Case No: CO/9694/2011

Neutral Citation Number: [2013] EWHC 2383 (QB)

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 31/07/2013

**Before** :

**THE HON MR JUSTICE BURNETT**

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**Between :**

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|  | **RAJAN NAVARATNAM** | **Claimant** |
|  | **- and -** |  |
|  | **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant** |

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**Hugh Southey QC and Paul Turner** (instructed by **Barnes Harrild & Dyer**) for the **Claimant**

**Andrew Deakin** (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 10th and 11th July 2013

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Judgment**The Hon Mr Justice Burnett:**

1. 1. The claimant, Mr Navaratnam, was the applicant to the Strasbourg Court in *NA v. United Kingdom* (2009) 48 EHRR 15. He is a Sri Lankan national now aged 37 who arrived in the United Kingdom in 1999. He claimed asylum but was unsuccessful. Having pursued an appeal and sought judicial review he was subject to removal action in June 2007. In his application to the Strasbourg Court the claimant argued that removal to Sri Lanka would violate his rights under article 3 of the European Convention on Human Rights [“the Convention”] on the basis that he faced a real risk of treatment contrary to article 3 at the hands of the Sri Lankan authorities. The application was regarded as something of a test case at the time.
2. 2. On 17 July 2008 the Strasbourg Court found in his favour. It declared that the circumstances in Sri Lanka were such that the expulsion of the claimant to Sri Lanka would violate article 3. It also held that costs should be paid to the claimant. The judgment became final on 6 August 2008. In the usual way there followed exchanges between the British Government and the Committee of Ministers responsible for the application of article 46 of the Convention. By article 46 state parties to the Convention undertake to abide by the final judgment of the Strasbourg Court and the Committee of Ministers supervises the process. On 14 October 2008, the United Kingdom authorities confirmed that the claimant would not be removed. On 16 January 2009 they indicated that the applicant would be able to remain in the United Kingdom with either refugee status, or discretionary leave to remain. It was clear from the nature of that communication that no decision had yet been taken. The state of affairs represented by those two communications was recorded in a document prepared for a meeting of the Ministers’ Deputies in the middle of March 2009. The only other document before me relating to the post-judgment consideration of this case in Strasbourg is the resolution of the Committee of Ministers in 2011 closing its examination of the case. The resolution noted that the costs had been paid as required and that general measures had been put in place via an operational guidance note to officials on Sri Lanka to reflect the Court’s factual conclusions. As regards the claimant himself, the Committee said:

“The United Kingdom authorities provided information on 14 October 2008, confirming that the removal directions would not be applied to the applicant. The applicant was granted six months leave to remain on a discretionary basis.”

1. 3. No such leave had in fact been granted. The first sentence accords with the first communication to which I have referred. The second does not appear to reflect any further communication. The claimant did not in fact receive discretionary leave to remain in the months that followed the Strasbourg Court’s judgment. It was not until December 2012 that a final decision was made in his case. He was refused leave to remain with an in-country right of appeal to the First Tier Tribunal. The basis of refusal was that circumstances had changed in Sri Lanka to the extent that the claimant was no longer in need of protection.
2. 4. The claim for judicial review, issued on 29 September 2011, proceeds upon two bases. First, Mr Southey QC submits that the circumstances of the case demonstrate conspicuous unfairness amounting to an abuse of power by the Secretary of State in failing to grant the claimant discretionary leave to remain [“DLR”] shortly after the Strasbourg decision and thereafter. He submits that the claimant should have been granted five years DLR. Had that happened he would by now very possibly have been eligible for indefinite leave to remain [“ILR”]. In the result, he submits that the court should quash the decision refusing leave and direct the Secretary of State to grant ILR. He bases his submission upon the decisions of the Court of Appeal in *R (Rashid) v. Secretary of State for the Home Department* [2005] Imm AR 608 and *R (S) v. Secretary of State for the Home Department* [2007] EWCA Civ 546. As a fall back position he submits that the Secretary of State should at least be directed to reconsider her decision taking into account the unfairness upon which he relied. Secondly, he submits that in any event the claimant’s case should have been dealt with as part of the ‘legacy case’ programme, whereby the Secretary of State announced in July 2006 that a total of approaching 500,000 outstanding cases would be resolved within 5 years. It is submitted that had his case been considered by July 2011, by one mechanism or another, the rules then in place would have delivered leave to remain to the claimant. They have since changed. It is not suggested that the applicable rules were wrongly applied in December 2012 if the conclusion that the claimant could safely be returned to Sri Lanka was correct. Nonetheless, it is submitted that the claimant should not be prejudiced by the delay. The Secretary of State should be obliged to reconsider her decision taking account of the unfairness and prejudice which it is said the claimant has suffered, not only by the delay but by the change in the rules. The underlying principle upon which Mr Southey relies in support of the second argument is that like cases should be treated alike: all those treated under the legacy programme should be treated consistently.
3. 5. These arguments require the factual position relating to the claimant to be considered in more detail. The available evidence demonstrates that in parallel with the process of communicating with the Strasbourg authorities after the judgment official consideration was indeed being given to the status which should be accorded to the claimant in the United Kingdom. A decision was approved by a minister personally on or about 1 May 2009 that the claimant should be given six months discretionary leave to remain. The process is described by James McGinley, an official who has been involved in the claimant’s case from the days of the Strasbourg application. He explains that in the ordinary course following the judgment of the Strasbourg Court the claimant would have been granted five years Humanitarian Protection. But the claimant had a number of convictions and was on the sex offenders’ register. He was convicted of common assault following an incident in September 2002. In October 2005 he pestered a woman in the street, making inappropriate comments and then exposed himself. That was what got him on the register. He was also convicted of possession of a bladed article in a public place because when he was arrested on that occasion a 3.5 inch kitchen knife was found in his pocket. In an entirely unconnected incident, it was alleged that on 21 May 2008 the claimant exposed himself to a woman and her four year old daughter by dropping his trousers in a shop in Tooting. The police were called and he was arrested, but by that time the complainant and her daughter had gone. The information available in March 2009 (when a submission was sent to the Minister) was to the effect that the case would be “re-opened should the victims come to light.” Mr McGinley explains that “it was not was deemed appropriate” to grant Humanitarian Protection and that, in accordance with the policy then in force, there would be consideration of the grant of six months discretionary leave instead. Then as now the position of foreign national offenders was regarded within the Home Office as particularly sensitive. The grant of leave to such a person required a submission to and decision of the Chief Executive of UKBA once the matter had been brought to the attention of Ministers. The submission to the Parliamentary Under Secretary of State from Mr McGinley is dated 17 March 2009. It indicated that it was intended to grant the claimant six months DLR, which the Minister was asked to note. The process enables the Minister to raise concerns or an objection. The timing of the submission was said to be routine, but the interest of the Strasbourg Court was identified. The immigration history was set out and the convictions summarised. The normal procedure following a successful application to Strasbourg was explained together with the fact that the claimant could not be removed, but Mr McGinley added:

“Mr Navaratnam is however a registered sex offender and falls to be excluded from a grant of Humanitarian Protection … In such circumstances, policy recommends a grant of six months Discretionary Leave. In granting such leave, Mr Navaratnam’s case will be subject to active review every six months. If circumstances in Sri Lanka later change to the effect that Mr Navaratnam would no longer be a risk on return, voluntary departure or enforced removal can be pursued.”

1. 6. Mr McGinley’s evidence explains that a submission was made to the Chief Executive on or around 1 May 2009. The decision was made to grant six months DLR. The claimant had until then been granted temporary admission and was reporting weekly. The decision was not served upon him immediately and, as Mr McGinley puts it, before the decision could be implemented the claimant absconded. His case was then put on hold until he could be located. He last reported on 25 June 2009 and was treated as an absconder shortly thereafter. Absconding in the context of his temporary admission was one thing, but the claimant also failed to comply with his obligations arising from being on the sex offenders’ register. He was arrested on 24 March 2010 and prosecuted for failing to comply with those obligations. The claimant was convicted and sentenced to 12 weeks’ imprisonment. He was ‘released’ from the custodial part of his sentence on 5 May 2010 but remained in immigration detention. It is clear that the left hand did not know what the right hand was doing within UKBA at this point. He was released from immigration detention on 1 June. There was no immediate prospect of removal, nor had there been when he was detained. The claimant should not have been detained. A claim for false imprisonment in respect of that period of detention, brought originally as part of these proceedings, has since been settled.
2. 7. On 29 July 2010 solicitors acting for the claimant wrote to UKBA demanding that he be granted refugee status to give effect to the judgment of the Strasbourg Court. It was argued that the delay was unlawful. Proceedings were threatened in the absence of a satisfactory response within 14 days. There appears to have been correspondence in parallel from the claimant himself. That is clear from the substantive reply sent by Mr McGinley to the claimant rather than his solicitors on 25 November. In that reply Mr McGinley told the claimant that a decision to grant him six months DLR had been made, but that it could not be implemented because of his absconding. He went on to explain that circumstances in Sri Lanka had changed significantly since the judgment of the Strasbourg Court in the summer of 2008. The case was to be reviewed to determine whether it was reasonable to require the claimant to return to Sri Lanka. Mr McGinley was unable to say how long the review would take, but reassured the claimant that he would not be removed until the case was concluded including, if the circumstances arose, any appeal. On 15 December the claimant’s solicitors responded, again threatening proceedings within 14 days. On 25 February 2011 the Case Resolution Directorate of UKBA (which was dealing with legacy cases) indicated that it expected to deal with the claimant’s case within 3 months. That did not happen. The claimant’s solicitors wrote again on 8 July 2011. In that letter they suggested that the claimant’s case should have been given priority. Judicial review was threatened on four grounds:
	1. i) The delay in granting leave after the decision of the Strasbourg Court was unlawful and resulted in financial loss to the claimant;
	2. ii) It was irrational to consider the question of leave in the light of developing conditions in Sri Lanka. In any event, the decision of the Strasbourg Court in *EG v. United Kingdom* (App. No. 41178/08) given on 31 May 2011 suggested that nothing had changed;
	3. iii) The delay in considering the case under the legacy was also unlawful and it should have been prioritised because the claimant’s case had been seriously mishandled;
	4. iv) There was no lawful justification for failing to make a decision, since the claimant’s case did not fall within any category identified by UKBA as being unresolved.
	5. 8. UKBA responded on 26 July suggesting that the claimant’s case should be resolved with three months. Once again it was not. It is important to bear in mind that the claimant’s case was not being dealt with as if it were one of the hundreds of thousands of legacy cases, which has been languishing unresolved in the filing cabinets in UKBA. His was a singular case which had proceeded to Strasbourg. His circumstances were under review quite independently of the legacy programme.
	6. 9. Proceedings were issued on 29 September 2011. The relief claimed was a

“Mandatory order to the defendant to give effect to the ECHR determination in *NA v UK* and grant the claimant refugee status without further delay.”

In short, it was suggested that the Secretary of State had ‘failed to give effect’ to the Strasbourg judgment. A series of authorities was relied upon which decided that the Secretary of State is obliged to give effect to an appellate decision within the Tribunal structure within a reasonable time, unless circumstances have changed.

* 1. 10. After some delay the Secretary of State’s response to the proceedings was to offer to make a decision “as soon as practicable”. That was not acceptable to the claimant because it would not necessarily have delivered him leave to remain in the United Kingdom. An acknowledgment of service followed on 19 December 2011. Permission was refused on the papers a few days later but was granted on renewal on 4 April 2012. In due course the substantive hearing was listed for 7 December 2012. In the days leading up to that hearing consideration of the claimant’s case on up to date information regarding Sri Lanka was concluded. A letter refusing his claim for asylum and for humanitarian protection was drafted at the end of November, settled on 5 December and served on 6 December 2012. The full hearing was adjourned on 7 December by Lord Carlile of Berriew Q.C. who gave directions. He granted permission to the claimant to amend his grounds to challenge the decision of 5 December 2012.
	2. 11. The claimant took advantage of his right to appeal that decision, but the First Tier Tribunal has stayed consideration of the appeal pending the outcome of these proceedings. That appeal would, in particular, be concerned with the question whether the claimant’s circumstances give rise to any relevant risk were he to be returned to Sri Lanka. The factual conclusions reached by the Secretary of State in the decision letter are not in issue in these proceedings. I note that in the days before the hearing of this claim, the Upper Tribunal (Immigration and Asylum Chamber) handed down fresh country guidance relating to the position of post-civil war returnees to Sri Lanka: [2013] UKUT 00319 (IAC).
	3. 12. The amended grounds dated 11 March 2013 (but served on 3 April) do rather more than add a challenge to the decision of 5 December 2012. They continue to rely upon the line of authority relating to abiding by the decisions of Tribunals in this jurisdiction, but add the conspicuous unfairness or abuse of power argument. A new claim for damages for breach of Article 8 is introduced by reference to *Anufrijeva v. London Borough of Southwark* [2004] QB 1124. It is said that had the Secretary of State granted DLR, the claimant would have been able to work lawfully and get full access to state benefits.

Unfairness amounting to an abuse of power

* 1. 13. Mr Southey suggests that the Secretary of State has failed to abide by the judgment of the Strasbourg Court and has failed to honour a promise made to the Committee of Ministers to grant the claimant status. He submits that the delay in dealing with the consequences of the Strasbourg decision until 1 May 2009, the delay in serving the decision to grant DLR before the claimant absconded seven weeks later and the refusal to grant him leave after he re-emerged, when taken together, amount to conspicuous unfairness amounting to an abuse of the sort described in *Rashid.* That was a case which has given rise to considerable difficulty because of the relief which was granted, namely a declaration that the claimant was entitled to ILR even though the court recognised that he was not entitled to refugee status: see the discussion in *S* and the criticism in *KA (Afghanistan) v. Secretary of State for the Home Department* [2012] EWCA Civ 1014 and *EU (Afghanistan) v. Secretary of State for the Home Department* [2013] EWCA Civ 32.
	2. 14. The concept of conspicuous unfairness amounting to abuse of power, which was relied upon by the claimant in *Raschid* along with legitimate expectation, was encapsulated by Simon Brown LJ in *R v. Inland Revenue Commissioner, ex parte Unilever plc* [1996] STC 681 at p. 695a:

“Unfairness amounting to an abuse of power as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.”

* 1. 15. In *Rashid* Pill LJ noted that Lord Hoffmann had adopted this formulation in *Secretary of State for the Home Department v. Zeqiri* [2002] Imm AR 296 at para 44. He added,

“Mr Rabinder Singh defines it as unfairness which is easy to see and ‘leaps up from the page’.”

Mr Singh was leading counsel for Mr Rashid whose formulation was cited with approval.

* 1. 16. “Fairness” is a concept which arises in many public law contexts and also in connection with the conduct of proceedings. There can sometimes be a fine line between fairness and unfairness depending upon the eye of the beholder. The essence of “conspicuous unfairness” is that it does indeed leap from the page or, to put it another way, is plain as a pike staff.
	2. 17. Both in the written material and oral argument Mr Southey submits, if I understood him correctly, that a failure to give effect to a decision of the Strasbourg Court could have direct legal consequences in this jurisdiction. He relies upon article 46 of the Convention. However, article 46 does not find a place in Schedule 1 of the Human Rights Act 1998 [“the 1998 Act”] and is not a “Convention Right” for the purposes of section 1. It is not one of the provisions of the Convention which has direct application. He also relies upon Lord Bingham’s observation in *R (Von Brandenburg) v. East London and the City Mental Health NHS Trust* [2004] 2 AC 280 at para 8 that

“ …the rule of law requires that effect should be loyally given to the decisions of legally-constituted tribunals in accordance with what is decided.”

The context of that observation was the decision of a Mental Health Tribunal to direct the discharge of a patient. Similarly, the line of authority relating to the immigration appeals system (*R v. Secretary of State for the Home Department ex parte Mersin* [2000] INLR 511; *R (Mambakasa) v. Secretary of State for the Home Department* [2003] EWHC 319 (Admin); *R (R Algeria) v. Secretary of State for the Home Department* [2006] EWHC 3513 (Admin)) are concerned with the general obligation of the Secretary of State to abide by the decisions of the appellate immigration tribunals, and to do so reasonably promptly.

* 1. 18. There is no obligation enforceable in this jurisdiction upon the United Kingdom government to comply with a judgment of the Strasbourg Court. That is a matter for the Strasbourg organs. But in any event, in this case the limit of the Court’s requirement was that the claimant should not be removed to Sri Lanka. He has not been. It is difficult to imagine the United Kingdom government receiving a judgment which relates to an individual and contains a finding that removal would breach the Convention and then ignoring it. But were such an unfortunate eventuality to occur, the person concerned would obtain an injunction in this jurisdiction to restrain removal not on the basis of defiance of the Strasbourg Court’s decision, but on the entirely orthodox premise that there would be a very strong arguable case that his Convention Rights, as defined by and applied domestically by the 1998 Act, were about to be violated.
	2. 19. I do not consider that the *Mersin* line of cases provides assistance to the claimant. The decision of the Strasbourg Court is different in its impact from decisions of the immigration appellate tribunals. It confers no rights enforceable in this jurisdiction upon the claimant. In any event, the judgment of the Strasbourg Court does no more than record its decision that removal would violate the claimant’s article 3 rights. It says nothing about the legal basis upon which the claimant should be allowed to stay in the United Kingdom. I readily accept that the United Kingdom government’s dealings with the Strasbourg organs can form part of the material upon which an overall determination is made whether there has been conspicuous unfairness in dealing with the claimant amounting to an abuse of power. So, for example, if the government was saying one thing to the Strasbourg organs and another to the claimant, that might fall into the picture relating to fairness.
	3. 20. However, Mr Deakin’s submission on behalf of the Secretary of State is that the factual circumstances of this case do not come close to establishing conspicuous unfairness.
	4. 21. I agree with that submission. Just over two months after the Strasbourg Court’s judgment had become final the government indicated that the claimant would not be removed from the United Kingdom. As part of its dialogue with the article 46 committee the government said that the claimant would be granted refugee status or DLR. It may reasonably be said that the decision making process which resulted in the submission to the Minister and the Chief Executive’s decision to grant six months DLR on 1 May 2009 was slow. It is also right that the decision might have been served on the claimant in the few weeks remaining before he disappeared. It is, however, an inevitable conclusion that many of the problems which the claimant has encountered flow from his absconding. If he had not done so, he would have been given his six months DLR, which would then have been renewed from time to time until any decision was taken that it was safe for him to return to Sri Lanka. If he was unhappy with the grant of six months DLR (and Mr Southey suggests that it was unlawful not to grant him five years DLR despite his criminality) he might have chosen to challenge it in judicial review proceedings. Applications to renew DLR made before the expiry of extant leave have the effect of extending that leave until another decision is taken. The reality of the claimant’s position is that had he not absconded he would have been granted DLR. It would have been extended from time to time until a further extension was refused on precisely the same basis as eventually occurred in December 2012.
	5. 22. The contention that the decision to grant six months DLR was unlawful depends upon a reading of Mr McGinley’s submission to the minister and evidence in this case (see para 5 above) to suggest that he thought that presence on the sex offenders’ register without more led to a denial of five years humanitarian protection. But in his witness statement the language he uses is that “it was not deemed appropriate” to grant humanitarian protection. There is no suggestion that he considered the claimant’s criminal history to be a bar under the relevant rules and policies. The alleged illegality of the original decision, which I do not accept, is prayed in aid by Mr Southey in support of the unfairness argument but also in an attempt to defeat Mr Deakin’s submission that the claimant is the author of his own misfortune by absconding, and furthermore that he would anyway be in the same position whatever had occurred in 2009. Mr Southey’s hypothesis is that if six months DLR had been granted, the likelihood is that the claimant would have challenged it in judicial review proceedings (if not straight away then on renewal) and come away with three or five years DLR as a result.
	6. 23. In my judgment, it was the claimant’s disappearance, his arrest, conviction and imprisonment which gave the Secretary of State the opportunity to review the question whether he was in need of any protection at all. It is not right to suggest that the government failed to honour its ‘promise’ to Strasbourg. The government did precisely what it said it would do – consider refugee status or DLR – and determined on the latter course. It was the claimant’s conduct which frustrated the grant of DLR. I have noted that UKBA used immigration detention powers inappropriately in May and June 2010 but do not consider that bears upon the question of conspicuous unfairness amounting to an abuse of power in connection with determining the claimant’s immigration status. A mistake was made and the resulting claim has been settled. The exchanges between the claimant, his solicitors and UKBA demonstrate that the Secretary of State was slow to consider the substantive question relating to the safety of return to Sri Lanka. But in my judgment there is nothing in the history of the Secretary of State’s dealing with the claimant which smacks of conspicuous unfairness.

The Legacy Scheme

* 1. 24. The workings of the legacy scheme are set out in the judgments of Collins J in *R (FH) v. Secretary of State for the Home Department* [2007] EWHC 1571 (Admin) and Burton J in *R (Hakemi and others) v. Secretary of State for the Home Department* [2012] EWHC 1967 (Admin). Mr Southey’s submission is that the claimant’s case should have been resolved as part of the legacy backlog early on in the process, but in any event by July 2011 when the five year programme was due to end. Had it been he would have been granted ILR or at least three years DLR. It was the change in the underlying rules and applicable policy which determined that when the decision was eventually made he was refused leave. Although Mr Southey recognised that the Secretary of State could not now purport to apply directly rules and policy that had been superseded, she should do so in fact by exercising her discretion to grant leave outside the rules altogether in recognition of the unfairness suffered by the claimant.
	2. 25. In my judgment there is an insuperable difficulty which prevents the claimant erecting an argument founded upon the application of the legacy programme to his case. It was not a true legacy case at all. Even though correspondence was being handled from time to time by the Casework Resolution Directorate this was not one of the half million outstanding applications received prior to 5 March 2007 which were referred to that directorate and its 950 dedicated caseworkers. In 2006 and 2007 the claimant was engaged in domestic litigation following removal directions being set in early 2006. The removal directions were reset for 25 June 2007. The claimant responded by making his application to the Strasbourg Court. He was then engaged in Strasbourg litigation with the government until the summer of 2008. The claimant’s case was the subject of individual consideration by the Chief Executive of UKBA and a junior minister in the spring of 2009. A decision to grant him DLR was made. After he emerged following his absconding, his case remained under Mr McGinley’s responsibility at the end of 2010 when he told the claimant that his entitlement to any leave was under review.
	3. 26. The nature of the claimant’s case and the particular attention it was subject to lead to the conclusion that there was no illegality in the Secretary of State failing to consider it as part of the legacy programme before July 2011.

Article 8

* 1. 27. The article 8 claim is supported by a few paragraphs in the witness statement from the claimant dated 3 April 2013 which accompanied the amended grounds. In that statement the claimant deals with the circumstances surrounding some of his offending and his accommodation and means before the Strasbourg case. Of more recent times, he explains that he has been working for cash in hand (in breach of his conditions of temporary admission) and that he rented accommodation from the proceeds. He has apparently not applied for NASS support and, as a result, says that he is sometimes short of money for food. He receives support from the Tamil community of which he is part. The claimant says that he had permission to work until 2003 and earned good money. He seeks damages for loss of earnings and also suggests that the uncertainly over his immigration status has led him to abuse alcohol (which he appears to have the funds to buy) and to have sleep difficulties. He has been prescribed tablets although he is not sure what they are. He attributes his ill health to the uncertainly over his immigration status and refers to mental health problems when he was detained in 2006 and 2007.
	2. 28. Even were this a case where a breach of article 8 could be established, the quality of evidence adduced by the claimant to support what appears to be a substantial claim equivalent to general and special damages in a personal injury claim is woefully inadequate. But in any event, it would not be appropriate to compensate pecuniary losses of this sort at least from the summer of 2009 because the claimant’s lack of DLR until the decision in December 2012 resulted from his absconding.
	3. 29. However, the facts of this case do not support the conclusion that the treatment of the claimant in connection with the failure to grant of leave violated his right to respect for his private life because there was no maladministration of the sort identified in *Anufrijeva.* That is the starting point (but far from the end point) for a finding of a violation of the State’s positive obligation under article 8.

Conclusion

* 1. 30. The claimant has failed to substantiate any of his grounds. The claim for judicial review is dismissed.