must be the fact that an available extradition bar, relevant to an asylum claim, has not been raised or pursued in extradition proceedings.

[58] This is not the case in which to resolve any issue as to whether, where the asylum claim is essentially a human rights claim, repeated with an asylum "tag", and that human rights claim has been rejected or not pursued in extradition proceedings, as here, there is scope to treat the asylum claim as an abuse of process or finally disposed of.

69. As Mr Keith observed, the facts in Troitino are not on all fours with the facts in this case. The applicant in Troitino had not been discharged from the extradition proceedings and what was in issue was his attempt to frustrate the extradition proceedings with reference to an asylum claim which had never been clearly made. The applicant in this case, in contrast, has been discharged from extradition proceedings and the question before me is whether that fact carried a special significance which was not understood by the respondent.

70. Troitino is nevertheless of some limited assistance because, even in the *obiter* observations which I have reproduced above, the court did not begin to suggest that the Secretary of State would forever be prevented from removing an individual who had been discharged from extradition. In my judgment, the position is instead as follows.

71. Where an individual is discharged from extradition, the extradition proceedings are brought to an end and the individual may not be extradited

to the requesting state pursuant to the originating request. It might be an abuse of process for the respondent, in the exercise of her immigration powers, to attempt to circumvent the extradition process, or to ignore the extradition decision, but that is not to say that she is bound by it or that she can never seek to remove the individual. The respondent must have regard to the fact that the individual was discharged from extradition but the weight to be attached to the extradition decision is not a fixity. Where the decision in the extradition proceedings is recent, reasoned and based on the same evidence as is before the respondent, it might be difficult for her (or an appellate body) to take a different view. But the extradition decision confers no lasting status. Where circumstances have changed, or more evidence has become available, or even perhaps where the extradition decision is scantily reasoned, the respondent might justifiably take a different view from the extradition court when considering a human rights claim or deciding whether to remove an applicant. To do so would be neither contrary to the 2003 Act nor an abuse of process.

72. Acceptance of Mr Keith's submission would bring about absurd consequences. An individual who was discharged from extradition as a result of his family life with young children could never be removed by the Secretary of State, even if a Family Court subsequently ordered that he should not be allowed to see the children. Equally, an oppositionist politician who was discharged from extradition on s81 grounds could never be removed by the respondent even if his party won the subsequent election. In either case, the respondent would obviously not misdirect herself in law or act abusively in deciding to remove the individual in the exercise of her immigration powers under the Immigration Act 1971.
73. For these possibly over-long reasons, I reject Mr Keith's submission that the respondent misdirected herself in law in concluding that the applicant might ever be removed to Russia. Whatever the basis upon which he was discharged from extradition, that discharge did not have the effect for which Mr Keith contends.
74. The second submission advanced in ground three is of a simpler character. Mr Keith submits that the respondent reached an irrational conclusion in the first sentence of [18] of the decision under challenge. The specific target of this submission is the words "it is anticipated conditions will change to allow you to return safely to Russia in the future". Mr Keith's submission is that this was an irrational conclusion in the traditional *Wednesbury* sense and also in the sense contemplated by Brooke LJ at [11] of R (Iran) & Ors v SSHD [2005] EWCA Civ 982; [2005] Imm AR 535 ("a finding of fact that was wholly unsupported by the evidence"). Mr Keith highlights what was said by Mr Lough about the situation in Russia, including in particular what was said at [100] of his report, that it is "impossible at present to see any

possibility of broader political reform". He submits that the report of Mr Lough was not taken into account by the respondent when she reached the conclusion at [18] and that the respondent gave no reasons for taking a different view from Mr Lough.

75. Ms Anderson responds with a submission that the respondent clearly referred to the expert report and had it in mind. So much is clear, she submits, from the [3] and [37] of the decision. Ms Anderson reminds me that the decision must be read as a whole and submits that the respondent was not required to engage in detail with every twist and turn of the case advanced by the applicant.
76. I have no difficulty whatsoever with the submission that a decision such as the present should be read as a whole, or with the submission that the reasons given by the respondent in such a context need not be elaborate. It is not necessary to cite authority in support of such well-trodden propositions.
77. The difficulty I have with the submission is that it fails to come to grips with the specific complaint advanced by Mr Keith. The applicant made a case for ILR in which he sought to submit that the point had come where the only proper course was for the respondent to grant him that status. I do not have the application which was made to the respondent but the basis upon which it was made is appreciably clear from the applicant's witness statement, the report of Mr Lough and the decision letter itself.
78. The applicant sought to engage with the factors set out by the Upper Tribunal in R (MS & MBT) v SSHD and by the Court of Appeal in R (MS & MBT) v SSHD. He submitted that he had not been excluded from the Refugee Convention for the most serious of reasons; that he had remained blamelessly in the UK for a long time; that the prospect of removal was remote or non-existent; and that he had a settled family and private life in the UK. Those submissions formed the mainstay of the applicant's case that he should exceptionally be granted ILR and it was for the respondent to address that case with some specificity in her decision: R (MS & MBT) v SSHD, at [144].
79. It is clear that the likelihood of removal becoming possible is a relevant factor in the holistic assessment of whether ILR should exceptionally be granted to an excluded and irremovable person such as the applicant. Richards LJ (with whom Fulford LJ and Vos LJ, as he then was, agreed) made reference at [32] of R (Kardi) v SSHD [2014] EWCA Civ 934 to the point at which the prospect of removal has become 'so remote' being a factor in that exercise. That passage was cited by the Upper Tribunal at [145] of R (MS) v SSHD and the prospect of removal featured as one of the factors

described by the Upper Tribunal as being relevant to whether ILR should be granted. At [118] of R (MS & MBT) v SSHD, Underhill LJ also made reference to cases in which 'there is no foreseeable likelihood of removal becoming possible'.

80. Although the applicant advanced a clear case, supported by expert evidence, that there was no foreseeable prospect of his removal to Russia, the respondent failed to engage with the expert report insofar as it supported that contention. She also failed to cite any evidence in support of what must (with or without expert evidence) be regarded as the surprising conclusion that it was 'anticipated' by her that conditions in Russia would change to allow the applicant to return safely to Russia in the future. I asked Ms Anderson about the evidential basis upon which that conclusion was reached. She was unable to point to anything in the papers before me. Nor was she able to point to any part of the letter in which the respondent had come to grips with the expert evidence in this respect.
81. Ms Anderson instead made a submission that conditions had changed quite quickly in Russia when Mikhail Gorbachev came to power. That is of course quite right but the point about the expert evidence, with its reference to 'Fortress Russia' 'taking shape' is that it was Mr Lough's conclusion that no such change was foreseeable, as a result of which the applicant's removal was not foreseeable. In failing specifically to address that evidence, I am satisfied that the respondent erred in law. I am also satisfied that she reached an irrational conclusion (i.e., one which was wholly unsupported by the evidence) in the first sentence of [18] of her decision. She accepted at [37] of her decision that the applicant could not immediately be removed to Russia but the basis upon which she anticipated at [18] that conditions would change so as to permit a safe return in the future is at odds with the expert evidence, unclear and unreasoned.
82. By ground four, Mr Keith submits that the respondent failed to undertake any meaningful assessment of the seriousness of the conduct which led to the applicant's exclusion from the Refugee Convention. He submits that the respondent failed to consider or to engage with the applicant's witness statement or the expert report in this connection. He also submits, with reference to a number of authorities, that the respondent failed to assess the basis upon which the applicant was excluded under Article 1F(b) against other more serious cases of exclusion, particularly under Article 1F(a). In the circumstances, he submits that the respondent failed to reach a lawful conclusion on the gravity of the relevant conduct, that being the second of Underhill LJ's factors relevant to whether ILR should be granted.
83. Mr Keith said little about this point in his oral submissions. I can deal with it quite shortly and without detailed consideration of the cases cited by Mr

Keith at [57]-[62] of his skeleton argument (R (Kardi) v SSHD, R (MS & MBT) v SSHD, SSHD v Ruhumuliza [2018] EWCA Civ 1178 and Babar v SSHD [2018] EWCA Civ 329). Kardi, MS and MBT were excluded for terrorist activity. Babar had committed crimes against humanity as a Pakistani police officer. Ruhumuliza was a senior church leader who had acquiesced in the Rwandan genocide.

84. It was not necessary, in my judgment, for the respondent to consider the range of reported cases in which individuals had been excluded from the Refugee Convention. Nor was it necessary for her to undertake any greater examination of the gravity of the applicant's conduct. She recalled in the decision under challenge that the Upper Tribunal had concluded in 2010 that the applicant's embezzlement of US \$6 million for his own personal benefit was a serious non-political crime: [11]. She noted what was said by the applicant about his crime at [12]. She concluded at [13] that these points had been considered by the Upper Tribunal and that the applicant should remain excluded from the Refugee Convention under Article 1F(b).
85. The respondent gave further consideration to the nature of the applicant's conduct at [18], where she gave reasons for deciding to grant 12 months' leave to remain, and at [37], where she declined to grant ILR. Nothing more was required. In particular, I see no proper basis for the submission that the respondent was somehow required to chart a course through the reported authorities with a view to placing the applicant's conduct somewhere on a notional scale of seriousness. She was not required to do so by [121] of R (MS & MBT) v SSHD and to do so would place an unnecessary burden on the respondent. She took the view that the applicant's conduct was serious. She formed that view having taking account of the evidence he had adduced. She concluded that this was a factor which militated against granting ILR. The reasons given were adequate.
86. I therefore reject the applicant's submission that the respondent erred in law in her consideration of the extradition decisions. I also reject the applicant's submission that the respondent failed to consider the seriousness of his conduct. I do accept, however, that the respondent erred in her observation that it was anticipated that conditions in Russia 'will change' to allow the applicant to return safely in the future.
87. It remains for me to consider whether the public law error into which the respondent fell was a material one. In submitting that it was not, Ms Anderson made detailed reference to the respondent's policy. She highlighted, in particular, the objectives of the policy in creating obstacles to the settlement of those, like the applicant, who are 'not welcome' in the UK as a result of their conduct but cannot be removed due to the ECHR. She also noted the importance of the respondent being able to impose

conditions, which would no longer be available upon ILR being granted. The submission, in essence, was that the respondent could not rationally have concluded that there was a proper case for an exceptional grant of ILR on these facts, even if she had not erred in concluding as she did at [18] of the decision under challenge.

88. I have not found this submission easy to resolve. In support of Ms Anderson's submission is the full weight which must be afforded to the policy and the particular respect which is due to the respondent's view on the public acceptability of granting ILR to those such as the applicant. It is frankly doubtful, against that backdrop, that the respondent would have granted ILR to the applicant even if she had not fallen into error at [18] of the decision under challenge.
89. But that is not the test; what Ms Anderson must establish if she is to persuade me that I should refuse relief is that it is highly likely that the outcome for the applicant would not have been substantially different if the error had not occurred: s31(2A) of the Senior Courts Act 1981, as applied to the Upper Tribunal by s15(5A) of the Tribunals, Courts and Enforcement Act 2007. Although that statutory threshold for withholding relief is clearly intended to be lower than the common law test of inevitability (R (Smith) v North East Derbyshire Primary Care Trust [2006] EWCA Civ 1291; [2006] 1 WLR 3315, it remains a relatively high threshold: R (Enfield LBC) v Secretary of State for Transport [2015] EWHC 3578 (Admin), at [106], per Laing J, as she then was.
90. I am not able to conclude that it is highly likely that the respondent would have refused ILR even if she had not erred at [18] of the decision under challenge. The effect of that error was to place the applicant into the first of the two categories contemplated by Underhill LJ at [117]-[118] of R (MS & MBT) v SSHD. At [117], Underhill LJ set out types of case in which 'it is self-evident that there are no compelling circumstances justifying a departure from the general rule'. He gave three examples of such cases, the last of which was a case in which 'there is good reason to believe that the barriers to removability may soon be lifted'. The effect of the respondent's error was to place the applicant into that category.
91. The applicant should instead have been placed into Underhill LJ's second category, as described at [118]:

...where there is no foreseeable prospect of removal becoming possible; where the migrant poses no risk to national security; and where there is no risk of repetition of the kind of conduct which has led to their exclusion – and where indeed he or she has made a settled and respectable life in this country.

92. Even in that category of case, a grant of ILR would be exceptional, as Underhill LJ went on to note in the remainder of [118], and as Ms Anderson emphasised before me. I cannot predict with any degree of certainty, however, what the respondent would have made of the application for ILR if she had not erred in her categorisation of the applicant. That is particularly so in a case which involves, as Ms Anderson correctly notes in her skeleton argument, “foreign policy, the UK’s international standing and public confidence in the maintenance of a published policy’. Cases such as this are necessarily a matter for the Secretary of State and a judge should be slow indeed, to my mind, to attempt to second-guess the outcome of a decision taken on the correct footing.
93. At the time of the decision, the applicant had lived in the UK for nearly seventeen years. He has been granted DL or RL on ten separate occasions. There is no suggestion that there is any risk to national security, or of any future criminality, and the references presented with the application suggest that the applicant has made a settled and respectable life in this country. There is every reason to believe that he has changed in the two decades or so which have passed since he defrauded the Russian state. The applicant’s wife and adult son live with him in this country and both are now British citizens. Having regard to all that was said by Underhill LJ at [118]-[122] of R (MS & MBT) v SSHD (including the significant public interest in erecting ‘road blocks’ in the way of the applicant’s settlement), I am unable to conclude that the respondent is able to satisfy the test in s31(2A). I decline to refuse relief on that basis.
94. The respondent did not submit at the hearing that I should refuse relief on the basis set out by the Upper Tribunal at [151]-[153] of R (MS & MBT) v SSHD. In those passages, Dove J and UTJ Gill declined to grant declaratory relief or a quashing order to MS on the basis that the decision under challenge was time-limited; that the period of limited leave which had been granted had expired; and that a further application for leave would have been made by the time the Upper Tribunal’s decision was issued.
95. I heard the application for judicial review on 23 June and the applicant’s leave came to an end on 6 July. Given that his RL remained extant on the day of the hearing, it seemed to me that it would be wrong simply to assume that the respondent did not seek to rely on the point on relief taken in R (MS & MBT) v SSHD. The parties having confirmed that they were content to make written submissions on the point, I directed that written submissions should be filed and served. In the event, the timetable in my directions proved somewhat optimistic and it was only on 18 August that the applicant filed and served written submissions in response to those made by the respondent on 11 August.

96. In her written submissions, Ms Anderson did submit that the Upper Tribunal should withhold relief in the exercise of its discretion. She invited me to adopt the same approach as had been taken in R (MS & MBT) v SSHD. She accepted that there was a general presumption in favour of relief where it had been established that the decision under challenge was unlawful but submitted that there was a range of circumstances in which that presumption should not apply. She cited 18-055 of *De Smith's Judicial Review* (8th Edition) in support of a submission that no order should be made where it would serve no useful purpose to make one.
97. For the applicant, Mr Keith submitted that the Tribunal should exercise its discretion and grant relief to the applicant despite the passage of time. He had made several applications for ILR and the respondent had fundamentally misunderstood the facts and the law in relation to the application. Making an order, rather than resting simply on the terms of the judgment, would bring greater clarity to the applicant's position in the future.
98. I prefer Mr Keith's submissions on this issue and I come to the clear conclusion that it is appropriate to quash the decision under challenge. I do not accept that it would serve no useful purpose to make that order and I find myself in respectful disagreement with what was said at [151]-[153] of R (MS & MBT) v SSHD.
99. The applicant has made several applications for ILR. The cost of such an application (consisting of the application fee and legal fees) is significant. I have concluded that the basis upon which the respondent decided that he should again be granted RL was unlawful. The effect of an order quashing the decision to grant limited leave is that the application for ILR remains outstanding before the respondent and must be considered lawfully. A quashing order therefore serves a useful purpose, and to fail to make one would be to require the applicant to incur the further cost of making a further application for ILR despite the fact that he did not receive a lawful decision on the application he made in April 2019.
100. The position is different from the examples given at 18-055 of *De Smith's*, all of which concern situations in which a quashing order would serve no useful purpose. The first example is where 'a licence, the validity of which is challenged in the proceedings, may have expired by the time the claim is determined'. Evidently, an individual who contends that a licence should not have been granted cannot expect the court to quash the licence when it has already expired; either way, there is no longer a licence. In the circumstances before me, however, quashing the respondent's decision does not beat the air; it confers a real benefit on the applicant, in that he is entitled to a lawful decision on his application for ILR.

101. In the circumstances, I will make an order quashing the decision under challenge. No further relief is necessary or desirable on the facts. I will invite submissions from counsel on other consequential matters.

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